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The Cambridge Yearbook of European Legal Studies

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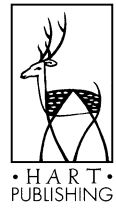

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THE ELEMENTS OF A CONSTITUTIONAL SETTLEMENT FOR THE EUROPEAN UNION

*Alan Dashwood**

I. Introduction

A debate is under way about the future of the European Union. It was started by the Declaration adopted by the European Council of Nice in December 2000,[1] was given more substance by the Declaration of Laeken in December 2001,[2] and received a formal focus in the Convention which has been brought together in Brussels under the chairmanship of former President Giscard d'Estaing. The Nice Declaration referred to, among other things, 'the simplification of the Treaties with a view to making them clearer and better understood without changing their meaning', but the Laeken Declaration goes considerably further. There is a section in the Declaration entitled, 'Towards a constitution for European citizens', which contemplates possible changes to the structure not only of the Treaties but of the Union itself, including perhaps the abolition of the division into three so-called 'pillars', and the distinction between the European Union and the European Communities. The Declaration also raises the matter of the legal status of the Charter of Fundamental Rights which was proclaimed in Nice, and speculates as to the possible adoption 'in the long run' of what it calls a 'constitutional text'. A reordering of the primary instruments of the Union is, therefore, very much on the agenda of the Convention, and the idea has heavyweight political supporters.

What should be the object of this exercise in constitution-making? After all, most EU lawyers would agree that the Union has a constitution, albeit a messy and complicated one. The written part is found in the Treaty on European Union (or 'TEU'), together with the three Community Treaties, one of which,

* This is a version of a lecture that was given on 28 February 2002 at the University of Leicester on the occasion of the inauguration of the Centre for Europe Law and Integration, and as a contribution to the lecture series celebrating the fortieth anniversary of the granting of the University's Charter.

[1] See Declaration No 23 on the Future of the Union, pt. 5, third indent.

[2] See Document No SN 273/01, annexed to the Laeken Presidency Conclusion.

the ECSC Treaty expired in July 2002.[3] There are also bits and pieces of primary law in other Treaties, such as the provisions on the common fisheries policy in the 1972 Act of Accession.[4] The unwritten part of the constitution consists of judicial precedents—including the case law on the primacy and direct effect of Community law[5]—as well as various soft law texts[6] and political practices.[7]

To me, as an English lawyer, messiness and complexity in a constitution are not necessarily a bad thing. I do, though, accept the case for simplifying the structure of the Union, and reorganising its primary instruments, as part of the response to the crisis of legitimacy which has been gathering force since the fiasco of the campaign for ratification of the Maastricht Treaty. I don't pretend that a tidying up of the constitution is going to bring cheering crowds of Union citizens onto the streets. What we must aim for is to make the Union more user-friendly to its primary users—politicians, civil servants, lawyers, journalists, teachers and students—and hope that this will produce a trickle-down effect.

There will, of course, be those at the Convention who see it as an opportunity to change the European Union into a political entity which is more state-like. That is an honourable objective, but I believe it is profoundly misguided.

The European Union is a new kind of polity. On the one hand, the Members States have pooled their sovereignty in many important matters, and have accepted the discipline of acting together through common institutions. On the other hand, they retain the legal and political quality of States. They haven't been reduced to the status of provinces, even of a very grand type, like the German Länder. They are recognised by other international actors as full subjects of public international law. And for their own peoples, they represent the main focus of collective loyalty and the main forum of democratic political activity. I call that remarkable construction 'a constitutional order of States'.[8]

[3] The ECSC Treaty was concluded for a period of 50 years (Art. 97 ECSC). It came into force on 20 July 1952. Following the expiration of the Treaty, coal and steel products have fallen within the purview of the EC Treaty. There is a Protocol on the Financial Consequences of the Expiry of the ECSC Treaty and on the Research Fund for Coal and Steel annexed to the Treaty of Nice.

[4] See Act concerning the conditions of accession and the adjustments to the Treaties, Title II, Ch. 3, Arts. 98 to 103.

[5] The leading cases on direct effect and primacy are Case 26/62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa* v. *ENEL* [1964] ECR 585; Case 106/77 *Simmenthal* [1978] ECR 629. The basic organising principles of the European Community were more recently restated by the Court of Justice in Opinion 1/91 *European Economic Area Agreement*, [1991] ECR 6079, para 21.

[6] E.g. the series of Inter-Institutional Agreements ('I.I.A') containing 'financial perspectives' which, from 1988 onwards, have underpinned the financing of the Community/Union. For the text of the current I.I.A., see OJ 1999 C 172/1.

[7] E.g. the practices governing the conduct of the meetings of Heads of State or Government of the Member States, together with the President of the Commission, which are known as 'the European Council'. On the role and composition of the European Council, see Art. 4 TEU.

[8] These ideas have been more fully developed by the writer elsewhere. See Dashwood, A. 'The Limits of European Community Powers' (1996) 21 *ELRev* 113; 'States in the European Union'

Any necessary changes to the present constitution must be carefully designed to preserve the delicate system of checks and balances which gives the European Union its unique character. I say that for two reasons. First, because a polity in the form of a constitutional order of States is particularly well suited to our historical and cultural circumstances. The Member States of the EU are highly self-conscious entities, and they include some of the world's oldest and historically most successful States. We are also a continent of extraordinary cultural and linguistic diversity. These are factors the impending enlargement of the Union can only accentuate.

Second, our national parliamentary institutions—imperfect as they often are—remain the principal source of legitimacy for the exercise of public power by both Member State and Union authorities. To upset the existing balance would risk worsening the legitimacy-deficit we are seeking to correct.

So, in my submission, the objective must be to give the Union a clearer identity, and to make the fundamental arrangements under which it operates more accessible, and easier to explain and understand, but without altering its character as a constitutional order of States.

With that objective clearly in mind, I propose that the constitution-makers of the Convention, and of the Intergovernmental Conference that will follow in 2004, concentrate on the following four elements.

II. First Element: Simplification of the Overall Structure of the EU

One of the insights of the Laeken Declaration is that the simplification of the Treaties has a substantive as well as a purely textual aspect.[9] The architecture of the Union—more Byzantine than classical—needs remodelling.

As presently constituted, the EU is a complex order consisting of three sub-orders (or, in the jargon, 'pillars').[10] The European Communities, with their characteristic way of functioning which owes much to the interpretative genius of the Court of Justice, comprise the first pillar; while the second and third pillars respectively concern foreign, security and defence policy, and police and judicial co-operation in criminal matters.[11] The three sub-orders are served by the same set of institutions, but these operate under arrangements which differ markedly from one pillar to another. In crude terms, the Member States have

(1998) 23 *ELRev* 201, reprinted in Rider B (ed.) *Law at the Centre* (The Hague, Kluwer Law, 1999) 235. See also *Wyatt and Dashwood's European Union Law*, (hereinafter, 'Wyatt and Dashwood') Ch. 7.

[9] See the references in the Declaration, which were noted earlier, to possibly reviewing the distinction between the Union and the Communities, as well as the division into three pillars.

[10] The Union/Community relationship is more fully analysed in Wyatt and Dashwood, Ch. 8.

[11] The legal basis of the second pillar is found in Title V TEU and that of the third pillar in Title VI TEU.

pooled their sovereignty less thoroughly for the purposes of the second and third pillars than of the first.

What can be done to simplify the pillar structure? At present there are opposing tendencies: of the third pillar to converge on, and the second pillar to diverge further from, the Community model of the first pillar.[12]

The Treaty of Amsterdam effected a transfer of third pillar powers to the EC Treaty—those concerning visas, asylum, immigration and other aspects of the free movement of persons, as well as judicial co-operation in civil matters. Amsterdam also gave the Court of Justice jurisdiction under the third pillar, though of a truncated kind; and it created a form of legislative instrument, the 'framework decision', which resembles a Community directive, except that it is incapable of having direct effect. The convergence of the third pillar on the first pillar has been taken forward by the Treaty of Nice, and I believe the process could, and should, now be completed: *could*, because in the post-11-September climate worries about pooling sovereignty in politically sensitive areas are taking second place, in the minds of politicians and the public, to the need for effective decision–making on measures to combat terrorism and serious crime;[13] *should* because such measures touch the rights and freedoms of individuals, and their adoption and application ought, therefore, to be subject to the sophisticated system of judicial control available in the Community order.

The second pillar is an entirely different case. The only significant element of convergence on the first pillar is the acceptance, subject to the notorious 'emergency brake' procedure,[14] of qualified majority voting for certain decisions not having military or defence implications. Divergence from the Community model is much more marked. Decisions on foreign, security and defence policy are not only taken by the Council but also prepared and ultimately executed by its Presidency and General Secretariat.[15] Remarkable confirmation of this divergent tendency is provided by the power the Treaty of Nice will give the Council to authorise the new Political and Security Committee to take decisions on the

[12] Those tendencies are more fully analysed in the chapter entitled 'Issues of Decision-Making in the European Union After Nice', which the author has contributed to a forthcoming volume, Arnull, A. and Wincott, D. (eds.) *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002).

[13] Examples of such measures are the Framework Decision on the European arrest warrant and the Framework Decision on combating terrorism which were adopted by the Council on 13 June 2002.

[14] The procedure enables a member of the Council to oppose the adoption of a measure by QMV 'for important and stated reasons of national policy'. The Council, acting by QMV, may request that the matter be referred to the European Council, for decision by unanimity. See Art. 23(2), second para. TEU. For criticism of the procedure, see Dashwood, 'States in the Union', above n 8.

[15] On the role of Presidency, see Art. 18 TEU. On the role of the Secretary General as High Representative for the common foreign and security policy, see Art. 26 TEU.

political control and strategic direction of crisis management situations.[16] I have explained on other occasions why the specificity of second pillar arrangements seems to me inevitable and right.[17] It is due, in part, to the large disparity of diplomatic and military assets between the Member States; in part, to deep-seated differences of political culture, affecting States' willingness to engage with the wider world; but, most of all, to the fact that decisions which may have to be carried through to the point of committing military forces, can only be taken by democratically responsible governments.

What of the relationship between the European Union and the European Communities? The issue is complicated and controversial. To which entity do the institutions belong? The Council has renamed itself 'Council of the European Union', while the Commission and the ECJ stick to the designations 'Commission of the European Communities' and 'Court of Justice of the European Communities'. Who is right? Another oddity: the EC has international legal personality and Treaty-making power; and so, it now seems, does the Union, but only for the purposes of the second and third pillars.[18] We can thus expect some future international agreements to have both the EU and the EC as parties? What on earth are our international partners going to make of that?[19]

I am clearly of the view that the distinction between the Union and the Communities ought to be abolished, through the absorption of the latter by the former. The radical-seeming proposal I am making is that the EC and Euratom should cease to exist as constitutionally distinct entities with specific legal personalities—the ECSC has already died a natural death. There would only be the European Union, endowed with a range of competences which it would exercise under the appropriate legal conditions, depending on the purpose for which it was acting. The main challenge would be to preserve the *acquis communautaire* without the Communities. Careful drafting would be needed to prevent 'cross-contamination' between the first and second pillars, but I can think of no technical reason why this should not be possible. After all, as Bruno de Witte has demonstrated, strong differentiation exists within the present Community

[16] See Art. 25 TEU, as amended by the Treaty of Nice.

[17] See Dashwood, A. (ed.) *Reviewing Maastricht: Issues for the 1996 IGC*, 215 ff.

[18] A procedure for the negotiation and conclusion of international agreements relating to second and third pillar matters was introduced into the TEU by the Treaty of Amsterdam: see Arts. 24 and 38 TEU. The procedure has been used to conclude agreements in the name of the Union: Council Dec. 2001/352 concerning the conclusion of the Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY, OJ 2001 L 125/1; Council Dec. 2001/682 concerning the conclusion of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia (FYROM) on the activities of the European Union Monitoring Mission (EUMM) in the FYROM, OJ 2001 L 241/1.

[19] The issues here referred to are more fully analysed by the writer in the chapter referred to above n 12.

order, e.g. as regards economic and monetary union.[20] One way of meeting possible concerns would be through the structure of the Union's primary instruments, a matter to which I shall presently be turning.

So, to conclude on this first constitutional element, I hope to see the 'pillars' of the Union reduced to two, and the distinction between the Union and the Communities disappear.

III. Second Element: More Precise Delineation Between the Powers of the Union and of the Member States

This was one of the issues for the 2004 Intergovernmental Conference which was specifically identified by the Nice Declaration, and it also figures in the Laeken Declaration. There is particular concern among the German Länder about what they see as the encroachment by the Union on their constitutional prerogatives. The issue was also raised by the Prime Minister in his Warsaw speech on 6 October 2000,[21] and by the Foreign Secretary in his speech in The Hague on 21 February 2002.[22]

The rather crude idea of drawing up a catalogue of no-go areas for the Union which is favoured by some, was rejected in those speeches—quite rightly, because such an approach would be doomed to failure.

One reason for this is that there aren't many policy areas left in which the Union doesn't have at least limited powers of action under one pillar or another. Just a few years ago, one might have cited, as fields of exclusive Member State competence, asylum and immigration, security and defence, criminal law and procedure, and policing—all fields in which the Union is now particularly active, and uncontroversially so.

A second reason concerns the technique characteristically employed in the Treaties for attributing powers to the Union. This involves setting objectives for the Union, rather than listing things it is authorised to do. Article 95 of the EC Treaty, on the approximation of national laws affecting the internal market, provides a good illustration of this technique.

A third, and rather more subtle, reason is that, even in cases where the Union lacks competence to act, the exercise of powers by the Member States may be subject to principles derived from the Treaties. To take an example close to home, the organisation of higher education is an exclusive Member State competence; but the conditions of access to university courses mustn't discriminate

[20] See de Witte, B. 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?' in Heukels, T. et al. (eds.) *The European Union after Amsterdam: a Legal Analysis* (The Hague, Kluwer Law International, 1998) 51.

[21] See *Developments in the European Union*, July–Dec. 2000, The French Presidency, 8.

[22] 'Reforming Europe: New Era, New Questions'.

between the nationals of Member States.[23] That's why the British Government has to pay the undergraduate tuition fees of nationals of other Member States attending British universities.

On the other hand, I am attracted by the suggestion in the Prime Minister's Warsaw speech that a statement of principles be drawn up articulating, more clearly than you find in the Treaties at the moment, the limits of Union powers.

I have had a go at drafting such a statement of principles. My re-formulations of the three principles that are stated, not very happily, in the present Article 5 of the EC Treaty, are set out below.

First, the principle of the attribution of powers:

> The Union has only those powers which have been conferred on it. Any action which is taken by the institutions in the name of the Union must be specifically authorised, either expressly or by necessary implication, under a power-conferring provision contained in, or adopted pursuant to, one of the Treaties.

Next, subsidiarity:

> The principle of subsidiarity is a general and fundamental principle of the Union's constitutional order. It requires that powers be located and be exercised at the level of the Member States, except where a clear common advantage can be discerned in acting at the level of the Union. The principle shall serve as a guide when the Treaties are being amended. It must be adhered to on any occasion when the institutions are minded to act in pursuance of a Treaty objective which is capable of being achieved by Member State action.

On proportionality, I would propose saying:

> The principle of proportionality is likewise a general and fundamental principle of the constitutional order. As it applies to the relationship between the Union and the Member States, it requires that the powers of the former be exercised in ways that encroach, to the smallest degree compatible with the attainment of the relevant Treaty objectives, on the powers of the latter.

Reformulated along the lines I am proposing, those principles would be more readily justiciable. All the same, given their political content, the principles are bound to be treated by any court with extreme circumspection. They are only likely to be applied robustly by a political organ. However, experience shows that, within the Council, subsidiarity issues are liable to disappear from view in the general bargaining process. The Prime Minister's idea, floated in the Warsaw speech, of creating a special 'subsidiarity organ', as I would call it, composed of national parliamentarians, merits very serious consideration; and I like the Foreign Secretary's suggestion of perhaps involving the Scrutiny Committees of Member States' parliaments in this process, though I see no

[23] See the line of ECJ authorities, beginning with Case 293/83 *Gravier v. City of Liège* [1985] ECR 606. The authorities are fully considered in Wyatt and Dashwood, Ch. 28.

need for the members of such Committees actually to come together. The views of individual Committees could be communicated to the Council Secretariat, which would certify whether there was a qualified majority satisfied that the principles were being complied with.

So, on the delineation of powers, I am against attempting to list areas of exclusive Member State competence, but for a statement of principles, perhaps enforceable by a subsidiarity organ. On a more mundane level, I also favour tight drafting of the power-conferring provisions contained in the Treaties, in the style the TEU pioneered.

IV. Third Element: Reform of the Law-Making Process

Criticism of the law-making process of the EU has been mainly about three things: its complexity, owing to the bewildering variety of procedures; insufficient democratic accountability; and the lack of transparency. The series of Treaty revisions that began with the Single European Act of 1986 has brought significant progress, but the Nice Declaration rightly emphasises the continuing need to improve the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to citizens.

First, then, the criticism that the law-making process is excessively complicated. Talk about 'the Community model' masks the multifariousness of procedures under the EC Treaty. There are five main ones. Under the simplest of them the Council acts on a proposal from the Commission, with no involvement of the European Parliament. In the consultation procedure, the Council must wait to receive an opinion from the European Parliament on the Commission's proposal before acting, but is not bound by the opinion. The co-operation procedure was introduced by the Single European Act for legislation connected with the implementation of the internal market programme.[24] It entails two readings and was designed to enhance the influence of the Parliament over the legislative outcome, though the Council could always override opposition and impose its will by acting unanimously. Co-operation has been replaced—largely, though still not entirely—by the co-decision procedure, which was introduced by the TEU and refined by the Treaty of Amsterdam.[25] Under co-decision, Commission proposals can only become law if they receive the approval of both the Council and the European Parliament. Should the co-legislators be unable to agree on the proposal or on amendments to it, there is provision for their representatives to meet in a conciliation committee, so that a compromise can be worked out. The last of the main procedures—the assent procedure—requires the Council to obtain the agreement of the European

[24] The procedure is set out in Art. 252 EC.
[25] The procedure is set out in Art. 251 EC.

Parliament before acting, but differs from co-decision in that formal machinery for the resolution of differences is lacking.[26]

Besides those main procedures, there are multiple variants, both within the Community pillar and under the second and third pillars. It is not necessary to give examples. Suffice it to say that, depending on how you count them, the procedures under which EU law is made are now getting on for 30.

The starting point for reform must be a systematic examination of existing arrangements. The aim should be to establish within the first pillar, to which I am hoping the third pillar will be assimilated, just two standard procedures for the adoption of law-making acts under primary powers. Co-decision should be the standard procedure for acts of a legislative character, by which I mean any measure laying down rules directly or indirectly applicable to the behaviour of individuals.

Acts of an executive character should be adopted under the consultation procedure; or without consultation, but with a subsequent report to the European Parliament, in cases of urgency. Variant procedures should be tolerated only where they are constitutionally justified. For instance, it is reasonable, given the nature of its task, that the European Central Bank should have the right to initiate,[27] and even to adopt[28] legislation on some aspects of monetary policy. Similarly, the specificity of foreign, security and defence policy explains why the Council and the Member States must retain their dominant role in decision-making.

Turning to the second criticism, that of insufficient democratic accountability, the success of the co-decision procedure needs to be acknowledged. In its post-Amsterdam form, the procedure gives the European Parliament real partnership with the Council in shaping Union legislation. It is well adapted to the unique conditions of a constitutional order of States, because it provides a system of dual legitimation; through the political systems of the Member States, since Ministers are responsible to their national parliaments for Council decisions in which they take part; and also by way of a directly elected European Parliament. I would add that co-decision has been judged a thoroughly practicable procedure, though sometimes an onerous one, by politicians and officials on both the Council's and the Parliament's side, who are involved in making it work.[29]

[26] On the original (Maastricht) version of co-decision, see Dashwood, A. 'Community Legislative Procedures in the Era of the TEU' (1994) *ELRev* 343. On the version of the procedure resulting from the Treaty of Amsterdam, see Dashwood, A. 'European Community Legislative Procedures after Amsterdam' (1998) 1 CYELS 25. On the law-making process post-Nice, see Dashwood, A. 'The Constitution of the European Union after Nice: law-making procedures' (2001) *ELRev* 215.

[27] See e.g. Arts. 107(5) and (6) EC and Arts. 111(1) and (2) EC. The ECB exercises its right of initiative by way of a recommendation.

[28] See Art. 110 EC.

[29] See the Report presented to the European Council of Nice by the French Presidency and the General Secretariat of the Council (Press Release: Brussels (28.11.2000)—No 1336. 1/00). See also

There remain, however, serious concerns about democratic accountability, which are of two sorts. One concern is that, in some major areas of Union policy, legislation is still enacted under procedures other than co-decision: for instance, the two areas in which by far the greatest part of the Union's budget is spent, namely agriculture and regional aid. Primary legislation on the Common Agricultural Policy is adopted under the consultation procedure, which limits the European Parliament to expressing an opinion.[30] For regional aid, the assent procedure applies.[31] That procedure is unsatisfactory for enacting legislation, as I have indicated, because there is no structured interaction between the Council and the Parliament. These are among the cases that reform of the law-making process must bring within the general application of co-decision.

The other concern is that, even where co-decision applies, the system of dual legitimation is still not working as it should be. That is partly because, in most of the Member States, Ministers are not properly held to account by their parliaments for what they do in the Council; and partly because the European Parliament has failed thus far to establish a genuine political process at Union level, through the forging of direct links between MEPs and their electorates. Those are matters that require political action and which neither the Convention nor the IGC can do very much about.

The third criticism—lack of transparency—puts in question the diplomatic style of Council decision-making, through negotiations between Member State delegations which take place behind closed doors. My experience as a Council civil servant led me to defend that process, as facilitating the formation of consensus round a Presidency compromise, in an era of qualified majority voting when substantial concessions sometimes have to be made by delegations. However, I now believe that any gains in terms of efficiency in compromise-building that may come from striking bargains in secret, are outweighed by the cost to the legitimacy of the system. The tabloid myth of 'Brussels, the sinister tyrant', is sustained by the public's ignorance of the part played by representatives of the Member States in ensuring that divergent national interests are as fully accommodated as possible. Opening up the Council's process may also help to meet the accountability deficit by improving the flow of information to national parliaments. It was a pleasure to read on the front page of the *Financial Times* of 25 February 2002 that the Prime Minister and Chancellor Schröder are in agreement that, when the Council is legislating, its proceedings ought to be public, at least in the sense of being televised. I understand that also to be the view of Mr Barnier, the Member of the Commission responsible for

the Press Release issued following the Joint European Parliament /Council/ Commission Seminar of 6 and 7 November 2000 on the functioning of the co-decision procedure since the Amsterdam Treaty.

[30] See Art. 37(2) third sub para. EC.

[31] See Art. 161 EC.

animating the debate about the future of Europe. To achieve this, no Treaty amendment would be necessary, simply a change in the Rules of Procedure of the Council and in its working methods.[32]

A final point on the legislative process concerns the role of the European Council, the meeting of the Heads of State or Government of the Fifteen, together with the President of the Commission, which now takes place normally four times a year. In his Warsaw speech, Mr Blair put forward the idea that the European Council should set an annual agenda for the Union, and oversee its implementation. The Prime Minister made clear that he was talking about a legislative as well as a political programme. That seems a good idea to me, because the general thrust of legislative activity in the Union would be seen to be coming from democratically accountable national leaders. However, to maintain the institutional balance, the Commission must keep its autonomy in determining the specific content of proposals.[33]

V. Fourth Element: The Form of a Future Constitution

The options for restructuring the texts containing the primary law of the European Union are essentially: to bring all the relevant provisions together in a single enormous instrument; to establish a basic instrument with annexes; or to create a cluster of distinct, though formally related, instruments.

I share the widely held view that, for reasons of presentation, but also to facilitate the rationalisation of amending procedures, the primary law of the Union should be organised in a way that brings out clearly the difference between the basic concepts, principles and procedures of the constitutional order, on the one hand, and the provisions defining the substantive activities that may be carried on, and the means of doing so, on the other. This could be achieved under the single instrument option, through a careful division into parts; but the option of a basic instrument with annexes, or that of an instrument cluster, would surely provide a more elegant solution.

The choice between the three options is likely to be influenced by the choice made as to the basic structure of the Union. Suppose, as I have proposed, that the third pillar is assimilated to the first, the second pillar is retained and the distinction between the Union and the Communities is abolished. To reassure those who may be concerned about possible contamination of the *acquis*

[32] The Report by the Presidency to the Seville European Council on 'Measures to Prepare the Council for Enlargement' refers *in fine* to the fact that opinion is favourable to opening Council meetings to the public when the Council is acting in co-decision with the European Parliament. This would occur at the initial stage of the procedure and at the deliberation stage and the final vote. See doc. No 9939/02, POLGEN 25.

[33] See *ibid*. the proposals relating to preparation for, and the conduct of, proceedings of the European Council.

communautaire, it might seem wise to go for the option of distinct but related instruments forming a cluster. So a possible solution would be to have a short basic instrument, linked by appropriate language to at least two other instruments: one of them incorporating the law contained in and resulting from the EC Treaty, the Euratom Treaty and Title VI of the TEU (which governs the third pillar); and the other incorporating the law of Title V TEU (which governs the second pillar). I say 'at least two instruments', because one might wish, for example, to add the Charter of Fundamental Rights to the cluster.

I have been using the neutral term 'instruments' to describe these texts. In his speech on 21 February, the Foreign Secretary was relaxed about the use of the term 'constitution', and so am I. However, I confess to a marginal preference for the term 'Treaty', because that seems to me a more suitable designation for texts laying down the conditions organising the common institutional life of a group of sovereign States. I propose, boringly but uncontroversially, that the basic Treaty keep the name 'Treaty on European Union'[34] and that the other two instruments be called, respectively, 'The Protocol on Economic and Social Policy' and 'The Protocol on Foreign, Security and Defence Policy'.

As to procedures for the amendment of the primary instruments, I would resist suggestions to abandon the present procedure of Article 48 TEU. In a constitutional order of States, it should be for governments to negotiate amendments, and to secure ratification of the outcome according to their respective internal requirements. However, I would restrict that procedure to the basic Treaty on European Union. For amending the Protocols, use should be made of one of the simplified procedures which, the European University Institute in Florence has usefully reminded us, are already available under the existing EC Treaty.[35] Less far-reaching amendments could be decided by the Council acting unanimously[36] with the assent of the European Parliament; and more far-reaching ones by the Council, after consulting the European Parliament, subject to ratification at national level.

VI. Conclusion

Those, then, are the elements I would propose in constructing a constitutional settlement for the European Union.

Let me end with a story, which some of you may have heard before. At a meeting of the former EEC Commission, its first President, Walther Halstein, was being criticised by colleagues for changing his mind about some issue. He

[34] Or it might be called more adventurously, "Constitutional Treaty of the European Union".

[35] See the Report 'Reforming the Treaties' Amendments Procedures' which was submitted to the Commission on 31 July 2000.

[36] Or, arguably, by what the EUI Report calls a 'super-qualified majority' of, say, four-fifths of the Member States.

came back with the reply: 'I always reserve the right to be more intelligent today than I was yesterday'. The Belgian Commissioner, Jean Rey, who later became President, and from whom I heard the story, responded: 'In that case, let's adjourn until tomorrow'.

It's a story I like, but it is also a relevant one. In a *general* sense, because, if the European Union is about anything, it is about being more intelligent today than in the awful yesterday of early twentieth century Europe. The establishment of the European Coal and Steel Community, the precursor of the European Union, was a wonderfully intelligent way of neutralising what its founding Treaty calls '*age-old rivalries*'. As regards the *future* of the Union, the story is a reminder that it is part of the genius of the integration mechanism set in motion by the ECSC Treaty, to proceed step by step. Let there be no pretence of giving definitive shape to the Union. The Convention must set itself the modest but attainable objective of ensuring that the constitutional settlement of 2004 is as well constructed as possible to meet the challenges of the next generation.

2

HARMONISATION AND COOPERATION WITHIN THE THIRD PILLAR—BUILT IN RISKS

*Petter Asp**

I. Introduction

During the past nine years, co-operation in criminal matters within the European Union has developed in a rather fascinating way. Before the Maastricht Treaty, which entered into force in 1993, there was not much co-operation in this area at all.

During the time before Maastricht, the focus was on the creation of the internal market, on the rules on competition etc. and criminal law did not fall within the scope of the Treaties. Thus, although Community law had (and has) some implications for national criminal law and despite the fact that some conventions were agreed upon within the European Political Co-operation[1] one cannot really say that criminal law questions were formally on the agenda before Maastricht.

However, since 1995, when the first conventions under the third pillar were signed,[2] things have changed. Nowadays

—co-operation in criminal matters is institutionalised under the third pillar,
—the co-operation is very intense,

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[1] For example, a convention on double jeopardy has been in existence since 1987 (Convention between the Member States of the European Communities on double jeopardy, Brussels 25 May 1987), as well as a convention on the enforcement of foreign criminal sentences since 1991 (Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences, Brussels 13 November 1991).

[2] See, e.g. Convention on simplified extradition procedure between the Member States of the European Union (OJ 1995 C 78/1) and Convention on the protection of the European Communities' financial interests (OJ 1995 C 316/48).

—the working parties dealing with criminal matters have meetings frequently and regularly,
—new instruments are proposed at an ever higher speed,
—new conventions and framework decisions are agreed upon under each and every presidency, and
—there is a lot of political interest and pressure in this area.

For a researcher in criminal law this development is, of course, very interesting. Criminal law has traditionally been seen as an area very closely connected not only with the idea of an independent nation state and its sovereignty, but also with the moral and religious backgrounds of different states. Nowadays these ideas seem to be somewhat in retreat and one could actually talk about a process of internationalisation of criminal law. Thus, even though the co-operation within the third pillar is still an interstate co-operation, it deserves attention in several respects.

This article will discuss this development mainly from the viewpoint of criminal policy, deliberately using a pessimistic and provocative tone. The reason for this approach is neither that I want to defend the concept of national criminal law (from 'unauthorised influence') nor that I am an opponent in principle as regards European co-operation and harmonisation within the field of criminal law.

It is clear that we are at the beginning of a process; no one really knows where it may lead, and, since there are a few tendencies that are a bit troublesome, there is a need for reflection as regards the objectives of the co-operation and as regards the risks associated with it.

I will argue that unless the purpose of the co-operation and the means to achieve the objectives set out are discussed comprehensively and seriously, there is a risk that the co-operation under the third pillar will lead to an unwarranted increase of repression and also to a loss of balance as regards the interests of the Member States and the Union on the one hand, and the interests of the citizens on the other. Before moving on, it should be noted that there are a lot of different and partly interrelated factors that contribute to the risks that will be envisaged, yet this article will focus on three of them only.

II. Minimum-Level Thinking

First of all, the structure of the text governing the co-operation under the third pillar, the Treaty of the European Union (TEU), in itself reflects a one-sided, mainly repressive conception of criminal law. The relevant texts are found in title VI TEU, and as far as substantive criminal law is concerned Articles 29 and 31 are the most important. First of all, these articles give information on the objective of co-operation in criminal matters. The latter, according to Article 29 paragraph 1, aims at 'provid[ing] citizens with a high level of safety within

an area of freedom, security and justice'. The text also indicates the means by which this objective has to be achieved; *viz*. by 'developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia'.

Paragraph 2 more specifically states that the objectives shall be achieved by preventing and combating certain types of crime through:

—closer co-operation between police and customs authorities,
—closer co-operation between judicial authorities, and
—'when necessary'—through approximation of the substantive criminal law rules in the Member States in accordance with Article 31(e).

Moreover, it is stated in Article 31(e) that common actions in this area shall include the progressive establishment of:

> measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

Article 31(e) is a bit puzzling. The fact that organised crime, terrorism and illicit drug trafficking are the only crime categories mentioned, has recently led to a discussion on the question whether the wording of the Article excludes other areas of substantive criminal law from such co-operation. That question will remain open. Suffice it to underline for the purpose of this paper that, as regards harmonisation of substantive criminal law, the Treaty explicitly refers to the establishment of minimum rules. In the instruments proposed or agreed upon under the third pillar, this is reflected for example by the fact that several instruments contain articles which provide for common minimum rules as regards the maximum penalties for certain offences.[3]

The fact that the Treaty explicitly refers, in respect of harmonisation of substantive criminal law, to minimum rules is perhaps not surprising, but it is, at least in my view, nevertheless problematic. It should be quite evident that any criminal law co-operation that focuses on minimum rules will inevitably have a repressive touch. Since minimum rules will not provide any added value, unless the minimum level of repression is set above the existing minimum level within the Union, one can take for granted that each and every decision on minimum rules will, in practice, lead to an increased level of repression within the Union. To express things more bluntly, the decisions will lead to an increased level of repression in those Member States that are most moderate in this regard. In this context, one Member State may, of course, be moderate in a certain respect, but very repressive in another, hence these remarks do not entail a general division of the Member States into two categories: repressive and moderate.

[3] See for example, the framework decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2001 L 140/1).

Moreover, it is quite obvious that the minimum-level thinking reflected in Article 31(e) builds on a rather unreflecting assumption that the existence of differences of any sort between the Member States, as regards the level of repression, is a problem. This assumption in itself can of course be challenged, but it is perhaps possible to provide arguments in support of it. For example, one could refer to the risk of safe havens, the risk that differences as regards criminal law will distort competition or to the risk that differences between the criminal law systems of the Member States will be an obstacle to effective judicial co-operation between the Member States, for example due to the double criminality requirement or due to the fact that the minimum and maximum penalties prescribed may be important in terms of providing judicial assistance.

However, even if it is assumed, due to the abovementioned factors, that there actually is a substantial need for harmonisation, one could dispute whether an approach that focuses on minimum levels is appropriate. The most important objection is that the approach taken actually presupposes, or takes as a point of departure, that it is the Member States that are least repressive that constitute the problem. It is presupposed or taken for granted that these Member States should be brought in line with the others, and not vice versa. This is perhaps, speaking in practical terms, a realistic approach. There are, for example, reasons to believe that, perhaps with certain exceptions, it would be quite troublesome to reach an agreement on instruments that would have as a consequence that certain Member States had to decriminalise or had to provide for more lenient penalty scales etc. But if one allows oneself to be a bit utopian, one could raise the question whether it would not be equally, or even more, reasonable to use the fact that some Member States seems to manage without being very repressive in a certain respect as a basis for the conclusion that the other Member States are actually needlessly repressive. At least, it is fair to say that there is not much effort made to justify the assumption that there is a need for more repression as regards the areas discussed under the third pillar.

In this respect, the pressure to establish common minimum rules as regards maximum penalties could be used as an example. One can say that it is generally hard to find empirical evidence of a positive correlation between the actual level of repression of a criminal law system and its ability to prevent crime effectively. And it is probably even harder to find such evidence for a positive correlation between effectiveness and the maximum penalties as such. Thus, there is not much evidence either for the view that there is a need for more repression, nor that instruments providing for minimum rules as regards maximum penalties will increase the effectiveness of criminal law. A lot of time and effort is nonetheless spent on negotiating instruments which require the least repressive states to increase their statutory maximum penalties for certain crimes.

In order to make this point even clearer, one could make a comparison between the assumption that underlies the pressure for harmonisation on the one hand and the principle of proportionality, which generally holds a very prominent place within European Union Law, on the other. According to the principle

of proportionality a measure, for example a rule that provides for sanctions or for restrictions of any other kind, must be *necessary* in order to be legitimate and justified. And according to the case law of the European Court of Justice a measure is necessary if, and only if, the measure chosen is the least intrusive means that can be used in order to achieve the objective striven for. Naturally, it is very hard to reconcile this principle with the minimum-level-approach according to which the least repressive Member States will always, and almost automatically, have to adjust themselves to states that are more repressive.

To be provocative, one could say that the principle of proportionality, which is generally regarded as one of the most fundamental principles of European Union Law, seems to be totally ignored when it comes to co-operation within the field of criminal law. In criminal law terms, the presumption with regard to the need for a measure to be justified, is turned around, turned upside down or inside out. The point of departure is that repression does not call for justification and that the burden of proof lies with the Member States that are least repressive in the specific area discussed.

To summarise: the minimum level-approach reflected in Article 31(e) TEU is one factor that creates the risk of a one-sided, mainly repressive, development. If you add that a far-reaching harmonisation probably presupposes some sort of common criminal policy *and* that there are fairly significant differences between the Member States in respect of the general level of repression, the problem becomes even clearer.

III. The Lack of Clear Objectives and the Bicycle-theory

The European Union is an 'ever evolving union' that is, an entity which is continuously moving forward. It is quite often said that concepts such as progress, development and evolution are at the very heart of co-operation within the Union. In this context one can think of the Union as demonstrating the so-called bicycle theory of EC law, the essence of which is that co-operation must develop and continuously be moving forward, otherwise it risks falling to the ground, just as a bicycle does when it loses speed. This bicycle-theory reflects, at least to some extent, the nature of the co-operation within the Union and in my view the co-operation within the third pillar must be seen in this context. There is a general ambition to make 'progress' and to make 'progress' continuously.

However, this progressive attitude, were it to be useful, presupposes a fairly clear conception of the objectives or, expressed in another way, a fairly clear conception of what 'progress' really means. As regards the original objectives of the European Communities, for example the creation of one internal market out of six, twelve or fifteen, these things were *fairly* clear. At least to some extent there has been some sort of compass which gave the direction. As regards criminal law, however, things are not so settled and the text of the Treaty is not enough. One could suggest that the third pillar co-operation ultimately aims at

creating a single European Criminal Law system, yet it is unlikely to be the case. Progress cannot, at least not yet, be equated with taking steps towards a single European Criminal Code.

In a more general criminal law context, clarifying what progress actually means is genuinely difficult. Perhaps more than in other areas, the concept of progress is dependent upon ideology and the choice of ideology will, speaking in general and simplified terms, be dependent on how the function of criminal law is understood, on how the values of efficiency and legal security are balanced etc. Thus, before one knows which way to go, there is a need for a thorough analysis of what actually there is to achieve.

In the absence of such analysis and in the absence of a clear objective, it is, especially when the Treaty explicitly refers to minimum rules, very easy to resort to a simplistic and archaic understanding which suggests that anything extending the possibilities to use repressive measures is to be equated with progress. Such an understanding would entail, for example that:

—an extension of the criminalized area means progress,
—more severe penalty scales mean progress,
—more severe sentences in court practice mean progress,
—less impediments and safeguards as regards different forms of judicial co-operation means progress.

The concept of progress just described is not only simple; it is also attractive in a political context. It is generally easier for governments to attract praise for having agreed on instruments that increase possibilities to combat crime, than it is to attract praise for having agreed on decriminalisation. Having said that, it is undeniable that there may be, at times, good reasons for agreeing on instruments on the basis of which Member States undertake to introduce new offences or undertake to provide for certain minimum penalties. However, there are risks associated with a thinking according to which such measures are more or less automatically equated with 'progress'.

One objection that may perhaps be raised is that criminal law actually concerns repression and that it is therefore quite natural that co-operation as regards criminal law focuses on repression. However, co-operation in criminal law cannot only be concerned with minimum levels as regards offences or punishment, or rules which simplify international co-operation etc., but it can also contribute to the creation of a good or just criminal law system. Although the comparison is a bit unfair, one could for example refer to the work done within the Council of Europe as regards the simplification of criminal justice, disparities in sentencing, the use of administrative sanctions etc. One could also refer to Winfried Hassemer who has emphasised that criminal law is not only *Strafbegründungsrecht*, but also *Strafbegrenzungsrecht*.[4]

[4] See *e.g.* Hassemer, W. 'Diskussionsbeitrag' in Sieber, U. (ed.)*Europäische Einigung und Europäisches Strafrecht, Beiträge zum Gründungssymposium der Vereinigung für Europäisches Strafrecht e.V.* (Köln, Carl Heymanns Verlag KG, 1993) 126 ff.

To summarise, there is a risk that the lack of analysis with regards to the objectives of cooperation will lead to a situation where focus is put only on the repressive side of criminal law. Criminal law is thereby conceived as a means to combat crimes committed by 'them', rather than on criminal law as a legal framework applicable to 'us all'. The bicycle theory, if combined with the fact that the concept of progress is not clearly defined, makes me feel a bit ill at ease: perhaps too much progress will be achieved during the years to come.

IV. The Idea of Criminal Law as a Compensatory Measure

An additional factor that deserves attention, and that is equally risky, is the structure of thinking in criminal law. A general argument, which is often advanced when discussing third pillar co-operation, is that free movement of goods, persons etc. must be accompanied by a corresponding free movement of judgments and evidence, and that a common internal market should or must be accompanied by common rules in the field of criminal law. It is quite evident that this argument is closely connected to the idea of 'compensation' which could be reformulated in the following way: the rules on free movement and the lack of control at the borders facilitate criminal activities and this tendency must be compensated by harmonisation of criminal law and by closer criminal law co-operation between the Member States. One could say that this school of thought is reflected in Article 2 TEU, according to which one of the Union's objectives is:

> to maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Another area where this idea of compensation is important is the area that could be referred to as EC fraud or the protection of the financial interests of the Community. In this field, one finds a system of allocation of funds and subsidies etc. which, to put it bluntly, provides great opportunities to make money by not being completely honest. It is quite clear that one assumption is that harmonisation and co-operation in criminal law will compensate for the fact that the system of subsidies creates possibilities for misbehaviour.

Sometimes this idea of compensation is expressed by the argument that European integration implies new challenges for Member States criminal law systems or to criminal justice as such. Obviously, there is nothing wrong with the arguments built on the idea of compensation. On the contrary, it is likely that on-going integration creates a need for harmonisation and improved co-operation, at least in certain respects. However, from the viewpoint of criminal policy, I would, nevertheless argue that this idea of compensation remains problematic insofar as it reflects a belief that the criminal justice system is actually

good at solving problems. It corresponds to a belief that harmonisation and improved co-operation will actually make a real difference, by providing a potential solution to the problems we are faced with. Yet, such a belief is not wholly well founded.

As argued earlier, it is on the one hand very hard to find evidence that changes within the criminal law system affect criminality in a tangible way. Adjustments as regards the criminalised area, the penalty scales or the actual level of repression have, generally speaking, only marginal effects on the level of criminality. On the other hand, it is probably fair to say that changes in the actual possibilities to commit crimes or changes that increase the possibilities to commit crimes without being detected, e.g. providing tempting opportunities, minimising control etc., at least have the potential manifestly to affect the level of criminality.[5] To simplify a little, changes in criminal law do not mean that much for criminality, but changes in the non-legal reality do have the potential for affecting people's behaviour. Now, the problem with the idea of compensation is that it turns, these experiences upside down, at least to some extent:

—new and profitable opportunities to commit crimes are created through the system of subsidies,
—cross-border crimes are facilitated by the abolition of the internal borders,
—and this shall be compensated for by making use of the generally speaking inefficient means of criminal law.

Once again, there is perhaps nothing wrong in this ambition. The fact that the criminal law system is knowingly fairly inefficient is not a very good reason for not using the system to tackle unwanted and harmful behaviours. However, expectations as regards the result of the measures adopted should be reasonable. If it is expected that the responses, such as the criminalization of misuse of subsidies or the introduction of minimum rules as regards maximum penalties, will actually make a real difference, there is obviously a risk of first, genuine disappointment, and secondly, of eventually coming to the conclusion that one has not done enough and that more of the same medicine is needed. And this, in turn, creates the risk of a subsequent increase in the level of repression.

From the foregoing, one could say that criminal law in the European Union context is very much conceived of as a means to solve problems which have arisen through the creation of the Union. Moreover, such an approach creates a risk for the development of unreasonable expectations that will not be met, and as a result a tendency to gradually increase the level of repression.

[5] As an example, one could mention that the number of cheque frauds in Sweden was reduced by about 80% when the public bank guarantee was abolished and it became mandatory to show an identity card when using cheques.

V. Concluding Remarks

As suggested at the beginning, this article has purposely been written with a provocative and pessimistic tone. The future is not necessarily as bleak as it has been depicted. I have attempted to show, by taking things a bit to their extremes, that there are a few unpleasant tendencies inherent in the very structure of criminal law co-operation, in the context of the Union. One could say that the purpose has been to raise questions rather than to give answers. And the questions could be formulated as follows: is there a risk that the third pillar co-operation becomes a one-sided co-operation that merely or mainly focuses on increased repression? And if so, how can it be avoided?

Finally, on a more optimistic note, one could say that something has perhaps already been achieved if awareness of the risks has increased. Risks are, generally, whether they are built-in or not, most dangerous when they are not perceived.

3

CRIMINAL JURISDICTION, THE PUBLIC DIMENSION TO 'EFFECTIVE PROTECTION' AND THE CONSTRUCTION OF COMMUNITY-CITIZEN RELATIONS

*Estella Baker**

I. Introduction

In a series of decisions the European Court of Justice ['the Court'] has ruled that Member States must deploy their law enforcement authorities, including their criminal justice systems, so as to safeguard Community interests from threat or damage. These rulings have received attention from commentators because, amongst other things, they make it explicit that Community law has a tangible impact on matters of criminal law and justice[1] notwithstanding the absence of a criminal legal base in the Community Treaty.

This is a principal source of their interest in the discussion that follows as well, but it is an interest that will be explored from a very particular perspective. Fundamental to the reasoning of the Court in these cases is its reliance upon the so-called 'obligation of loyalty' contained in Article 10 EC. As is

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[1] See, *inter alia*, Albrecht, P.A. and Braum, S. 'Deficiencies in the Development of European Criminal Law' (1999) 5 *ELJ* 293; Delmas-Marty, M. ''The European Union and Penal Law' (1998) 4 *ELJ* 87; Harding, C.S. 'Member State Enforcement of European Community Measures: The Chimera of 'Effective' Enforcement'' (1997) 4 *MJ* 5 and Baker, E. 'The Duty of National Criminal Justice Authorities to Enforce Community Law' in Cullen, P. and Jund, S. (eds), *Criminal Justice Co-operation in the EU Post-Amsterdam* (Academy of European Law, 2002, forthcoming). This is not the only thread in the Court's case law through which it is apparent that Community law has an important bearing on national penal law: see also, for example, relevant Article 234 preliminary ruling cases discussed, *inter alia*, in Baker, E. 'Taking European Criminal Law Seriously' [1998] *Crim LR* 361.

well-known, this provision places Member States under a broad, over-arching duty to ensure fulfilment of the objectives of the Community and to refrain from steps that might place those objectives in jeopardy. Equally widely appreciated is the fact that Article 10 has proved critical to the Court's ability to construct many of the key tenets of Community law. Foremost in significance for the argument to be pursued here is the doctrine of 'effective protection' which establishes the principles that national courts must apply in ensuring that individuals obtain an effective remedy for breach of their Community law rights.[2] In identifying the duty upon Member States to safeguard Community interests it is notable that the Court has borrowed heavily from the principles that it applies with respect to remedies.

The purpose of the present paper is to examine the connection between the two branches of case law under Article 10. The initial, limited objective, is to suggest that it is by this means that the content of the law enforcement duty owed by the Member States can be established with accuracy. However, it will then be proposed that more should be read into the Court's resort to common principles than its significance in definitional terms.

Analysed at a doctrinal level the close proximity between the two areas betrays the fact that the Court has become engaged in the construction of a *public* dimension to effective protection to complement that which has taken root in the private sphere. Once Member States' duty to safeguard Community interests is regarded in this light a number of thought provoking implications are thrown into relief. Accordingly, the final part of the article will consider both the impact of the public duty of effective protection on Member States' autonomy over their criminal justice systems and also its relevance to the evolving dynamics of the relationship between the Community, the Member States and individual citizens. The article begins, however, by setting out a brief summary of the status of criminal justice matters under the Treaties and establishing the theoretical link between the exercise of criminal jurisdiction and the obligation of loyalty in Article 10.

II. The Status of Criminal Jurisdiction under the Treaties and Article 10 EC

The formal status of criminal matters under the Treaties is dictated by a fundamental tension. On the one hand, the Member States regard the exercise of criminal jurisdiction as so intimately entwined with the assertion of statehood that they are unwilling to cede sovereignty over criminal matters to the Community; on the other, they recognise the potential practical benefits to be

[2] For general discussion see, for example, Kilpatrick, C. et al (eds.) *The Future of Remedies in Europe*, (Oxford, Hart Publishing, 2000).

gained from co-operation in this vital field. Regard for the former explains the absence of a criminal legal base in the Community Treaty that was noted in the introduction. It also accounts for the presence of identically worded provisions in that Treaty and the Treaty on European Union which can be read as reserving competence over 'the maintenance of law and order and the safeguarding of internal security' to the Member States.[3] By contrast, regard for the pragmatic interests at stake has led to the founding of the intergovernmental 'Third Pillar' of the Union to provide a framework for 'Police and Judicial Co-operation in Criminal Matters'[4] while retaining a high degree of national sovereignty over the development of associated initiatives.

Belying the careful political crafting of the Treaties the true legal position with respect to matters of criminal law and justice is, in practice, far more complicated and ambiguous than appears on the surface. To begin with, Community law is supreme over national penal laws in just the same way as it is over any other national law.[5] Accordingly, the Court has stated that:

> Although, generally speaking, criminal legislation and the rules of criminal procedure . . . are matters for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power . . . [6]

A clear example of such a limit is that provisions of penal law which are inconsistent with Community law must, where possible, be interpreted so as to render them compatible with it or disapplied.[7] Plainly, this creates a significant qualification to the division of competence that appears to be written into the Treaties; a second, the one of central relevance here, flows from the application of Article 10.

Set out in full Article 10 states that:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

[3] Arts. 64(1) EC and 33 TEU. It is, however, necessary to read these Articles with care as they apply specifically to Titles IV EC and VI TEU.

[4] Title VI TEU. Originally 'Justice and Home Affairs', Title VI was retitled by the Treaty of Amsterdam.

[5] Case C–6/64 *Costa* v. *ENEL* [1964] ECR 585; Case C–213/89 *R* v. *Secretary of State*, ex parte *Factortame* [1990] ECR I–2433.

[6] Case C–274/96 *Criminal proceedings against Horst Otto Bickel & Ulrich Franz* [1998] ECR I–7637, para 17.

[7] Barring special exceptions for criminal provisions: see, *inter alia*, Case C–148/78 *Ratti* [1979] ECR 1629, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, Case C–168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I–4705.

It can be seen that, on its face, there is nothing to suggest that it might have a bearing on matters of criminal justice. However, appearances are deceptive. As is well-known, the obligations contained in Article 10 operate not only to bind a Member State as a whole but crystallise upon each of its constituent institutions and organs. Set the task of drawing up a list of what these might be it does not take long to identify the criminal justice system as an obvious candidate for inclusion. What is more, there is a curious paradox here. The very fact that the Member States perceive the exercise of criminal jurisdiction as a quintessential function of the state, and are thus so reluctant to deliver competence over it to the Community, serves only to emphasise the status of their criminal justice systems as a core tool through which to discharge their obligations under Article 10. Put another way, there is something akin to an inherent contradiction in declining to provide an explicit criminal base in the Treaty, on the one hand, but casting Article 10 in such broad terms that it becomes an indirect means for criminal justice powers and techniques to be fostered in furtherance of Community interests, on the other. Having traced the theoretical link between Article 10 and matters of criminal law and justice, the next section will now examine relevant case law of the Court.

III. Article 10 and the Public Dimension to Effective Protection[8]

Although there is a wider portfolio of cases from which to choose,[9] the discussion that follows will focus upon two key decisions: *Commission* v. *French Republic*[10] and *Commission* v. *Greece*[11] (colloquially known as the '*Greek maize*' Case). Both display a common litigation pattern. In each instance the Commission alleged that the relevant Member State was in breach of its Treaty obligations because of its failure to act to protect an important Community interest and proceeded to bring successful enforcement proceedings under Article 226 EC. Analytically, the legal construction of the confirmed breach was identical in that it involved default on a specific provision (or provisions) of Community law in combination with the simultaneous infringement of Article 10 of the Treaty.

The more recent, and widely-discussed, decision[12] in *Commission* v. *French Republic* will be considered first. In it the Court ruled that France was in breach of Article 28 EC in conjunction with Article 10. This was because of the

[8] This section contains a summary of an argument set out more fully in Baker (in Cullen and Jund), above n 1.

[9] See further the discussions in Delmas-Marty, above n 1; Harding, above n 1.

[10] Case C–265/95 [1997] ECR I–6959.

[11] Case 68/88 [1989] ECR I–2965.

[12] See, *inter alia*, Case-note by Jarvis, M. at (1998) 35 *CMLRev* 1371; Muylle, K. 'Angry Farmers and Passive Policemen: Private Conduct and the Free Movement of Goods' (1998) 23 *ELRev* 467.

'manifest and persistent' failure of its law enforcement authorities to take 'appropriate and adequate' steps to protect the passage of imported agricultural products across French territory from the recurrent, violent acts of sabotage of French farmers.[13] One aspect of the case that deserves specific mention is that it was explicitly concerned with the way in which the resources of the criminal justice system had been deployed. More usually the Court discusses the duty of the law enforcement authorities in generic terms, leaving the implications for criminal justice agencies to be inferred. In coming to its conclusions the Court stressed that the Member States enjoy a margin of discretion in determining the measures to be taken to protect the free movement of goods and that it was not for any Community institution to substitute its own judgement for that of the national authorities.[14] It seems safe to assume that these principles would extend to cover the protection of Community interests in general. But the Court then went on to provide that the discretion was not so broad as to permit a Member State to tolerate hostile acts of citizens that were calculated seriously to undermine intra-Community trade. On the contrary, the French authorities' reluctance to deal with those responsible for the conduct that had sparked the Commission's complaint constituted just as much of an obstacle to the free movement of imports as a positive act by the State itself.[15]

One weakness of the Court's ruling is that it does not provide any explanation of the degree of default necessary for a Member State to be found to have infringed the Treaty or, conversely, any guidance on what a Member State must do to avoid liability. However, it is arguable that assistance on these points can be found in its earlier judgment in *Commission* v. *Greece*,[16] which established general principles for the Member States to follow in penalising infringements of Community law. The litigation arose in this case because the Greek authorities had declined to take steps to deal with a serious agricultural fraud which the Commission had verified was being perpetrated on its territory and with the active collusion of state officials. From the perspective of the Commission, subsequently confirmed by the Court, the omission to act constituted a breach of various legislative provisions concerning the budget and Common Agricultural Policy and of Article 10. Expressing a view that was subsequently echoed in *Commission* v. *French Republic* the Court emphasised here too that the choice of penalties to be imposed on those responsible for activity of this kind was one for Member States. However, it then proceeded to make clear that their discretion was fettered by Community law, which required certain principles to be adopted in exercise of the choice. Unlike *Commission* v. *French Republic* though, the judgment was not expressly concerned with criminal justice but was couched in the more abstract terms of law enforcement and sanctioning.

[13] Case C–265/95 [1997] ECR I–6959, para 65.
[14] *Ibid*., paras 33–34.
[15] *Ibid*., para 31.
[16] Case 68/88, above n 11.

Nevertheless, analysis of the Court's principles leaves no scope for doubt that its ruling has implications for the manner in which Member States deploy the resources of their criminal justice systems as will become evident.

The critical passage in the judgment states that Member States must:

> ensure … that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.
>
> Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.[17]

An important point that emerges immediately from this extract is that the Court takes a systematic approach to the task of imposing penalties. The requirement of 'same procedural diligence' in the second paragraph makes clear that its concern is not restricted to events at the conclusion of the law enforcement process. Instead, it has a more sophisticated conception that recognises that the mechanisms by which those who have infringed the law are called to account must have practical effect for the existence of sanctions to have any real meaning. It is the fact that the judgment displays this understanding of enforcement as a systemic process which underpins the assertion that the principles with which it is concerned are directly transferable to the circumstances of enforcement default that gave rise to the litigation in *Commission* v. *French Republic*.

Turning then to examine the first paragraph of the extract, it is here that the parallels between what the Court has to say about law enforcement and its effective protection case law can be seen. With regard to the latter it has prescribed that the remedy for breach of a Community law right must be both 'equivalent'[18] and 'effective'. Each of these concepts, which are of course conjunctive, has a settled meaning. To satisfy the obligation of equivalence a remedy must be available on at least the same basis as would apply to an analogous breach of national law. Meanwhile, to comply with that of effectiveness, the remedy must also be neither 'virtually impossible' nor 'excessively difficult' to obtain.[19] Comparing these definitions with what the Court has to say on the subject of penalties, it can be seen that the equivalence principle is reproduced without qualification. By contrast, it is less transparent that the phrase 'effec-

[17] *Ibid*., paras 24–25.

[18] The principle of equivalence is also sometimes referred to as the principle of assimilation: see, for example, Harding, above n 1.

[19] See, *inter alia*, Cases C–46 and 48/93 *Brasserie du Pêcheur* v. *Germany* and *R* v. *Secretary of State for Transport*, ex parte *Factortame Ltd*. [1996] ECR I–1029; Case 199/82 *San Giorgio* [1983] ECR 3595.

tive, proportionate and dissuasive' is meant to refer to effectiveness in its effective protection sense.[20] However, there are persuasive arguments that this is the interpretation that it should be given.

To begin with, there is no conceptual obstacle in applying this meaning in order to yield a sensible principle for Member States to follow. Expressed in general terms it merely requires them to ensure that the law enforcement processes that are used to combat infringements of Community law are such that it is neither virtually impossible nor excessively difficult to penalise the perpetrators. Nor does the addition of 'proportionality' and 'dissuasion' as additional characteristics that a penalty must display appear to disturb the content of this obligation to any material degree. Dissuasion implies deterrence and thus serves to emphasise punitive impact. Meanwhile, proportionality contributes equilibrium. On the one hand, it speaks to the need to reflect the seriousness of an infringement in the level and severity of enforcement and punishment, again emphasising punitiveness; on the other, it acts in the more conventional Community law guise to ensure that the exercise of state power against citizens is conducted in the least restrictive manner. In the instant context, that means that it ought to guard against over-coercive law enforcement and excessively punitive penalties. Overall, therefore, both dissuasion and proportionality can be regarded as adjuncts to effectiveness, rather than as modifications of it.[21]

Assuming that the basic line of argument that the concepts of equivalence and effectiveness should be transferred from the field of remedies to that of law enforcement and penalties holds good, it is possible to go further and to derive more detailed propositions regarding their application in the latter context. They are as follows:

—that to satisfy equivalence Member States must (i) criminalise infringements of Community law if analogous infringements of national law are dealt with in that manner and (ii) ensure that offences originating in Community law are enforced and penalised on equivalent terms to analogous domestic offences;

and, in addition,

—that to satisfy effectiveness Member States must (i) criminalise infringements of Community law if the failure to do so would render enforcement and the imposition of penalties exceptionally difficult or virtually impossible and (ii) ensure that the processes whereby offences originating in Community law are enforced and penalised are implemented in such a

[20] It is possible to identify plausible alternative interpretations. For example, effectiveness might be conceptualised in economic terms instead: see, for example, Goldblatt, P. and Lewis, C. *Reducing Offending: An Assessment of Research Evidence on Ways of Dealing with Offending Behaviour*, Home Office Research Study 187 (Home Office, 1998).

[21] For full argument on this point see Baker (in Cullen and Jund), above n 1.

way that their achievement is neither exceptionally difficult nor virtually impossible.

Returning to consider the facts of *Commission* v. *French Republic*, it is now possible to suggest a principled reason for the Court's ruling. According to the judgment the police had neglected to respond to tip-offs about prospective incidents and, even when present at the scene of the protests, had declined to intervene despite their superior numbers. As for the prosecuting authorities, they had failed to identify more than a handful of the perpetrators of the violence despite the existence of television footage of relevant incidents.[22] In short, the criminal justice system was not merely incompetent in protecting the free movement of imports, but the authorities displayed a reluctance to combat the sabotage of French citizens that was palpable. It is evident, therefore, that the 'appropriate and adequate' steps which the law enforcement authorities had failed to take were those that would discharge the Member State's obligation to ensure that the resources of its criminal justice system were deployed in a manner that was effective (in the technical sense) in protecting Community law interests.

Having sketched out the content of the duty placed on Member States by the Court's case law it is appropriate to step back to gauge its significance in doctrinal terms. It was suggested in the introduction that the line of decisions of which the two that have just been analysed form a part can, and should, be understood in terms of the development of a public dimension to the concept of effective protection. This is not a mere matter of semantics in that the Court has chosen to define the relevant duty on Member States in analogous terms, but a product of the fact that they are designed to perform functionally allied tasks. With regard to remedies and the established application of effective protection to private law, the doctrine obliges Member States (via their national courts) to safeguard the Community law *rights* of individuals. Transposed to the public sphere, it requires them to deploy their law enforcement systems in order to ensure that Community law *interests* are safeguarded from harm or threat. There is, therefore, a common thread running between the two situations. At heart, both propositions arise from the acknowledgement that the Community possesses assets that are of fundamental importance and which are worthy of safeguard, not just in their own right, but more significantly, in terms of the benefits that they confer upon citizens. As the Community is not equipped with a suitable legal infrastructure of its own to perform the task, Article 10 provides the means whereby those of the Member States can be placed under a superior obligation to promote and protect their enforcement and enjoyment. There are, however, certain critical differences in the nature of the consequences that flow from this underlying rationale as between the private and public spheres. Before turning to consider what they are the next

[22] Case C–265/95 [1997] ECR I–6959, paras 48–49.

section will examine the implications of the public duty of effective protection for Member States and for citizens.

IV. Implications for Member States and for Citizens

The doctrine of public effective protection has the potential to make a significant contribution to the legal infrastructure that supports the governance of the Union, but one that is liable to prove controversial in a variety of respects. At base, many (but not all) of the contentious issues that it provokes originate in the question of competence. Therefore, discussion of the implications of the doctrine for the Member States and for citizens will begin by returning to the fundamental matter of the lack of a criminal legal base in the Community Treaty.

A. Constitutional Control Over Criminal Jurisdiction

Briefly to recap, the previous section sketched out the argument according to which the general obligation of loyalty contained in Article 10 crystallises into a specific duty upon the Member States to deploy their criminal justice systems to safeguard Community interests. Couched in alternative terms, the situation could be described in terms of Article 10 operating to establish a delegated Community criminal jurisdiction.[23] In other words, the Court has identified in Article 10 the means to bring about indirectly what the Treaty denies directly. This surely raises a fundamental issue of whether the duty on Member States to comply with the doctrine of public effective protection constitutes a legitimate exercise of the rule of law. Regarded in its own terms, the legal logic by which the Court has been piecing together the doctrine of public effective protection is sound enough. But that does not necessarily confirm its validity because the doctrine relies for its obligatory force on a particular jurisprudential assumption about the interaction between competence and the hierarchy of national and supranational norms. Specifically, the argument that the Member States are bound by the doctrine of public effective protection only works if the content and degree of constitutional power that they have vested in the Community as a consequence of Article 10 is sufficient to override their steadfast reluctance to confer a dedicated criminal legal base upon it. If not, the doctrine constitutes a clear infringement of the *Kompetenz-Kompetenz* principle.[24] But even if there is no such violation, that does not dispense with the legitimacy issue because the technically elaborate, opaque method by which Community

[23] This is consistent with the standard account: see, *inter alia*, Albrecht and Braum, above n 1; Delmas-Marty, above n 1.

[24] Case 11/70 *Internationale Handelsgesellschaft mbH* v. *Einfuhr-und-Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; *Brunner* v. *The European Union Treaty* [1994] 1 CMLR 57.

criminal jurisdiction is constructed via Article 10 ensures that it is a problem with a number of dimensions.

A further one surrounds the matter of transparency in relation to the exercise of constitutional authority over the criminal justice system. Stated in terms of the separation of powers, the appropriate distribution of functions (at least in the United Kingdom) is that:

> decisions about what conduct should be criminal should be taken by the legislature, and these decisions should then be implemented by the executive and applied by the courts.[25]

Plainly, the doctrine of public effective protection disturbs this arrangement because it creates a situation in which, where threats to Community interests are at stake, autonomy over decision-making is transferred from the national to the supranational arena.[26] Consequently, as a comparatively superficial matter, it gives rise to the need to redraft the statement of constitutional responsibilities to take account of the manner in which Community membership has extended sovereignty beyond the level of the nation state. More significantly though, it should be recognised that the existing statement does not simply record a factual paradigm, but encapsulates a set of principles regarding the appropriate division of labour as between the three branches of government. It therefore provides a pertinent tool through which to subject the legitimacy of the doctrine of public effective protection to further scrutiny. Moreover, the tool is effective because two additional deficiencies are thrown into relief as a consequence.

Reviewing the content of the statement, one of the things that it rules out is the right of the courts to generate fresh criminal offences through judicial action.[27] What implications does this have for the role of the Court of Justice in the cases that have been under discussion here? While its decisions are based in Article 10 of the EC Treaty, it hardly needs reiterating that that provision provides an obscure legal basis from which to fashion a delegated criminal jurisdiction, and that the degree of judicial activism entailed in utilising it for this purpose is really quite substantial. It might be suggested that the Court's actions can be justified on the basis of a literal argument that its contribution is confined to drawing up broad principles for national authorities to implement. However, it is hard to see this as an argument that rings anything but hollow. The mechanism by which the principles that it has designed can crystallise

[25] Ashworth, A.J. *Principles of Criminal Law* 3rd edn. (Oxford, OUP, 1999) 60.

[26] It is interesting to consider the nature of this process in the context of discussions elsewhere of the inability of nation states effectively to deal with crime problems: see especially Garland, D. 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36 *Brit J Crim* 445.

[27] For relevant domestic case law see *Shaw* v. *DPP* [1962] AC 220; *Knuller* v. *DPP* [1973] AC 435; *R* v. *R* [1992] 1 AC 599; *C* v. *DPP* [1996] AC 1. One reason for such a prohibition is that the creation of offences by this method is in potential violation of Art. 7 ECHR.

into a Community obligation on the legislature of a Member State to criminalise particular conduct were spelt out above. Where this occurs it is wholly unconvincing to class the processes at work as 'domestic' in the conventional sense. On the contrary, the principles that the Court has established constitute a highly material factor in triggering the criminalisation decision.[28] Accordingly, its intervention represents a tangible problem of principle.

The second point that emerges when the doctrine of effective protection is appraised in terms of the statement of separation of powers is even more significant. Put into practice, it ensures that the criminal justice system is subject to democratic control and accountability because, if the electorate does not like the decisions of the legislature and/or their implementation by the executive, it can vote for a change of government. For a series of interlocking practical and theoretical reasons this scope for democratic input is an extremely important feature of the way that criminal justice is practised in the Member States. The principal strands of argument in support of this view will now be outlined in brief and what will emerge is that all of them raise problematic issues in relation to the Community obligation of public effective protection.[29]

First, it has long been argued that there should be a connection between the content of the criminal law and the moral and social values of the society in which it operates.[30] The precise nature and degree of the link is a bone of contention, and the debate now regarded as somewhat old-fashioned. Disregarding these details however, the relevant underlying point is that one guise in which the criminal law can be seen is as a declaration of cultural expression.[31] For that expression to be genuine and at its most effective, democratic input into relevant decision-making is vital. However, where the obligation of public effective protection is concerned, the scope for such input is severely constrained. In combination, the pattern of competences in the Treaty and the legal framework according to which litigation can be brought, operate to dictate that decisions as to which assets, interests, or values should be safeguarded are taken by the Court in the context of proceedings brought by the Commission. Neither the process nor the institutions that act within it is celebrated for its democratic

[28] In the light of the decision in *Commission* v. *Greece* (above n 11) it is clear, for example, that Greece was not the only Member State that had failed to make adequate legal provision to deal with the problem of fraud. See further Passas, N. and Nelken, D. 'The Thin Blue Line Between Legitimate and Criminal Enterprises: Subsidy Frauds in the European Community' (1993) 19 *Crime, Law and Social Change* 223.

[29] The list that follows does not purport to be exhaustive.

[30] See the classic debates between H.L.A. Hart and Lord Devlin, on the one hand, and John Stuart Mill and Sir James Fitzjames Stephen, on the other, which are usefully summarised in Hart, H.L.A. *Law, Liberty and Morality* (Oxford, OUP, 1963).

[31] This observation raises the question of the status of Member States' criminal laws with respect to Article 151 EC which, in paragraph 1, asserts that the Community will respect their 'national and regional diversity'.

credentials.[32] That does not mean, of course, that the doctrine of public effective protection is being developed in a vacuum of cultural influence from the Member States. Its purpose is to safeguard the fundamental interests of the Community, those interests are derived from the Treaty, the Treaty is the product of collective political agreement between the Member States and, because of its origin in political negotiation, at some level its content is influenced by what is perceived to be acceptable to the electorates of the Member States.[33] But it is hardly a novel point that the link that has just been traced represents an exceedingly weak form of democratic participation and accountability. Certainly, by comparison with the degree of influence that the electorate is able to exert over criminal justice matters at national level (which is itself imperfect, despite being more direct), that operating at Community level is negligible. The reality is that voters do not have a voice in the selection of those interests that are of such fundamental importance that they deserve the special safeguards afforded by the doctrine of effective protection.

The second line of argument in support of democratic involvement in the criminal justice process relates to the question of accountability in a broader sense. Particularly where policing and allied forms of law enforcement are concerned, although not exclusively in relation to these components of the criminal justice system,[34] it is regarded as highly desirable for the agents of the criminal justice system to execute their functions in a manner that is sensitive to the community which they purport to serve. Apart from promoting the cultural resonance of the criminal law, the rationale for this type of direct accountability includes the notions that, in a democratic society, the criminal law should be enforced by consent and that the objective of consensual enforcement is best achieved by agencies that enjoy a high degree of public confidence.[35] Once again, the doctrine of public effective protection challenges these ideals.

To begin with, there is a further transparency issue. For reasons that have already been rehearsed the obligation on national criminal justice authorities to act in protection of Community interests does not take the form of an explicitly

[32] For general discussions of the democratic deficit within the European Union see, *inter alia*, Curtin, D. 'The Fundamental Principle of Open Decision-Making and EU (Political) Citizenship' in O'Keeffe, D. and Twomey, P. (eds.) *Legal Issues of the Amsterdam Treaty* (Oxford, Hart Publishing, 1999); de Búrca, G. 'The Quest for Legitimacy in the European Union' (1996) 59 *MLR* 349; Douglas-Scott, S. *Constitutional Law of the European Union* (London, Longman, 2002) ch. 3; Majone, G. 'Europe's 'Democratic Deficit': the Question of Standards' (1998) 4 ELJ 5.

[33] Furthermore, of course, the Member States have the opportunity to intervene in proceedings before the Court, thereby contributing to its decision-making process.

[34] See, for example, the emphasis placed on the need to take account of public opinion in formulating proposals for the reform of sentencing: Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001).

[35] See relevant discussions in, *inter alia*, Hough, M. and Roberts, J.V. *Attitudes to Punishment: Findings from the British Crime Survey*, Home Office Research Study 179 (Home Office, 1998); Home Office, above n 34.

labelled packet of instructions. On the contrary, it is communicated as the broad abstract principle that is the duty of public effective protection, which must then be deciphered in order to tease out its practical consequences. There is some substance in the assertion that this arrangement can be supported as an example of the principle of subsidiarity at work because, as previously explained, it leaves a broad margin of appreciation within which the Member States are free to determine how best to satisfy the twin obligations of equivalence and effectiveness. But such substance as it has is seriously undermined by other considerations. The problem is that there is nothing to distinguish those coercive measures that are applied to protect Community interests from those used to answer the demands of a conventional domestic law and order situation. In other words, unless furnished with specialist knowledge, citizens of Member States would not be able to tell these situations apart.

Practically speaking, it is right to acknowledge that transparency as to the identity of the ultimate authority behind the decision to deploy such measures is likely to prove unimportant in many instances because a high correlation between the Community interest in law enforcement and that of the Member State in maintaining its internal order can be expected. But it is only necessary to return to the circumstances that led to the enforcement proceedings in *Commission* v. *French Republic*[36] and *Commission* v. *Greece*[37] to appreciate that such coincidences of interest cannot always be relied upon. The whole point of these judgments is that they confirm that national authorities are legally bound to exercise their coercive powers on behalf of the Community in circumstances where, if acting in accordance with domestic priorities and policies, they would choose not to. It is these latter situations that raise the accountability issue in acute form as they entail an obvious collision between legal duty and the principle that law enforcement authorities should be answerable to their local communities for their actions. Furthermore, there is a clear danger that the price for respecting the supremacy of Community law and implementing the measures deemed necessary to discharge the obligation of public effective protection will be to transfer the site of conflict to the relationship between the authorities and the community (sic) that they purport to serve. In short, satisfaction of Community objectives constitutes a potential threat to law enforcement by consent and may cause public confidence in national criminal justice authorities to be undermined with the result that their legitimacy is called into question.[38]

As Community law currently stands, a Member State that seeks to deal with this problem while acting in accordance with the Treaty will encounter difficulties. In *Cullet* v. *Centre Leclerc Toulouse*[39] the Court considered whether a

[36] Case C–265/95, above n 10.
[37] Case 68/88, above n 11.
[38] See further the discussion of compliance below.
[39] Case 231/83 [1985] ECR 305.

Member State could rely on the public policy derogation in Article 30 EC in circumstances where civil disturbances blocked the free passage of goods. It concluded that such reliance might be possible if the State could demonstrate that the failure of its law enforcement authorities to act was a genuine function of its lack of means to cope. But any suggestion that the *Cullet* principle might apply materially to limit the scope of national authorities' public effective protection obligations was scotched by the judgment in the ruling in *Commission* v. *France*. For, while the Court maintained that 'it [was] not impossible that the threat of serious disruption to public order [might], in appropriate cases, justify non-intervention by the police', it proceeded to state that the 'argument [could] . . . be put forward only with respect to a specific incident and not . . . in a general way.'[40] Therefore, a Member State may only rely on the ruling in *Cullet* in situations that are tantamount to an emergency. It does not provide a generic answer to the sorts of accountability difficulties that have been highlighted here.

A third, closely related aspect of the need for democratic input into the criminal justice system concerns recent theoretical work which has begun to explore in detail the mechanisms through which the criminal law acquires its obligatory force.[41] It is impossible to do justice to its sophistication in a few brief words, but as far as its significance for the current argument is concerned what it appears to show is that normative compliance is encouraged in three types of circumstance. They are, first, where there is a high degree of resonance between the values that an individual holds and those that the criminal law enshrines; second, where the individual is strongly attached to a social group, institution or individual whose values accord with the norms represented in the law and which has consequent high expectations that they will be upheld; and, third, where the individual recognises the legitimacy of the legal or social authority promoting the norm.[42] It would seem to follow that society has a vested interest in fostering a close nexus between prevailing cultural values, the content of the criminal law and the manner in which it is enforced[43] because, by doing so, social stability and respect for the rule of law will be enhanced.

[40] Case C–265/95, above n 10, para 58. For further discussion see Baker, E. 'Policing, Protest and Free Trade: Challenging Police Discretion under Community Law' [2000] *Crim LR* 95; Barnard, C. and Hare, I. 'The Right to Protest and the Right to Export: Police Discretion and the Free Movement of Goods' (1997) 60 MLR.

[41] See especially Bottoms, A.E. 'Morality, Crime, Compliance and Public Policy' in Bottoms, A.E. and Tonry, M. (eds) *Ideology, Crime and Criminal Justice* (Cullompton, Willan, 2002) and also von Hirsch, A. et al. *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford, Hart Publishing, 1999).

[42] Bottoms, above n 41 at 36–37.

[43] *Ibid*. at 36–37 where the significance for the perceived legitimacy of criminal justice agencies of the fairness of the processes according to which individuals are treated when they come into contact with them is highlighted.

Assuming that this hypothesis is correct, it confers an additional nuance upon the potential that has already been referred to for social conflict to emerge as a result of the duty on national law enforcement authorities to safeguard Community interests. To be specific, it suggests that, were a situation to develop in a Member State in which a critical mass of its citizens felt seriously and/or persistently alienated from the interests and values that are the subject of public effective protection,[44] then there might be scope for a more profound degree of social damage than mere civil disturbance to ensue. Put in a nutshell, the legitimacy of the Member State itself might be called into question. This observation adds further grist to the mill of the campaign for Europe to be brought closer to its citizens so that their understanding of its benefits and objectives is improved and the risk of widespread disaffection from the values and objectives with which it is associated eliminated. It also leads the discussion into territory that considers the impact of the doctrine of public effective protection upon the pattern of relations between citizens, Member States and the Community. In order to access this dimension to the debate it is necessary to examine the relevance of the doctrine to conceptions of public order and public space.

B. Public Order and the Community Space

Up until now the purpose in describing the aspect of effective protection with which this article has been concerned as 'public' has been to capture an important distinction between its application here and that in relation to the field of remedies. As pointed out earlier, it is plain that Article 10 EC operates in both contexts to impose an obligation on the legal authorities of the Member States to act in furtherance of Community interests. However, where remedies are concerned, the role of the relevant authorities is relatively passive in nature and comparatively confined. Without in any way under-playing the practical significance of what results, their obligations are discharged by ensuring that appropriate modifications are made to the terms on which remedies are available so that the principles of equivalence and effectiveness are complied with. The onus is then on individual litigants to bring civil actions before the courts to secure the rights that Community law in principle provides; there is no duty on state authorities to initiate applicable legal action itself.

This contrasts markedly with the position where the safeguard of Community interests is in issue. Not only must equivalence and effectiveness be respected at the stage of relevant court proceedings, but the principles apply to

[44] The continuing predominately economic ethos of the Community increases the chances that such clashes of values will occur between fulfilment of Community obligations and meeting citizens' expectations regarding conventional law and order objectives. For a domestic illustration of a clash of this type see *R* v. *Chief Constable of Sussex*, ex parte *International Traders Ferry Ltd*. [1999] 1 All ER 129 discussed in Baker, above n 40; Barnard and Hare, above n 40. See also the general discussion in Taylor, I. *Crime in Context* (Cambridge, Polity, 1999).

the entire law enforcement process and, crucially, in a manner that requires active intervention on the part of the authorities at every stage, from criminalisation, through policing and prosecution, to punishment. Therefore, found in the sanctions context, effective protection is 'public' in the sense that the proceedings through which it is implemented are the public proceedings of the criminal justice system. But there is a widespread understanding of criminal justice as public justice in more than this one sense. It regards it as public also in the sense that, when a crime is committed, it is not merely an injury against the immediate victim but, in some abstracted manner, also an injury against society itself.[45] Accordingly, the commission of crime can be interpreted as a challenge to the social -or public- order, and the criminal law and its surrounding apparatus as a primary mechanism of social defence.[46] Adopting this perspective an obvious question that arises is whether the obligation of public effective protection can be seen as 'public' in this fuller sense too? Light can be shed on the matter by attending to a hitherto unexplored aspect of the ruling in *Commission* v. *French Republic*. Moreover, it is light that may help to explain why the Court appears so keen to restrict the scope of its ruling in *Cullet*[47] to 'one off' breakdowns of law and order.

It is quite clear from the Court's judgment that its concern to censure the inactivity of the French authorities did not stem purely from a justified resolve to see that respect for the free passage of goods was observed, but had a further motivation. Statements in a number of passages reveal that it regarded the adverse consequences of the farmers' protests as having the potential to ripple out beyond the 'local' French environment to affect the Single Market as a whole. In fact, the judgment contains some remarkably colourful rhetoric to this effect, the best example of which is the following:

> the Court, while not discounting the difficulties faced by the competent authorities in dealing with situations of the type in question in this case, cannot but find that, having regard to the frequency and seriousness of the incidents cited by the Commission, the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them.
>
> That finding is all the more compelling since *the damage and threats to which the Commission refers not only affect the importation into or transit in France of the products directly affected by the violent acts, but are also such as to create a climate of insecurity which has a deterrent effect on trade flows as a whole*.[48] (emphasis added)

[45] For an excellent discussion of this aspect of criminal law see Lacey, N. and Wells, C. *Reconstructing Criminal Law: Text and Materials* 2nd ed. (London, Butterworths, 1998) ch. 2.

[46] There is a link between this idea and the argument developed by Bottoms discussed in the text, above n 41–43.

[47] Case 231/83, above n 39.

[48] Case C–265/95, above n 10, paras 52–53.

Without dismissing the gravity of the acts in question, it is hard to believe that the Court had any empirical evidence that would support the view that the last claim was anything other than exaggerated. But for the purposes of present discussion that is not the point. What is interesting is what these comments betray about the parameters within which the Court analysed the issues before it and the corresponding nature of response that was called for. Rather than restricting itself to dealing with the immediate problem of the disruption to the flow of imports, the scale and significance of what was at stake is inflated through the use of the type of hyperbole that is highly reminiscent of discussions of the ramifications of breakdowns in public order in the domestic context.[49] Behaviour that starts out as a threat to the free movement of goods is extrapolated into a threat to the Community public order space that is synonymous with the Single Market. Two points seem to follow. First, it appears that the doctrine of public effective protection is 'public' in the more developed sense referred to above. Secondly, if the problem is framed according to this reasoning, it is not surprising that the Court privileges the need to guard the Community interest over the French authorities' competing need to respond to domestic law and order demands.

Taking this line of analysis a stage further, the idea that the concept of public effective protection is apt to encapsulate notions of participation in the wider European public space can be used in turn to examine its significance for debates concerning the evolution of conceptions of citizenship in the Union. The point of departure for this argument is the proposition that the obligation of public effective protection exists not simply to safeguard Community interests in an abstract sense, but to safeguard them so as to secure the rights of those with an interest in their integrity; that is, potential 'victims'. For example, applied to *Commission* v. *French Republic* it is easy to identify the immediate victims of the farmers' actions: the importers whose goods were sabotaged. But of course, as the Court's rhetoric acknowledges, they were not alone. The vandalism also had the potential adversely to affect other traders with a stake in the Single Market and, on the basis that the latter's fundamental purpose is to enhance prosperity across the Union, ultimately, to damage the interests of EU citizens in general to whom it belongs as a collective asset.[50] Equally, a similar list of stakeholders could be compiled in connection with the fraud that was the subject of the litigation in *Commission* v. *Greece*. When viewed in these terms the picture that emerges is one in which both the protests of the farmers and the swindling of the fraudsters constituted tangible acts of participation in the wider European space (as well as their 'local' national space) that amounted to

[49] See further Lacey and Wells, above n 45.

[50] For the theory behind this assertion see the Commission's White Paper, *Completing the Internal Market*, COM(85) 310, discussed in Craig, P. and de Búrca, G. *EU Law: Text, Cases and Materials* 2nd ed. (Oxford, OUP, 1998), ch. 26.

Community public wrongs. It is this feature of the public effective protection cases which suggests that the dynamics of these situations involve some deeper connection with the developing nature of relations between individual actors and the Community. Moreover, a similar conclusion emerges if the matter is approached from an entirely different direction.

The cases of *Commission* v. *French Republic* and *Commission* v. *Greece* have two Treaty provisions in common: Article 10 and Article 226. In turn, these Articles also share a common feature in that it is plain from the terms in which they are drafted that they concern the Member States; not private citizens. But herein lies a curiosity. On the basis of the argument that has been developed here it seems that the doctrine of public effective protection, which is substantially constructed from these building blocks, is somehow effective to act as a catalyst for the transfer of Community obligations onto individuals. At least this proposition would appear to follow from the fact that the effect of the doctrine is to require Member States to exercise criminal jurisdiction over citizens. If individuals can find themselves at the wrong end of the criminal justice system because they have damaged imported goods or violated the Community budget (and so on), then they must have a responsibility to refrain from these forms of behaviour, and the foundational source of that responsibility is the norms set by Community law. This conclusion corroborates the idea that a feature of the public effective protection line of cases is to articulate something about the institution of European citizenship, but raises the question of exactly what it might be.

C. *Public Effective Protection and Evolving Conceptions of Citizenship*

As is well-known, the Treaty of Maastricht formally established 'citizenship of the Union' through the insertion of relevant provisions in the Community Treaty ['Union citizenship'],[51] an event that has spawned a significant academic literature.[52] One reason that its introduction elicited such a response is that it is a 'designer concept', artificially constructed by the Member States so as to be parasitic upon possession of national citizenship.[53] As nationality laws are not

[51] Now contained in Arts. 17–22EC.

[52] For general discussions of citizenship see, *inter alia*, Delanty, G. 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1 *Citizenship Studies* 285; Douglas-Scott, above n 32, ch 14; O'Leary, S. 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 ELRev 68; Shaw, J. 'The Interpretation of European Union Citizenship' (1998) 61 MLR 293; Shore, C. *Building Europe: The Cultural Politics of European Integration* (London, Routledge, 2000), ch. 3; Soysl, 'Changing Citizenship in Europe: Remarks on Postnational Membership and the National State' in Cesarani, D. and Fulbrook, M. (eds) *Citizenship, Nationality and Migration in Europe* (London, Routledge, 1996); Weiler, J. *The Constitution of Europe* (Cambridge, CUP, 1999), ch. 10.

[53] Art. 17(1) EC states that 'every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.'

harmonised, the question of whether an individual can claim Union citizenship or not is at the mercy of his or her Member State.[54] It follows that each Member State is in a position to block access to the privileges that stem from Union citizenship by manipulating its internal laws. The potential for arbitrary differences in status to emerge as between individuals whose circumstances are objectively identical is obvious. Despite the enthusiasm of the political masters of the Community for portraying citizenship as a positive, inclusionary and inspirational institution, it is plain that it has a negative, divisive and exclusionary side. In short, the Treaty fails to confer citizenship on all those within the territory of the Union, regardless of their status within the Member States, and therefore lacks the quality of universality. Consequently, it reinforces the trait within Community law for defining some Europeans as 'more equal than others.'[55] Added to this fundamental criticism is a further disappointment that is of particular relevance to the discussion here.

The package of benefits that are explicitly conferred on Union citizens by the Treaty is skeletal and, although not insignificant in value, rather lacklustre.[56] On the other hand, offset against this is the theoretical scope that exists for the Court to enlarge upon them through interpretation of the general proposition in Article 17(2) EC that citizens 'shall enjoy the rights conferred by [the] Treaty.' Despite the spilling of much academic ink in the quest to establish what the identity of the applicable rights might be, for the present, the Court is proving cautious in capitalising upon the opportunity provided by the open-ended language of Article 17(2) to put flesh on the bones.[57] Consequently, the extent to which the citizenship provisions provide much 'added value' to the rights that derive from elsewhere in the Treaty remains a substantially moot point. Article 17(2), though, does not merely speak of rights, but also states that citizens are 'subject to the duties imposed' by the Treaty. What is the position in relation to these?

Comparatively less attention has been paid in the academic literature to pinning down their identity and, likewise, the Court does not appear to have

[54] Confirmed by Case C–192/99 *R* v. *Secretary of State for the Home Department*, ex parte *Kaur* [2001] ECR I–2037.

[55] See, for example, the analysis in Hervey, T. 'Migrant Workers and their Families in the European Union: the Pervasive Market Ideology of Community Law' in Shaw, J. and More, G. (eds.) *New Legal Dynamics of European Union* (Oxford, Clarendon, 1995).

[56] Arts. 18–21EC.

[57] See, *inter alia*, Cases C–64 and 65/96 *Uecker, Jacquet* [1997] ECR I–3171; Case C–274/96 *Criminal Proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I–7637; Case C–86/96 *Martinez Sala* v. *Freistaat Bayern* [1998] ECR I–2691; Case C–378/97 *Florus Ariël Wijsenbeek* [1999] ECR I–6207; C–192/99 *R* v. *Secretary of State for the Home Department*, ex parte *Kaur* [2001] ECR I–2037. For general discussion see Fries, S. and Shaw, J. 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 EPL 533; Toner, H. 'Judicial Interpretation of European Union Citizenship—Transformation or Consolidation?' (2000) 7 *MJ* 158.

discussed the matter in terms. But might it have done so implicitly? It has been argued here that the doctrine of public effective protection has the capacity to transfer behavioural obligations onto individuals; that is, to place Community law duties upon them with regard to the effect of their actions in terms of the Community public space. Might it therefore supply the duty dimension to Union citizenship?

For reasons that will now be explained, the answer seems to be in the negative. That is because, if the attributes and mode of operation of Union citizenship are compared with the mechanism described by the doctrine of public effective protection, some interesting points of contrast emerge. For a start, the latter seems to confer benefits and burdens on individuals in a manner that is not dependent on their citizenship status under national laws. Instead, it sets up universal norms of behaviour for the Community space that are applicable to all participants within it, and for the good of all of its stakeholders. Therefore, even at first blush, there are good grounds to be dubious that it constitutes a missing piece of the Union citizenship jigsaw. That though does not scotch the suggestion that there is a citizenship link. Rather, it suggests something else: that the doctrine of public effective protection is indicative of the existence of a rival, earthier institution of citizenship that is inherent in the Treaty ['inherent citizenship'], and which has a distinctive set of characteristics. Some flow from its quality of universality, which has already been noted. It means that inherent citizenship offers an environment that is more egalitarian in ethos[58] and lacking in the type of premeditated inclusionary/exclusionary divisiveness that is integral to Union citizenship. But that is not all. Owing to its parasitic nature Union citizenship is rather stagnant in the manner in which it mediates relations between the Community/Union, the Member States and individuals. Inherent citizenship, on the other hand, provides a dynamic site for these relationships to be constructed and/or redefined.

Much of the evidence in support of the latter proposition has already been discussed in connection with other arguments that were rehearsed earlier in the paper. Therefore, only a brief reiteration is necessary now. It is handy to consider the matter in terms of 'horizontal' and 'vertical' relationships used in the direct effect sense. Beginning with the former, it has been seen that the doctrine of public effective protection operates in a manner that is ripe to capture the idea that individuals who do damage to Community assets in one geographical location in the Union thereby injure the interests of stakeholders throughout the entirety of its territory. The doctrine therefore encapsulates and defines a set of inter-relationships between the individuals who occupy the Community space. It is worth noting in passing that the Member States can qualify as

[58] There are some important caveats to this assertion that concern the uneven distribution of 'stakes' in Community assets and of opportunities to attain material and other aspirations through legitimate means: see further the general discussion in Taylor, above n 44.

'individuals' for this purpose because of their status as stakeholders which means, in turn, that they may rank amongst the 'victims' of relevant damaging conduct.

Analysis of the relevance of public effective protection to vertical relationships is a little more complicated. This is because two levels of connection must be considered: that between individuals and the Community and that between individuals and their Member State. As far as the first is concerned, the case for saying that the doctrine plays a part in defining the terms of a relationship between individuals and the Community rests upon the manner in which it has been argued to act as a conduit for establishing norms of behaviour that are applicable to the Community space. In common with the position where horizontal relationships are concerned, the nature of the role of public effective protection here is constructive. By contrast, the situation with regard to the effect on relations between individuals and their Member States is potentially quite different. It will be recalled that the suggestion was made above that the consequence of implementing the duty to safeguard Community interests might be to drive a wedge between national law enforcement authorities and the community that they serve because of the scope for conflict between national and Community values. Building on that idea, the possibility that this would then develop into a situation in which the legitimacy of the authorities themselves fell into disrepute was also flagged up. It will now be seen that what this would amount to is an erosion (or redefinition) of the previously established relationship between citizen and Member State to make room for the creation of that between citizen and Community.

V. Conclusion

The discussion in this paper has sought to establish that the Court has begun to construct a public dimension to the doctrine of effective protection, and to consider its implications. In particular, it has examined its consequences with respect to the formal division of competence in the Treaty as regards the exercise of criminal jurisdiction and with respect to the evolving pattern of relationships between the Community/Union, the Member States and citizens. In conclusion it is worth making one final point in relation to the significance of the transfer of effective protection from the private to the public sphere. That is to underline the striking contrast in impact upon citizens as between the two contexts. Whereas in the private arena the principles of equivalence and effectiveness provide a vehicle through which the situation of litigants is enriched by the enforcement of what would otherwise be merely putative rights, the effect of their application in the public sphere could not be more different. Implemented through the apparatus of the criminal justice system they are liable to ensure that more extensive and punitive measures are used against those who are alleged to have infringed Community interests. Accordingly,

rather than improving the lot of the individuals concerned, they provide the justificatory basis according to which the state deliberately inflicts suffering on citizens. Above all other considerations, this fundamental proposition provides the most persuasive reason why the case law that has been discussed in this article is deserving of greater scrutiny.

4

JUDICIAL CULTURES AND JUDICIAL INDEPENDENCE

*John Bell**

I. Introduction: Common Values

In this article, I argue that apparently common values, such as 'judicial independence' have significantly different meanings in different judicial cultures. As an illustration, I take Sweden and Spain, countries with very different histories and institutional arrangements. It is my contention that basic values are understood and implemented in the light of historical and institutional settings. These have given rise to issues which a nation's judiciary feel it has to address and set the context in which the contemporary judiciary has to operate. The purpose is to examine how far national histories and traditions colour the understanding of common values, such as judicial independence and democracy in the judicial process.

There are three reasons why this topic is interesting. First, and parochially, it provides a test-bed to examine contemporary comparative law debates. My research has as one of its inspirations a wise observation of Alan Dashwood in a seminar. In response to a talk on convergence and divergence in public law, he remarked that, in his experience, it did not matter from which legal system lawyers came, they were able to work together on common tasks in the European Union institutions, without any great clash of legal cultures. For him, as I understood it, the *institutional setting* and the *common task* are central, and previous *legal education* and the *legal tradition* from which a lawyer comes are less important. Now, these observations run contrary to the views of a number of comparative lawyers, notably Pierre Legrand, who argue that legal mentalities and legal traditions create important barriers to a genuine legal convergence in Europe.[1]

Secondly, the realisation of the projects of the European Convention on Human Rights and the European Union depends on national judges being willing to consider themselves and operate as European judges, and not just English, Spanish or Swedish judges. But do they understand the common

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[1] Legrand, P. 'European Legal Systems are not Converging' (1996) 45 *ICLQ* 52.

projects in the same way? Does their national context and tradition shape their understanding of the common project, a point which Legrand would emphasise.

Thirdly, and more specifically, many European standards in the Convention or in Community law are broad principles, and so any harmonisation depends on the judges being willing and able to adopt similar approaches in the different countries, not just when the result is dictated by Strasbourg or Luxembourg, but in advance. If Dashwood is right, then we need to pay attention both to the common task and the institutional setting in which this process is conducted.

This article is necessarily limited. The benchmark principles of judicial independence that I will use are set out in two documents. The 'Judges Charter in Europe' established by the European Association of Judges in 1993 (hereafter 'the Judges Charter')[2] is the private initiative of judges from across Europe. By contrast, the Council of Europe Recommendation R (94) 12 on 'The Independence, Effectiveness and the Role of Judges' (hereafter 'the Recommendation') is an official expression of standards. Both articulate the content of judicial independence in ways which have an impact on Member States. This article will simplify the issue of the meaning of judicial independence by focusing on two countries, Spain and Sweden, which have different histories. But I contend that the lessons of these narrow studies can be extended more broadly.

II. Background: The Judicial Career

A. Spain

The judicial career is highly sought after, because of the relative low standing of lawyers, and the important selectivity attached to it, which is more intense than in France or Italy. Law is a major university subject. For example, the largest university, Complutense de Madrid, offered some 2,040 places for the 2001 entry into the *Licenciado en Derecho*. Law and Social Sciences account for around half of all graduates from Spanish universities and half the registered students.[3] Although statistics are not available on women law graduates, it is likely that the proportion is high. Of all Spanish graduates in 1998–9, 58.08% were women. Becoming a judge is a career which begins with the *oposición*, the competitive examination for which one prepares (and is privately trained) after leaving university.[4] There are about 6000 candidates for the 250–300 places as

[2] http://www.richtervereinigung.at/international/charta.htm

[3] See statistics from http://www.mec.es/consejou/estadis (Ministry of Education).

[4] For the most part, the preparation for this entrance examination is privately funded. The 2–3 year preparation period carries few bursaries and the tutoring also has to be arranged and paid for privately. For a general account, see de Otto, I. *Estudios sobre el Poder Judicial* (Madrid, Ministry of Justice, 1989), ch 6.

judge or fiscal (prosecutor) each year. The competition is fierce, but large numbers apply. The status conferred by having passed these examinations is significant. It marks a person out as one of the best law students of their generation. There is no equivalent competition among *abogados*, for whom there is no specific training. But, whereas there is an ample supply of judges at the younger end, there is greater difficulty in encouraging *abogados* to apply for judicial posts in later life, once they are earning significantly more than a judge.

There are three grades of judge. Once training in the judicial college has been completed, a person will start as a *juez*. Normally, after seven or eight years, a *juez*, will have sufficient seniority to obtain a post carrying the status of *magistrado*. Beyond that, a person could aspire to become a member of the *Tribunal Supremo*. The *magistrados* of the *Tribunal Supremo* form a distinct category of judge. In 1998, there were 3,344 judges, made up of 522 *juez*, 2,731 *magistrados*, and 91 *magistrados del Tribunal Supremo*.[5] This hierarchical system makes the system of judicial promotions an important feature of the judicial career and, therefore, of a conception of judicial independence.

B. Sweden

The status of a judge trainee is also highly sought after in Sweden. Here, it is the passport to a good legal career. Student numbers are smaller than in Spain, but competition is as intense. In 2002, there were 3122 first choice applicants for the 702 places on the major law programmes in Göteborg, Uppsala, Lund and Umeå.[6] At the end of the law degree (*juris kandidatexamen*), a candidate applies to become a *notarie* (trainee) in one of the lower courts. The applications are handled by the judicial administration, *Domstolsverket* (DV). The application is judged according to a points system, which favours high academic achievement, but is flexible enough to take account of alternative prior experience.[7] Only about 30% of applicants are successful,[8] so entry to this programme is an esteem indicator. In 2000, there were 741 *notarie* (538 in the general courts and 203 in the administrative courts) on the three-year training programme. There is thus an average of nearly 250 trainees recruited each year. After that point, a *notarie* will go through further promotion stages, involving

[5] Arnaldo Alcubilla, E. 'Le fonctionnement du pouvoir judiciaire' in Renoux, T. *Les Conseils supérieurs de la magistrature en Europe* (hereafter 'Les Conseils supérieurs') (Paris, La Documentation Française, 1999) 191, 199.

[6] See the website of the Swedish university administration, Högskoleverket (http://nu.hsv.se)

[7] See DV website information: http://www.dom.se.

[8] See generally, *Vägen till domaryrket* (Stockholm Domstolsverket, 1999), and *Det svenska domstolsväsendet—En kort introduktion* (Stockholm Domstolsverket, 1999), 8. Baas, N. J. *Onderzoeksnotities 2000/8: Rekrutering en (permanente) educatie van de rechtsprekende macht in vijf landen* (The Hague Ministry of Justice, Netherlands 2000) (hereafter '*Rechtsprekende macht*'), 102. In 1999, 1041 students passed *the Juris kandidatsexamen*: see the statistics from the *Högskoleverket* (http://nu.hsv.se) on 'avlagda yrkesexamina'.

a short-term posting within the tenured career. But a judge will not expect to have a permanent posting until she or he is an *ordinarie domare* at about 43 years old. Promotion systems and decisions on posting are thus of significance. A judge will progress from being a *notarie* to being an *icke ordinarie domar* (a *fiskal* and then an assessor), before becoming an *ordinarie domar*.[9]

It is notable that, in both Sweden and Spain, the proportions of women in public sector employment (as judges and prosecutors) is greater than in private practice (as *advokat* or *abogado*). In Spain 34 per cent of judges are women and 28 per cent of prosecutors, in Sweden 30 per cent of judges are women and 37.6 per cent of prosecutors. The proportions are twice as large as the proportion of women in private practice. In these and other continental countries, work predictability and flexibility, especially in relation to career breaks, are seen as advantages of the public sector. In terms of gender profile, there is a clear difference between those over 40 and those under 40 in all professions, reflecting the greater number of women going into legal professions since the 1960s. This would be a factor in helping to explain the different position in England. But there are also differences in attitudes towards the recruitment of women within different legal professions.

III. Judicial Independence

A. Principle

Judicial independence has to be understood predominantly as a response to particular problems, rather than an abstract notion. Since the problems may not have been shared, so the focus of attention from one country to another has been different. Nevertheless, the transition to democracy in the former Soviet bloc and European Union enlargement have encouraged the articulation of common principles. In these cases, the principles have been developed predominantly by those who themselves have been coping with the end of dictatorships in the last 50 years, and the models are not those of Britain or Sweden.

In broad terms, the concept of judicial independence has been seen as a remedy to a number of problems. In the first place, some courts have been politicised institutions, more like an arm of government. The Spanish Tribunal de Orden Publico under Franco was such a body. The second problem is political influence on judicial decisions, either orders to judges or influence on them or on the prosecution process.[10] A third problem encountered in many countries is the political influence over the allocation of resources for justice. If the courts are to do justice, they need the requisite resources. There are concerns that the

[9] In 1999 there were 742 *notarier*, 769 *icke ordinarie domare* and 1002 *ordinarie domare*.

[10] For example, see studies of East Germany: Baer, A. *Die Unabhängigkeit der Richter in der Bundesrepublik Deutschland* (Berlin, Arno Spitz, 1999), 56–83.

allocation of those resources by politicians may serve agendas other than the effective service of justice. A fourth problem is political involvement in the selection and career progression of judges. If judges are rewarded or penalised because of their political leanings, this might well influence the performance of their judicial duties. A final problem is the involvement of judges in extra-judicial activities. Some may have political implications, such as chairing an inquiry into a sensitive social issue. Others, such as arbitration, may bring them into close contact with major business interests. The danger is that these activities may bring judges too much under the influence of politicians or business interests, or at least compromise their perception of impartiality.

There are a number of specific issues which illustrate these different concerns. I will concentrate on management (judicial independence as self-government), selection and promotions (judicial independence as freedom from dependence on political authorities), and freedom from outside pressure through their external activities.

B. Management

The Judges Charter, states in Article 6: 'The administration of the judicial body must be exercised by a organ independent of other powers and which is genuinely representative of the judges.' On this conception of judicial independence, judges need to be free from the control of other powers and this can be achieved only if the judges manage themselves. There are two primary issues concerning the management of the judicial service. First, the justice system should be *socially effective*, i.e. it must achieve its social purposes. Secondly, the *political insulation of the judicial career* should be secured in a way which gives confidence to the wider public that justice is delivered in a fair and impartial manner.

In broad terms, western European legal systems operate one of three models for managing the judiciary to achieve these two goals—that is to say, controlling the career, resourcing and supporting the judges in their career.[11] On a traditional model, the judiciary is managed directly by a central Ministry of Justice. A second model is the creation of a government agency which runs the judicial service, albeit under general directions from the Ministry of Justice. A third model is for the judicial council to be run by the judges themselves. If England and Germany represent the first model, Sweden illustrates the second, and Spain illustrates the third model.

[11] In managing the administration of the court service, other models are operated.

1. Spain: the Consejo General del Poder Judicial

The *Consejo General del Poder Judicial* (CGPJ) is a distinctive feature of the 1978 Constitution in that it tries to insulate the judiciary from the kind of subordination to the executive from which it suffered during the Franco era and before. Like France in 1946, Italy in 1948 and Portugal in 1976, Spain sought to place the judiciary under an independent council. The membership reflects the need for both judicial and independent voices, but the process of selection does not represent a process of 'self-government' in an Italian sense. An advisory body on judicial appointments and promotions had been created in 1917, but the 1978 *Consejo* is a substantially different body.[12]

The CGPJ is a *constitutional organ*, like the French and Italian predecessors. It is meant to constitutionalise the distinctiveness of the judicial function. The 20 members are chosen 12 from the judiciary and 8 from outside among lawyers in general with at least 15 years' standing in the profession. Since these are elected by the chambers of the *Cortes*, there is an inevitable political standing of the individuals. A further change was introduced in 2001[13] following an agreement between the parties. This principally affected the 12 places elected from the judiciary. Under the new scheme, 36 candidates are put forward to the *Cortes*. Eighteen are nominated by judicial associations in proportion to their membership.[14] A further 18 are nominated from individual judges who obtain at least 73 nominators among the judges. This assists those judges who do not belong to associations. The members are chosen by the *Cortes*, beginning with the Deputies. On the whole, the nominations are agreed by the political parties in advance on a sort of quota basis.[15]

The *Consejo del Poder Judicial* determines the overall objectives of the court system. It agrees its policy paper with Parliament. It is responsible for the recruitment, promotion and careers of judges, and for the general functioning of the courts. But the budget for equipment and buildings, as well as for administrative support staff lies with the relevant public administration. In addition, the national Ministry of Justice decides on the number of judicial posts which it includes in the budget request to the Parliament. With devolution, the Autonomous Communities are typically responsible for the administrative functioning and support staff in the courts. There was an agreement in 1992 with some Communities, but the *Consejo* indicated in the *Libro Blanco* that it would like to secure further uniformity of treatment across the country as

[12] See Lopez Guerra, L. 'Genèse et rôle du pouvoir judiciaire' in Renoux, Les Conseils supérieurs at 184.

[13] *Ley orgánica* 2/2001 of 28 June, *Bollletin Oficial del Estado* n° 155, 12535.

[14] See the instruction of the President of the *Consejo del Poder Judicial*, 29 June 2001, giving the *Asociación Profesional de la Magistratura* the right to nominate 10 candidates, the *Asociación Jueces para la Democracíia* 4, the *Asociación Fracisco de Vitoria* 4, and the *Unión Judicial Independiente* none.

[15] See Casqueiro, J. and Díez, A. *El País*, 2 July 2001.

a whole. In the complexity of devolved government, the *Consejo* acts as a lobbyist in favour of the courts system, negotiating with national and regional governments. It also conducts inspections of the courts to ensure they are operating in accordance with the targets which the *Consejo* has set.

2. *Sweden: Domstolsverket*

Domstolsverket (DV) was established in 1975 as an independent judicial *administrative agency*. It has a status akin to an ENDPB (Executive, Non-departmental Public Body) in the United Kingdom. Although fears had been expressed, e.g. by the *Skåne Hovrätt*, in 1971 that this would lead to centralised control, it has largely brought independence, in that it is an administration into which judges have an input. DV is appointed by the Minister of Justice and is composed of a Director General and a deputy, four judges and four parliamentarians.

Commentators now contrast the Swedish DV, which is part of the administration and is linked to the government, and the Danish *Domstolsstyrelsen* which is a more independent body directed by the judges themselves.[16] The Danish administration was separated from the Ministry of Justice on 1 July 1999, and has thus become a potent model for the freedom many Swedish judges wish to have in the government of their own courts. There is, thus, a pressure to move in the direction of the stronger independence of the Spanish and Danish systems.

DV is responsible for both judicial recruitment, training and careers, and the overall management of the courts, its staffing levels and equipment. The chief judge in each court has only limited budgetary control. There is an annual round of local meetings to discuss the budget for each court. Apart from recurrent expenditure, there is discussion of particular initiatives. The 1999 annual report comments on the significance of both collaboration between courts and projects to improve the efficiency of courts.[17] DV is charged by the Ministry of Justice not only to distribute the budget, but also to monitor the efficiency of the courts. It produces statistics on the efficiency of courts that look at the numbers of cases resolved, the time to judgment in different types of case, and the throughput of different courts (described in some sections of the report as 'productivity').[18] DV is also responsible for the administrative support within the courts. Since Sweden is a unitary country, there is no need to have separate negotiations with regional governments on this.

[16] See, for instance, Eriksson, P. 'Domstolsverket (S) och Domstolsstyrelsen (DK)—Olika sätt att reglera domstolsadministration' (2000) 1 *Tidskrift för Sveriges Domareförbund* 23.

[17] *Årsredovisning 1999*, sections 6.2 (distribution or resources) and 6.4 (locally generated projects).

[18] *Ibid*, ch. 2.

The combination of monitoring with control of the budget enables DV to encourage improvements in performance which are proposed by the courts themselves. It also takes the initiative to set up working groups to suggest new ways of working more efficiently in the courts. These efforts to change ways of working inevitably give rise to conflicts with the judges themselves who consider that DV is interfering with judicial independence.[19] In 1999, there was a particularly severe round of budget cuts which the DV had to administer (over 10%) and which obviously clashed with the judiciary's perception of its appropriate role and ways of working.[20] The situation illustrates the way in which DV is an agency of the government, as well as a lobbyist for the judges.

C. Selection and Promotions

1. Principles

In recent times, the emphasis in general statements of principle on judicial independence is that the political influence on judicial recruitment and selection should be minimised. For those used to societies which have recently either been ruled by a single party or have been politically polarised, the idea of judicial independence as impartiality from political powers is particularly poignant. Judges ought to be seen to speak in the name of the law and of society, not to be the representatives of ruling parties. To achieve this, it is considered that judges should not be beholden to political élites for their recruitment or promotion. Accordingly, the Council of Europe Recommendation, states:

> Any decision concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to their qualifications, integrity, competence and effectiveness. The competent authority for the selection and career of judges should be independent of the government and the administration. To guarantee its independence, there should be provision to ensure, for example, that its members are appointed by the judiciary, and that the authority itself determines it own rules of procedure. (Principle I, 2 c) . . .
>
> Judges, once nominated, are irremovable. (Principle I, 3)

Similarly, the Judges Charter states:

> [Art 4.] The selection of a judge should be based only on objective criteria, which guarantee his professional competence, and be made by an independent organ which is representative of the judiciary. Other influences, in particular those in the interests of political parties, should be excluded.

[19] See for example, the article by Judge Gregow, T. 'Domstolsverket lägger sig i vårt arbete', "Brännpunkt", *Svenska Dagbladet*, 4 September 2000.

[20] See the debate between the Minister of Justice and representatives of judges in 'Domstolen i framtiden' (1999) 4 *Tidskrift för Sveriges Domareförbund* 13.

> [Art. 5] This independent organ should apply the same principles for the career progression of judges.

The memory of the Franco period, and of earlier periods of totalitarian rule, has encouraged the present Spanish system to be quite radical in limiting political involvement in judicial selection. By contrast, the gradual and relatively peaceful development of the judiciary as an independent force in Sweden has left many links with politicians and government. Both countries have forms of open competition for entry, but different forms of post-entry training—Spain has a judicial college, while Sweden has essentially an apprenticeship system. In promotion, the issue is the extent to which the process is open and transparent, as well as free from control by the Ministry.

2. *Spain*

The *Consejo del Poder Judicial* is responsible for judicial appointments, but there is far less discretion than this might imply. Most appointments are based on applications and seniority. There are only about 165 posts (under 5%) where there is genuine discretion. Most of these are for the presiding judges of courts—the *Audiencia Nacional*, the 50 *Audiencias Provinciales*, the 17 *Tribunales Superiores de Justicia*, and the members of the *Tribunal Supremo* and the presidents of its Salas. Even here, the *Tribunales Superiores* may suggest three names from which the *Consejo* chooses one.[21]

The career of judges may be managed in other ways. The *Consejo* publishes the *modulos*, a workload model which serves as a benchmark to judge the effectiveness of a judge. The *Consejo* conceives it as a technique incorporating its values of efficiency and quality of justice, so as to achieve its mission.[22]

For example, for a *Juzgados de primera instancia* (a first instance civil court), there is an assumed caseload of 720 cases and the judge is assumed to work 1,760 hours, of which 1,650 are dedicated to judicial work. Having deducted time spent on enforcing decisions, conciliation and other such activities which do not have formal outcomes, a total of 1,250 hours remains. There is then a scoring system for different activities. Each different court has its own targets.[23] For example, at first instance, a trial of a substantial civil case carries 12 points or hours, whereas registration of a mortgage carries 1 point. If a judge requests a permission to undertake external tasks, e.g. teaching in a university on a regular basis, the judge's performance will be measured against the workload model. If the judge is within 10 per cent of the expected workload set out in the model, then the permission is likely to be granted. But if the judge falls below this work-rate, then permission is not likely to be granted.

[21] This respects the need for some expertise in local law.

[22] See *Modulos 2000*, approved 31 May 2000, 2.

[23] The *modulos* can be found on the website of the Consejo del Poder Judicial: http://www.cgpj.es.

3. Sweden

Since 1975, the process of promotion has become relatively open, though there remains a distinction between lower and higher posts.

Lower posts are advertised (now on the website of DV) and there is an application form. Candidates are required to provide information about their experience to date and the names of referees who can attest the qualities of the person. The application is then examined by TFN, which will make a decision. The candidates are not interviewed. The committee of TFN is made up of senior judges with two employee representatives. As a result, one can say that it constitutes a degree of self-government at this stage.

Senior posts remain within the control of the Ministry of Justice, as in the past. Traditionally, these have not gone only to career judges. A number of famous instances have occurred where places on *Högsta Domstolen* have been allocated to leading practitioners, not just to judges.[24] Lateral movement is important to bring in not only *advokaten*, but also prosecutors. In a recent committee report on the appointment of the higher judiciary,[25] it was suggested that the power of the government to appoint the highest judges should be modified by the introduction of a committee which would propose a number of suitable candidates from which the government's choice would be made. But the government's role would be maintained, as would the selection based on an assessment of the merits of candidates. The system is not based simply on seniority. Although there was talk in the mid-1980s that recruitment to the *Kammarrätter* and *Hovrätter* would be divided equally between those who had experience of government offices, those who had other external experience, and those who had purely judicial experience, the reality is that nearer 80% are drawn from those who have governmental experience. The reason is that working in government provides detailed knowledge of particular fields, and expertise is desirable in an appeal court, and there is an understanding of legislative procedure and thus the weight to be attached to preparatory materials and other legislative documents.

Interviews conducted with Swedish judges also suggested that being known in government circles, e.g. through committee work, was relevant to promotion. If you are known to be good by those who make the appointments, you are likely to be preferred over those who are not known. Vacancies are not advertised and, although it is difficult to identify individual 'political' appointments, there is still a sense that other, equally meritorious candidates, may have been overlooked.

Review of the Swedish system of appointments has been triggered in particular by the creation in 1999 of a judicial appointments committee in Denmark

[24] See Modéer, K. Å., *Lemän och Lagerlöfar* (Lund, Lund University, 1999), p 84 on Gunnar Bomgren, appointed in 1955, 119–120 on Marianne Lundius, appointed in 1998.

[25] SOU 2000:99 (chair Johan Hirschfeldt)

and by the adoption of the Judges Charter. (This neatly illustrates the major influences on Swedish legal development.)

The idea of openness to various non-judicial professions is quite important. The appointments will typically be to the higher courts, especially from academics.

D. External Activities

Judicial independence is not only under threat in relation to judicial tasks, but also in relation to other tasks which they can be called upon to perform. Some of the tasks performed by judges as leading public figures may involve chairing inquiries or committees on law reform. In other cases, they may be asked to become private arbitrators. There is a concern that involvement in these tasks may create the impression that judges are publicly taking sides in controversial social questions, or are beholden to politicians or business interests. In their private lives, judges in some countries can be active in politics, and this might be understood by the public to affect the way they perform their judicial functions. The Spanish, in particular, have been keen to restore the image of the judiciary, and to remove any hint that judges are dependent on politicians, or engaged in political life. The Swedish judiciary has a longstanding respect, which has resulted in part from their prominent role in external public activities.

1. Spain

The experience of Franco has made the Spanish very suspicious of links with the administration. On the whole, these are not encouraged. A judge may work as a *letrados* (a kind of court clerk) within one of the courts, such as the constitutional court or even the CGPJ, but not in the Ministry of Justice. Unlike in France and a number of other countries, it is not usual for judges to be seconded to work in the Ministry of Justice, though it does happen occasionally. Given the division of competence between the State and the Autonomous Communities, there are a number of different governments to which a person could be attached in any case, but this diversity perhaps reduces prestige. In any case, the Spanish conception of judicial independence and the separation of powers would preclude this as a major strand of a judicial career. Judges do not typically serve in the Ministry of Justice but in the administration of the courts through the *Consejo General del Poder Judicial*.

Spanish judges are not allowed to be members of political parties or to carry out political activities. Judges are constitutionally prohibited from belonging to political parties.[26] This rather rigid conception of political independence is

[26] This restriction is supported by the judiciary: 59.6% in the Elites survey of 1987: see Vera Padial, MM. 'Fiscales, letrados del Estado, notarios. una aportacion al estudio de la élite juridica española' in (1987) 53 *Documentación Juridica* 81.

attenuated in practice. In the first place, judges who campaign for political office are given leave without pay ('*servicios especiales*'). In the past, they used to be allowed to return immediately to judicial duties when their political office finished. This enabled leading judges like Garzón to be persuaded to join the Socialist Party list for the Cortes, to have a ministerial career, then to return to the role of investigating judge, and soon to be investigating his former government colleagues. Nowadays, should they happen to be appointed to some political post, then they will be put into 'quarantine' for three years (with only basic pay) before being allowed to go back to active judicial life.

2. *Sweden*

Swedish judges have traditionally played important roles within the administration—they are part of the governing élite which services government in the widest sense. Judges are encouraged to participate in a range of activities, especially relating to law reform. This role is institutionalised within the legislative process, especially in the area of pre-legislative scrutiny either in committees or in the *Lagråd*, the formal body to which draft legislation is submitted.

In its post-1979 version, the Swedish Constitution, Article. 8–18, states that the *Lagrådet* (LR) shall give an opinion on laws which affect the Constitution, press freedom and a number of fundamental rights, or where the law is important from a private or a public viewpoint.. The Constitution specifies that the LR shall give an opinion on (1) how the proposal relates to the Constitution or legal order in general, (2) how its provisions relate to each other, (3) how the provisions relate to legal certainty, (4) whether the proposal is so drafted that it can achieve the objectives for which it is being passed, (5) whether problems might arise in interpreting it. LR must avoid general policy grounds. Increasingly, the role of LR will be to identify conflicts with European norms.

You have to remember the strong links between the administration and lawyers. In the early twentieth century, 60 per cent of civil servants were lawyers, and there were close connections between judges and administrators. The lack of permanent appointments until one reaches about 43 and is appointed to be an *ordinarie* encourages the judge to seek appointments outside the normal judicial career (rather than looking for a vacancy far from home). Appointment as a (law reform) committee secretary, or even as a part of the Ministry of Justice or another administration is very common. It gets you known and will help with promotion.

In Sweden, there is a concern that judges should not be engaged in arbitrations.[27] Until recently, judges were allowed to be arbitrators (and to retain the honorarium for this work). In more recent years, a more purist view has been

[27] See, for example, Holmberg, E. 'Om domarkarriären' (1999) 3 *Tidskrift för Sveriges Domareförbund* 15.

taken that this should not be allowed, not only because it might distract judges from their proper role, but also because this might affect the perception of impartiality of judges. Judges who are too dependent for external income on large companies might be considered less independent in their judicial work. As a result, one judge, Ulf Nielsson, resigned from the HD in order to continue with his arbitration work.

Nowadays, judges rarely hold a political office. Lawyers are not a large group in the Riksdsag and of these, perhaps one or two are judges. In the past, particularly at the beginning of the twentieth century, more judges and lawyers were involved in politics.[28]

IV. Conclusion

A. The Conception of Judicial Independence

The contrast between Spain and Sweden is not meant to suggest that one country respects judicial independence more than the other. In both, there is strong respect. The concern of this article has been to present how this value is understood and how it is realised in institutional form. The classic fear is that judges will be bribed or threatened by powerful people into distorting the way the law is applied. Such fears were realised in a number of dictatorships, including that of Franco, where judges were removed or special tribunals consisting of specially chosen judges were used for politically sensitive cases. The creation of a democratic regime has been the principal way in which this fear has been allayed. But institutional reforms have tried to meet the more subtle and less obvious forms of bias. The *Consejo del Poder Judicial* has become a strong buffer between the judiciary and the government in the way individual judicial careers and the operation of the courts are managed. The historical legacy of Franco has led the Spanish to institutionalise a more radical version of independence than has been thought necessary in Sweden. Sweden has followed its governmental tradition of creating an administrative agency, in this case to manage the judges and the court system. Independent agencies have existed for many years in other parts of government, and the creation of *Domstolsverket* was seen as an efficient way of managing the growing system. But the traditional close links with government, and the government's overall responsibilities have remained. Both the need for institutional protection for judicial independence, and the form it takes, reflect each country's recent experiences.

[28] See Lewin, L. *Ideology and Strategy: A Century of Swedish Politics* (Cambridge, CUP, 1988), p 94–95. Holmström, B. 'The Judicialization of Politics in Sweden', 154, suggests that about a third of the upper chamber and 10–15% of the lower chamber of the Riksdag had legal qualifications, and about 10% and 6–8% respectively were judges.

As we try to put flesh on the bare bones of the principle of judicial independence, we have to consider the kinds of institutions and operational principles which we expect. But at the moment at which we try to become more specific, we tend to diverge in the implementation of the principle. This is not to deny the principle, but to demonstrate that, judging what the principle means in a given country during a specific period requires attention to the historical and political context in which it operates. Current institutions are often justified by reference to the historical problems which they resolve. In addition, a comparison with the past provides evidence of the extent to which a country has progressed in achieving judicial independence.

B. The Impact of Judicial Independence

People experience a dissonance between what López Aguilar labels the '*tempos judiciales*' and the '*tempos informativos*', the conflict between time as a guarantee of due process and the demand for instant satisfaction.[29] As Newton remarks, 'democracy may have cleansed the institutions of justice but in large measure has so far failed to make them more efficient'.[30] As a result, a public opinion survey of November 1995 found that the Spanish people held the judiciary in lowest esteem among public institutions, even behind the armed forces and the Church.[31] The *Libro Blanco* identifies an increasing sense that justice is performing badly—in 1987 only 28 per cent of the population had this view, but by 1995 this had risen to 46 per cent and to 51 per cent in 1997. The *Tribunal Supremo* had a backlog of 19 months. The *Libro Blanco* itself remarks that 'the decisions of the courts are so slow that it is better to avoid litigation'.[32]

Institutional setting determines what counts as a judge. History shapes the problems. Common principles are effective in handling common problems. To the extent that there are not common problems, then common solutions are not necessarily the right thing.

A further point would be that institutional change is gradual and incremental. Thus we see adaptations. Common principles are perhaps goals to be achieved, rather than minimum conditions to be imposed here and now. The importance in comparative law of 'functional equivalence' is urgent.

[29] *Ibid.*, 417–418.
[30] Newton, M. T. with Donaghy, P.J. *Institutions of Modern Spain* (Cambridge, CUP, 1997), 303.
[30] *Ibid.*
[31] Consejo del Poder Judicial, *Libro Blanco* (Madrid, 1997). 3.

5

A POLICY OF BITS AND PIECES? THE COMMON COMMERCIAL POLICY AFTER NICE

*Marise Cremona**

I. Introduction

It is of course by no means certain that the Treaty of Nice will be ratified and that we will face the most radical revision to the EC Treaty provisions on the Common Commercial Policy (CCP) since its inception in 1957. Unlike most other proposed changes, however, this revision was foreshadowed in substance if not in detail by the Treaty of Amsterdam, which by adding a new paragraph 5 to the existing Article 133, allowed for the possibility of the extension of the CCP by Council decision.[1] This aspect of the Treaty of Nice is particularly worth discussing, even in the absence of certainty as to its coming into force, both because some alterations to the CCP would be possible even under the existing regime, and because the issues raised by the Nice amendment are extremely pertinent to any such development. Discussion of the implications of the choices made at Nice are instructive when considering not only the post-Nice CCP but alternative options in the event of other Treaty amendments. The complexity of the Nice amendment is a reminder of just how difficult it is to achieve consensus in this area, and also of how important in practice that consensus is.

If it does come into force, the Nice amendment to Article 133 EC will represent a further stage in the evolution of the Community's CCP. If we look at how far the CCP has already come since 1957 in its scope and effects, based on the bare bones of Article 133 itself, we are probably justified in regarding this new

* Professor of European Commercial Law, Centre for Commercial Law Studies, Queen Mary, University of London This paper was first given at a University of Cambridge Centre for European Legal Studies lunchtime seminar in November 2001. Thanks are owed to participants in the seminar for stimulating comments and discussion.

[1] See further Cremona, M. 'EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders' in Weiler, J. (ed.) *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, Collected Courses of the Academy of European Law 1999 (Oxford, OUP, 2000).

step as evolutionary rather than revolutionary. An evolution resulting from a combination of Court-based responses to the original text of the Treaty and its changing context of world trade, the approaches adopted by secondary legislation, and more recently, Treaty amendment. An evolution with a number of different dimensions, involving the role of the CCP in the growth of Community external policies; its objectives and fundamental principles in the context of the internal market, the Community and the Union; the relationship between Community legislator and Member States, and between legislator and judiciary in the determination of policy. The Nice amendment has something to say about each of these; it is not merely a question of the substantive scope of the CCP. However, in terms of the history of the negotiation, perhaps that is where we should start.

This article will start by briefly discussing the negotiations within the IGC leading up to the Treaty of Nice, and the development of what became the final text. In this respect, what is not in the final version of the text is of interest, as well as what is. After a brief summary of the main changes, to give an overview of the Nice amendment, we will then turn to the major issues raised by the changes, under the broad headings of complexity and ambiguity, issues of competence, and changes which would affect the character of the CCP. Our purpose is to ascertain to what extent this amendment represents a consolidation and extension of the Community's external trade powers, enabling it to function more effectively at the international level; or does it rather threaten a fragmentation of the Common Commercial Policy, its deconstruction into a policy of 'bits and pieces'?[2]

II. The Legislative Background and History of the Negotiation

As trade in services became globally more important, and especially as the negotiations towards the GATS proceeded between 1986 and 1994, the debate about external Community competence in this field primarily centred on whether or not trade in services fell within CCP competence (now Article 133 EC). This issue has been regarded as particularly important for two reasons. On the one hand the decision-making implications of Article 133 which does not require even consultation of the European Parliament, which grants responsibility for international negotiations to the Commission and under which decisions are adopted in Council by qualified majority vote. On the other, the exclusive character of Community powers under the CCP.[3] More

[2] Readers will be aware that I have taken my title from Deirdre Curtin's critique of the Treaty of Maastricht, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CMLRev* 17.

[3] Opinion 1/75 *OECD Understanding on a local cost standard* [1975] ECR 1355; Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921.

broadly, the substantive scope of the CCP is important in the light of the fundamental principles which underlie it: uniformity of trade policy as between the Member States and trade liberalization as an objective of that policy.[4]

Although, as Article 131 EC recognises, the CCP is closely linked to the establishment of the customs union, which only covers trade in goods,[5] it could be argued that the case law on the dynamic evolutionary nature of the CCP and consequent interpretation of Article 133[6] supported its extension into the services sector as international rules expanded to cover these new areas of trade law.[7] These arguments indeed formed the basis of the Commission's submissions in Opinion 1/94.[8] During the negotiations leading to the Maastricht Treaty, the Commission had (unsuccessfully) argued strongly in favour of an alteration to former Articles 110 to 116 EEC, so as to greatly widen their scope; it envisaged the replacement of the 'Common Commercial Policy' with a 'common external economic policy' which would expressly include services, capital, intellectual property rights, investment, establishment and competition.[9]

Then came Opinion 1/94, in which the Court of Justice rejected the Commission's argument that the existing CCP could be interpreted to include all trade in services, as well as intellectual property rights in so far as they were covered by the TRIPS agreement. However, the Court also refused to exclude trade in services from the CCP as a matter of principle, referring to its 'open nature':

> It follows from the open nature of the common commercial policy, within the meaning of Treaty, that trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113.[10]

[4] See further Cremona, M. 'The External Dimension of the Single Market: Building (on) the Foundations' in Barnard, C and Scott, J. (eds) *The Legal Foundations of the Single Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002).

[5] Art. 23 EC Treaty.

[6] Opinion 1/78 *Natural rubber agreement* [1979] ECR 2871.

[7] Timmermans, C. 'Common Commercial Policy (Article 113 EEC) and International Trade in Services' in Capotorti, F. et al. (eds) *Du droit international au droit de l'integration, Liber Amicorum Pierre Pescatore* (Baden-Baden, Nomos, 1987); Mengozzi, 'Trade in Services and Commercial Policy' in Maresceau M. (ed.) *The European Community's Commercial Policy after 1992: The Legal Dimension* (Dordrecht, Martinus Nijhoff 1993).

[8] Opinion 1/94 *WTO Agreement* [1994] ECR I–5267.

[9] Maresceau, M. 'The Concept "Common Commercial Policy" and the Difficult Road to Maastricht' in Maresceau, above n 7.

[10] Opinion 1/94 at para 41. This is not the place for an analysis of Opinion 1/94; see rather Arnull, A. 'The Scope of the Common Commercial Policy: A Coda on Opinion 1/94' in Emiliou, N. and O'Keeffe D. (eds) *The European Union and World Trade Law after the GATT Uruguay Round* (Chichester, Wiley, 1996); Bourgeois, J. 'The EC in the WTO and Opinion 1/94: An Echternach procession' (1995) 32 *CMLRev* 763; Hilf, M. 'The ECJ's Opinion 1/94 on the WTO: No surprise but not wise?' (1995) 6 *EJIL* 245; Tridimas, T. and Eeckhout, P. 'The External Competence of the Community and the Case Law of the Court of Justice - Principle versus Pragmatism' (1994) 14 *YEL* 143; Pescatore, P. 'Opinion 1/94 on "Conclusion" of the WTO Agreement: is there an

The Treaty of Amsterdam in 1997 did not reverse the conclusion of the Court of Justice that certain aspects only of the GATS and TRIPS agreements fell within the scope of the CCP. Rather, it left the situation as it was, while providing for a possible future decision by the Council to extend the CCP into some new areas:

> The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

The most interesting aspect of the Amsterdam option is that in a practical demonstration of the 'open nature' of the CCP, it left the fundamental choice to the Council. The scope of the CCP would depend on a legislative decision by one of the Community's institutions (albeit one representing the Member States). Indeed, the Commission appears to regard the Treaty of Amsterdam as having already answered the fundamental question of competence:

> Questions relating to trade in goods, but only parts of investment, services and intellectual property are already included in the day-to-day EU trade activity. Since the Treaty of Amsterdam, the rest is in an intermediate position: essentially an EU competence, but only to be used when the Council decides so by unanimity.[11]

However, the new paragraph 5 also left unresolved a number of questions: would it be possible to exercise the option for certain sectors or types of agreement only? Could the Council decide to exclude exclusivity in relation to the new sectors? The preservation of the status quo also left open the precise extent of the Community's *existing* external competence in relation to services, based on implied rather than express powers.[12] The Nice Treaty has answered these questions while raising, in its complex structure, a number of new ones and challenging some long-standing assumptions as to the nature of the CCP.

This discussion over (at least) fifteen years as to the proper extent of the CCP, and in particular whether it should cover trade in services, has been very closely connected to the creation of the WTO: not only encompassing the new areas of services and IP, but also creating a forum for discussion, and almost an

escape from a programmed disaster?' (1999) 36 *CMLRev* 387; Tridimas, T. 'The WTO and OECD Opinions' in Dashwood, A. and Hillion, C. (eds) *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000). For comment on the EC's participation in the GATS, see Kennett, W. 'The EC and the General Agreement on Trade in Services' in Emiliou and O'Keeffe, above; Eeckhout, P. 'The General Agreement on Trade in Services and Community Law' in Konstadinidis, S. (ed) *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market* (Aldershot, Dartmouth 1996).

[11] EC Commission, 'EU Common Commercial Policy and the Intergovernmental Conference', MEMO/00/86, Brussels, 22 November 2000.

[12] Hilf, M. 'Unwritten EC Authority in Foreign Trade Law' (1997) 2 *EFA Rev* 437; Neuwahl, N. 'The WTO Opinion and implied external powers of the Community: a hidden agenda?' in Dashwood and Hillion, above n 10.

expectation that its remit would extend over future years to cover other aspects of international economic law such as investment and competition. The link with the WTO, and the need to put in place adequate mechanisms for negotiation within the WTO, formed the context in which possible changes to Article 133 were discussed during the IGC of 2000. The discussion was also situated within the more general debate on the extension of qualified majority voting (QMV) within the Union. As the Commission said in November 2000, 'Trade issues at this IGC essentially concern the replacement of the unanimity rule by qualified majority.'[13]

In May 2000 the Legal Adviser to the Council and to the IGC, Jean-Claude Piris, published a Note on External Economic Relations,[14] placing the question of WTO participation alongside two other questions also concerned with the broad question of the need to present a single position in relations with third countries and the decision-making processes best placed to achieve this. These were: the conclusion of mixed agreements, and the establishment of the Community's position within a joint body set up under an agreement, when that body is to adopt decisions having legal effects (for example, an Association Council). On participation in the WTO, the Legal Adviser set out two options. The first would revise Article 133(5) so as to require only a QMV in order to bring trade in services and intellectual property into the CCP provisions. The second, without affecting the current distribution of external competence between the Community and Member States, would establish a Protocol on participation in the WTO, which would allow QMV decision-making in this context, even in areas currently within Member State competence. The draft Protocol drew on inconclusive 1995 discussions on a Code of Conduct in relation to WTO/GATS negotiations on financial services.[15]

Piris argued that the current position only works where there is consensus; failure to reach consensus would lead to deadlock, and a failure to comply with the duty of cooperation articulated by the ECJ.[16] Enlargement would create an even greater risk of paralysis, with the inclusion not only of more Member States, but also greater diversity of interests and views. Existing procedures do not provide for a solution. What was needed, he said, were 'clear, simple, transparent, effective legal rules enabling a common position to be established by a qualified majority in all cases.' Under the draft Protocol, which would cover all

[13] EC Commission, above n 11.

[14] Legal Adviser to the IGC, Note for the Member State Government Representatives Group on External Economic Relations, 10 May 2000, SN 2705/00.

[15] A Code of Conduct was proposed in July 1994, during the dispute over the conclusion of the WTO agreements. Following Opinion 1/94, the Commission put forward a proposal for a Code of Conduct in May 1995, with the view to the conduct of negotiations on financial services: *European Report* no. 2042, 17 May 1995. The Code appears to have been discussed in Council (GAC) meetings in June and July 1995 and within the Article 133 Committee on the basis of both Commission and Presidency texts, but not to have been formally adopted within Council.

[16] Opinion 1/94 at para 108.

WTO matters whatever the division of competence between Community and Member States, common positions were to be adopted by the Council, acting by QMV; the Commission would be the 'spokesman and sole negotiator' for the EU (Community and Member States), acting under Council directives and presenting the common position agreed in Council. The Commission would also represent Member States as well as the Community in WTO dispute settlement proceedings.

The Legal Adviser's 'non-paper' was written on the assumption that the IGC 2000 would maintain 'the status quo on the breakdown of powers as between the Community and the Member States in external economic relations (services and industrial and intellectual property).' The Commission's Opinion of 26 January 2000 had been clear that alterations to voting procedures under Article 133(5) would in its view be a second-best. Its preferred option was the straightforward inclusion of services, investment and intellectual property into Article 133:

> The Commission would prefer a substantial amendment of the scope of Article 133 by extending it to services, investment and intellectual property rights.[17]

The European Parliament also supported this extension of the CCP, together with adoption of the co-decision procedure for Article 133, and a formalisation of the current informal practice of keeping the Parliament informed of the progress of negotiations.[18]

At Feira in June 2000 the European Council accepted the Presidency Report on IGC negotiations. The Presidency recorded the two options set out by the Legal Adviser, including the idea of a Protocol on WTO participation.[19] Both options were contentious. A Presidency Note in September 2000 on the possible extension to QMV summarises three alternative approaches to Article 133, adding the option of substantive amendment to the two options set out by the Legal Adviser. First, a substantive extension of competence to include services, intellectual property and investment; this could be done either by amending the first paragraph of Article 133 or by adding a new paragraph 5 covering specific new fields to be defined by means of a Protocol. Second, an alteration of the procedure in the current Article 133(5) so that the decision to include agreements relating to services and intellectual property would be taken by QMV. Third, the addition of a new Protocol establishing the rules of procedure to establish a common position within the WTO by a qualified majority, but without any transfer of competence under Article 133.

[17] Commission Opinion on the IGC, 26 January 2000, COM(2000) 34, 29 (esp. 53 for a draft revised text of Article 133).

[18] See note from the Representatives of the European Parliament to the IGC on the subject of commercial policy and international agreements, 11 July 2000, CONFER 4759/00.

[19] Brussels 14 June 2000, CONFER 4750/00, Annex 3.5.

By November 2000, two options were presented within the drafts being considered.[20] The alteration of voting procedure in Article 133(5) had gone, and in its place, Option 1 proposed (broadly following the Commission and European Parliament) simply to add trade in services, investment and intellectual property to Article 133(1). Option 2 was more complex. The extension of Article 133 to the negotiation and conclusion of agreements relating to trade in services and commercial aspects of intellectual property (not investment) was to be subject to a Protocol which defined these fields in terms of the WTO agreements, and which would be subject to amendment by future unanimous decision of the Council. The Protocol excluded the possibility of the Community concluding agreements involving harmonisation in areas where such harmonisation is not permitted under the EC Treaty. Voting in the respect of the new areas was to be by QMV, except where the agreement covers a field for which unanimity is required for the adoption of internal rules. This draft also included a separate Protocol on WTO participation.

The draft put before the IGC in Nice in December 2000 was different again. Option 1 had moved closer to the version finally adopted, in particular by introducing an explicit reservation of Member State powers. However, Option 2 maintained the idea of a Protocol defining the scope of services and intellectual property for the purposes of the Article, as well as the Protocol on WTO participation. The final text agreed at Nice was based on Option 1; Option 2 with its Protocol was dropped, as was the Protocol on WTO participation. As a result of the latter omission, we do not have agreement on a single procedure to be used for all WTO negotiations whether the matter is one of Community, Member State or shared competence.

III. A Summary of the Changes

The text of the new Article 133 EC is set out in the Appendix. As will be seen, the existing paragraph 5 is replaced by a completely new set of paragraphs 5–7 and a few changes are made to paragraph 3. Here we will summarise the changes, and then we shall turn to the issues raised by this development of external competence. In what follows, references to the various provisions of Article 133 will be references to the Article as amended by the Treaty of Nice, unless otherwise stated.

—Explicit reference is made to the need to ensure the compatibility of external agreements with internal policies and rules, under the joint responsibility of the Council and the Commission: paragraph 3.

—The Commission is under a duty not only to consult the special committee appointed by the Council (the 'Article 133 Committee') but also

[20] Presidency Progress Report on the IGC, Brussels, 3 November 2000, CONFER 4790/00.

explicitly to report to this Committee on the progress of negotiations: paragraph 3.

—The Common Commercial Policy is extended to include the negotiation and conclusion of agreements on trade in services and commercial aspects of intellectual property: paragraph 5.

—Specific voting rules are included for these new aspects of the CCP, as well as specific provisions on the relative competence of the Community and the Member States: paragraphs 5 and 6.

—Transport is clearly stated to be outside the CCP: paragraph 6. This reflects the Court's opinion in 1994,[21] and it means that the Nice revision of Article 133 does not resolve the on-going dispute between Commission and some Member States over competence in relation to air transport.[22]

—The possible extension of the CCP in the future to other aspects of intellectual property is envisaged, subject to unanimous decision by the Council of Ministers: paragraph 7.

In addition we may note what will not be changed by this amendment:

—Investment is still not explicitly included in Article 133, although as we shall see some aspects of investment are probably covered by the term 'trade in services'.

—The European Parliament is still formally excluded from decision-making under Article 133, except insofar as it would be consulted were there to be a proposal under paragraph 7 to extend Article 133 to other aspects of intellectual property. There is to be no co-decision, nor even consultation of the Parliament, in the negotiation or conclusion of agreements.

—The proposed Protocol on WTO participation was dropped. In Presidency summaries of the options before the Conference, this Protocol was associated with a decision not to transfer any competence to the Community under Article 133, and in the light of the revised text of Article 133 it presumably appeared unnecessary.

IV. Complexity and Ambiguity in the new Article 133

The amended Article 133 is notable for the complexity of its drafting. As none of the earlier options were adopted *per se* the Article consists of a combination of elements of these drafts, together with additions to meet individual Member States' concerns, all grafted onto the existing text. As the Commission has com-

[21] Opinion 1/94 at para 48. Note that in earlier versions of the draft, this provision was included in the Protocol and referred only to sea transport.

[22] See Cases C–466/98—C–469/98, C–471/98, C–472/98, C–475/98, C–476/98 *Commission* v. *United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany*, Opinion of Advocate General Tizzano, 31 January 2002.

mented, 'The text adopted by the European Council based on a compromise text submitted by Finland is maybe not a model of clear drafting'.[23] The result is not only complex to read and understand (as this author discovered when she attempted to devise a flow-chart based on the new provision); it is also full of ambiguity and unresolved questions.

A. What is 'Trade in Services'?

The concept of trade in services presents a particular problem: the term 'services', as it is used elsewhere within the EC Treaty, has a particular meaning; it is regarded as a residual concept, one which applies insofar as the activities (normally provided for remuneration) are not covered by the other Treaty freedoms (goods, capital and persons).[24] More specifically, within EC internal market law services are distinguished from establishment, largely on the basis of the inherently temporary nature of the provision of services.[25] Within world trade law, on the other hand, services is a broader concept, encompassing aspects of establishment and indeed capital movements.[26] Under Article I(2) of the GATS, four different modes of supply are identified: cross-border supply (with no movement of persons or commercial presence), supply within one State to a consumer from another State, the commercial presence of one State's service supplier within another State, and supply within one State through the presence of a natural person who is a national of another State.

How should 'trade in services' in the revised Article 133(5) EC be interpreted? Should it be defined by reference to the meaning of services elsewhere in the same Treaty? This would be the obvious solution, in terms of normal drafting practice, but for a number of reasons is probably not what was intended by the drafters of this provision. According to the Court of Justice, 'Mode 1' services are already covered by Article 133(1) and the wording of Article 133(5) preserves this position. Thus, the precedent set by the Court in Opinion 1/94, in adopting the GATS approach to services, has been followed by the Treaty drafters. Earlier drafts of the Treaty of Nice made the connection with GATS explicit by defining the scope of Article 133 (via a Protocol) with reference to GATS; the Article was to apply to:

> the sectors of services appearing on the schedule of specific commitments of the Community and its Member States as annexed to the General Agreement on Trade

[23] Commission DG Trade FAQ 'The reform of Article 133 by the Nice Treaty: The logic of parallelism' December 2000; http://europa.eu.int/comm/trade/faqs/rev133_en.htm#133

[24] Art. 50 EC.

[25] See the discussion of the distinction in cases 205/84 *Commission* v. *Germany* (insurance services) [1986] ECR 3753; C–221/89 *Factortame No2* [1991] ECR I–3905; C–55/94 *Gebhard* [1995] ECR I–4165.

[26] Eeckhout, P. 'Constitutional Concepts for Free Trade in Services' in de Búrca, G. and Scott, J. (eds) *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001).

> in Services (GATS) set out in Annex 1B to the Agreement of 15 April 1994 establishing the World Trade Organisation, as that schedule stands on the date of signature of this Protocol.[27]

Although this drafting methodology was finally rejected, there is no sign that the connection between Article 133(5) and GATS was rejected also. On the contrary, a number of factors point the other way.

Article 133(5) only applies to the negotiation and conclusion of international agreements: in this context it would be strange if the term were not used in the sense in which it is used internationally. Much of the point of the amendment would be lost if the new negotiating procedures and legal base were only available for those (limited) aspects of 'services' which fall within Article 50 of the EC Treaty. In addition the term 'trade in services' used in Article 133(5) reflects exactly the phrasing used in Article I of GATS, and could be distinguished from the 'freedom to provide services' and 'liberalization of services' used in Articles 49–55 EC. If this reading is correct, the 'new CCP' will cover establishment and aspects of investment as well as traditional Article 49–50 services. However the abandonment of the Protocol wording also removes the link between 'trade in services' within Article 133 and the scheduled specific commitments of the Community and its Member States under GATS. This makes sense: Article 133(5) would thus cover negotiations designed to expand the EC's scheduled commitments.

The classification of services derived from the GATS and adopted by the Court of Justice in Opinion 1/94, based on modes of supply, is explicitly preserved in the new Article and is relevant to the exclusivity of Community competence and the voting rules applicable. By virtue of Opinion 1/94 'Mode 1' (cross-border) services already fall within paragraphs 1–4 and paragraph 5 preserves this position; it only applies to agreements in the field of trade in services 'insofar as those agreements are not covered by the said paragraphs . . . '. To this classification methodology, the new Article adds a differentiation based on service sectors, with special rules for transport, cultural and audio-visual services, educational services and social and human health services. However as paragraph 6 is a derogation only from paragraph 5, this latter distinction between service sectors only applies to Modes 2–4 services, not to cross-border services (Mode 1) which continue to be covered by paragraphs 1–4 across all sectors.

B. What are 'Commercial Aspects of Intellectual Property'?

The term 'commercial aspects of intellectual property' is not defined either. In order for the amendment to fulfil its purpose, Article 133(5) must cover at least

[27] See the draft Protocol on Art. 133(4) in the Presidency Progress Report on the IGC, above n 20.

those aspects of intellectual property included in the TRIPS Agreement which are not already included by virtue of Opinion 1/94 (i.e. border control provisions to prevent piracy and counterfeiting[28]).[29] In the draft Treaty of Nice prepared by the Presidency in December 2000, the Protocol annexed to Article 133 defined commercial aspects of intellectual property in terms of TRIPS; Article 133 was to apply to:

> the matters covered by the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) set out in Annex 1C to the Agreement of 15 April 1994 establishing the World Trade Organisation, as that Annex stands on the date of signature of this Protocol.

For similar reasons to those set out in respect of services, I would argue that some linkage between Article 133(5) and TRIPS should be implied, in spite of the different phraseology adopted: 'commercial aspects of intellectual property' as opposed to Trade-related Aspects of Intellectual Property Rights.[30] However, this begs the question of exactly what kind of link is to be implied. Is the term in Article 133(5) intended to reflect the TRIPS as it stands at the time the Treaty of Nice enters into force, or does it represent a mapping of Article 133 onto a potentially moving target? The draft Protocol (which was not adopted) suggested the former, but as we have seen, this wording is not reflected in the final version of the Nice Treaty. It is possible to read the 'commercial aspects of intellectual property' as encompassing those aspects of intellectual property contained within the scope of TRIPS at any one time. If, for example, the scope of TRIPS were to be widened through negotiations within WTO, would such an amendment to TRIPS fall within the scope of revised Article 133(5)? Or would its conclusion require the exercise of Article 133(7)?[31] Krenzler and Pitschas have argued for a dynamic rather than a static interpretation of the scope of this provision in relation to TRIPS.[32] Herrmann, on the other hand,

[28] Opinion 1/94 at para 55; see Reg. 3295/94/EC laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods; OJ 1994 L 341/8, as amended by Reg. 241/99/EC OJ 1999 L 27/1.

[29] The TRIPS Agreement contains provisions relating to copyright and related rights, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits, and the protection of undisclosed information.

[30] Heliskoski argues, *contra*, that the 'commercial aspects of intellectual property' in Article 133(5) is narrower than that of TRIPS as it does not cover the content of such rights; Heliskoski, J. 'The Nice Reform of Article 133 EC on the Common Commercial Policy' (2002) 1 *Journal of International Commercial Law* 1, 6 and 13.

[31] The earlier options for the amendment of Art. 133, in addition to the draft Protocol with its reference to TRIPS as it stood at the time of the signature of the Protocol, make provision in the draft Article 133 for amendment of the Protocol by unanimous Council Decision, thereby resolving the question raised here.

[32] Krenzler, H. and Pitschas, C. 'Progress or Stagnation? The Common Commercial Policy after Nice' (2001) 6 *EFA Rev*. 291, 302, relying on the dynamic nature of the CCP as explored by the Court of Justice in Opinion 1/78.

argues in favour of a static link to the current scope of TRIPS,[33] and certainly the existence of Article 133(7) suggests that this is what was intended.

Under Article 133(7) other aspects of intellectual property may be included in the Article 133 (1)–(4) regime by a future unanimous decision of the Council. This recognition of the limited conferral of competence in the field of intellectual property under the new paragraph 5 is all that remains of the current Article 133(5). The implications of this provision for the development of the CCP are considered further below.

C. *Is Investment Covered by Article 133?*

Some of the earlier drafts of a revised Article 133 included investment alongside services and intellectual property, but any reference to investment has been left out of the final version of Article 133(5). The Commission,[34] the Parliament[35] and some Member States[36] had supported its inclusion, and Presidency summaries of the options for amendment of Article 133 in September 2000 included investment[37] but a number of Member States were opposed. The Commission has referred to the final exclusion of investment from Article 133 in express terms as 'unfortunate'.[38] Nevertheless, investment is not completely excluded, assuming that the interpretation of 'trade in services' offered above is correct. Aspects of investment will fall within GATS Mode 3 services (commercial presence), and as such should come within Article 133(5). Other aspects are covered by Article 57(2) EC on capital movements, and some aspects still fall within the competence of Member States. Investment is on the agenda of the New Round of WTO negotiations following the Ministerial Conference in Doha in November 2001, so this complexity as to both competence and legal base is unwelcome.

D. *Agreements and Autonomous Measures: Multiple Legal Bases*

Under Article 133(5), paragraphs 1 to 4 will apply to the negotiation and conclusion of *agreements* only. Existing legal bases and procedures (such as Article

[33] Herrmann, C. 'Common Commercial Policy after Nice: Sisyphus would have done a better job' (2002) 39 *CMLRev* 7, 18–19; a revised and extended version of an article published as 'Vom misslungenen Versuch der Neufassung der gemeinsamen Handelspolitik durch den Vertrag von Nizza' in *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2001, 269.

[34] Commission Opinion on the IGC, above n 17 at 27.

[35] See note from the Representatives of the European Parliament to the IGC on the subject of commercial policy and international agreements, above n 18.

[36] See Krenzler and Pitschas, above n 33 at 294.

[37] Presidency note on extension to qualified majority voting, CONFER 4770/00, ADD 1, 14 September 2000, 19–21; see also CONFER 4776/00, 28 September 2000.

[38] Commission DG Trade FAQ, above n 23.

47(2), 49 and 57(2) EC) will continue to apply for *autonomous measures*. This follows the approach adopted in the current version of Article 133(5) and reflects the desire for a simplified legal base and clear negotiating procedure for international agreements, particularly in the services sector. However it is a distinction which does not apply to the traditional goods-based CCP, under which Article 133 is used both for autonomous measures and for the conclusion of agreements. As a result, decision-making and even perhaps exclusivity will operate differently in respect of international agreements and autonomous measures (Article 47(2) EC, for example, requires the co-decision procedure), undermining the principle of parallelism which ostensibly underpins the new text.[39]

The restriction of paragraph 5 to international agreements will also mean that internal measures which *implement* agreements adopted on the basis of the revised Article 133(5) will need an alternative legal base, a position which reflects the Court's views of both Article 133[40] and Article 181[41] but which adds to the complexity of the legal structure in these fields.[42]

E. What is the Scope of the 'Cultural Exception' in Paragraph 6?

A number of questions arise relating to the scope of 'cultural exception' contained in the second subparagraph of Article 133(6), and in particular its relationship with other elements of this highly complex Treaty provision. Under this provision, certain types of agreement will fall within the shared competence of the Community and the Member States and are to be concluded jointly.[43]

> In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

[39] See Sect. V.A below.

[40] See discussion of relation between Arts. 113 and 43 in Opinion 1/94 at para 29, 'The fact that the commitments entered into under that Agreement [on Agriculture] require internal measures to be adopted on the basis of Article 43 [new 37] of the Treaty does not prevent the international commitments themselves from being entered pursuant to Article 113 alone.'

[41] Case C–268/94 *Portuguese Republic* v. *Council* [1996] ECR I–6177 at para. 47.

[42] It is suggested by Heliskoski that Article 133(5) might be taken to include the adoption of autonomous measures which are a necessary implementation of an international agreement falling within that provision; see Heliskoski, above n 30 at 7.

[43] The impact of this provision on the exclusivity of the CCP is discussed below, Sect. VI.B.

First, what exactly does 'by way of derogation from the first subparagraph of paragraph 5' mean? The first subparagraph of paragraph 5 grants express treaty-making competence to the EC in the specified fields, and also places the legal base for this competence within the CCP (paragraphs 1–4). Thus paragraph 6 is here not just providing a specific procedural safeguard (a derogation from QMV) for the Member States; it excludes certain sectoral agreements from the express CCP-based Community competence of paragraph 5. On the other hand, paragraph 6 confirms that the EC does have (limited) competence: 'agreements . . . shall fall within the shared competence of the Community and its Member States'. Any competence that exists must then be based on internal powers (implied powers), is subject to the limitations that attach to these,[44] and is defined as shared in the sense that mixed agreements are always required. The areas mentioned (apart from social and audio-visual services) are areas where the internal Treaty provisions require the Community and Member States to 'foster cooperation' with third countries and international organisations, without granting express treaty-making powers.[45] The Treaty provisions on social policy and services generally (which include audio-visual services)[46] do not refer expressly to external action. The new provision therefore removes uncertainty as to treaty-making competence in these areas, but requires the joint conclusion of international agreements.

Secondly, we have what appears to be a link between the first and second subparagraphs. The second subparagraph begins, '[i]n this regard, by way of derogation from . . . ', in an apparent reference to the first subparagraph, but it is not at all clear what this reference is intended to—or could—mean. It will be recalled that the first subparagraph expressly precludes the conclusion of agreements by the Council which include provisions going beyond the Community's internal powers, in particular in the matter of harmonisation. Does what follows then represent a specific example of such a case, or something more? Should '[i]n this regard'[47] be read as 'in particular' or 'for example', or rather as 'as a result' or 'it follows that'? At the least, the link suggests that in cases falling within both subparagraphs (that is, an agreement involving harmonisation in the fields covered by the cultural exception) a mixed agreement will be needed. Krenzler and Pitschas argue for a stronger reading; that the linking phrase means that the first subparagraph is thereby 'exhaustively defined' by

[44] See Opinion 1/94.

[45] See Art. 149(3) EC on education; Art. 150(3) EC on vocational training; Art. 151(3) EC on culture; Art. 152(3) EC on public health. As Dashwood points out, however, it 'must surely be intended' that such cooperation may be pursued within the framework of international agreements; Dashwood, A 'The attribution of external relations competence' in Dashwood and Hillion, above n 10 at 115, 138. Note that these Treaty provisions are also those for which harmonization of Member States' laws is excluded: see below n 55.

[46] See, *inter alia*, Case 52/79 *Debauve* [1980] ECR 33; Case C-23/93 *TV10* v. *Commissariat voor de Media* [1994] ECR I–4795.

[47] Earlier English versions read 'in this connection'; the French version reads 'À cet égard'.

the second subparagraph, and that it is the lack of harmonising competence that renders the compulsory mixed agreement format necessary.[48] However the second subparagraph appears to envisage a Community competence (albeit shared) in the specified sectors. It is also not obvious that the second subparagraph is intended to apply only where harmonising measures are at issue in an agreement; it seems to apply to all agreements in these sectors. In addition, to read the first subparagraph as exhaustively defined by the second subparagraph would be effectively to re-draft its opening phrase, '[a]n agreement may not be concluded by the Council . . . ', as '[a]n agreement may not be concluded by the Council *alone* . . . ',[49] and tempting though it may be to re-draft this whole Article, this alteration would give a very different flavour to the provision.

V. The New Article 133 and Community Competence

A. Parallelism and Attributed Powers

In the Commission's view, parallelism is the key to understanding the revisions to Article 133:

> by focusing on the principle of parallelism on which it is based, it becomes easier to understand. The guiding principle of the new Article 133 is to align the decision-making mechanism for trade negotiations on internal decision-making rules.[50]

This alignment, or parallelism, between external and internal powers is substantive as well as procedural: it concerns policy as well as decision-making rules, competence as well as compatibility. Article 133(3) gives the Council and Commission responsibility for ensuring that 'agreements negotiated are compatible with internal Community policies and rules'. This applies to all agreements negotiated on the legal basis of Article 133, not only the 'new CCP', and at first sight one might wonder why the provision was not inserted in Article 300, as it seems apt to cover external agreements generally, and not just those falling within the CCP. In fact, paragraph 3 also echoes Article 300(6); however Article 300(6) refers to Treaty-compatibility whereas paragraph 3 is broader: 'internal Community policies and rules' covers compatibility with secondary legislation as well. Just as Article 300(6) specifies that agreements found to be incompatible with the Treaty may only enter into force following Treaty amendment, so we must infer that the Community is entitled to negotiate and conclude agreements under Article 133 which would require amendment of secondary legislation. It would render external trade policy completely unworkable if this provision were to mean that the Community could not negotiate any

[48] Krenzler and Pitschas, above n 32 at 309.

[49] *Ibid*. As Herrmann points out, 'Council' should read 'Community' here: Herrmann, above n 33 at 21.

[50] Commission: DG Trade FAQs, above n 23.

agreement that was not compatible with Community law as it then stands (i.e. requiring no amendment of Community law).[51] The obligation is rather to resolve any inconsistency, an obligation that already derives from Article 300(7) EC.

However the force of the provision lies not so much in its legal obligation, if any. The inclusion of the new wording in paragraph 3 is designed to allay fears that the Community will negotiate (within the WTO, or other fora) in policy directions which cut across social, environmental and other sensitive internal policy sectors.[52] It instructs the Council and Commission to take responsibility to maintain consistency with internal policies but could also be seen as a directive to different Commission Directorates-General to talk to each other, and to DG Trade not to focus solely on its own agenda without regard for other policy inputs. There is another aspect to this. The current Treaty provisions on the CCP (as compared with the provisions on the CFSP and development policy) say very little about specific commercial policy objectives, apart from brief references to trade liberalization in Article 131 and uniform principles in Article 133(1). The new provision in 133(3) helps to fill this gap. It directs us—and the trade policy makers—to look to internal Community policies and rules. While not going further than requiring 'compatibility' (it does not require that trade policy must actively promote internal policies) it surely indicates that internal policy objectives are relevant in determining trade policy positions.

Substantive parallelism is also found in the new Article 133(6):

> An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

This is a matter of competence, rather than compatibility. It indicates that the changes to Article 133 are not to be seen as a complete *carte blanche* to the Council and Commission to engage in external trade negotiations on any possible services or intellectual property issue that may arise. The expansion of Article 133 is not to result in a by-pass of internal competence constraints. In the sphere of implied powers, this link between internal and external competence was confirmed by the Court of Justice in Opinion 1/94.[53] It is also reflected in the Court of Justice's comment about association agreements in the *Demirel* case: 'Article 238 must necessarily empower the Community to guarantee commitments towards non-Member countries in all the fields covered by the Treaty.'[54] Here the link is extended to trade agreements, and it is not

[51] See discussion of this provision by Krenzler and Pitschas, above n 32 at 299 and Herrmann, above n 33 at 26–27.

[52] See the rather defensive Commission Memo about Art. 133 revision: MEMO/00/86, Brussels, 22 November 2000.

[53] Opinion 1/94 at paras 59–60.

[54] Case 12/86 *Meryem Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719 at para 9.

limited to the 'new CCP' fields. Given the different—albeit compatible—objectives operating at internal and external level, it is not entirely clear how this will operate in practice, except in cases where there are clear constraints (for example, ruling out harmonisation).[55] How exactly, for example, does the general competence to enact rules designed to remove restrictions (Article 49) and thereby achieve the internal market in services (Article 95) apply to negotiations within the GATS framework? Should we read paragraph 6 as limiting Community competence to the conclusion of agreements which will directly assist in the completion and operation of the internal market? This would be a narrow reading, based on the extent of the Community's current implied powers in relation to services, and would not reflect the scope of the existing GATS. Alternatively, it seems more likely that Community competence is intended at least to encompass agreements which seek to apply the liberalisation objectives of Article 49 in a wider international context.

In Article 133(5) second subparagraph, we find examples of the decision-making parallelism that influenced the Court of Justice in Opinion 1/94. Although under paragraph 4, decisions are generally to be taken by qualified majority vote (QMV),

> [t]he Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The reference to the first subparagraph means that this provision applies only to the 'new CCP'. The first category (unanimity required for the adoption of internal rules) includes Articles 93 (harmonisation of indirect taxation), 94 (approximation of laws), 67(1) (visas, immigration and asylum), 308 (the residual legislative clause), 137 (aspects of social security), and Article 175(2) (aspects of environmental policy). The second category (where there are no internal rules) emphasises the need for special care where international negotiations are breaking new ground, especially given the 'package deal' nature of many of these negotiations. The Council may muster a QMV for a complex international agreement, where it would not do so for a single-issue piece of internal legislation. This caution also reflects the fact that where internal legislation has been debated (probably extensively) and implemented, the issues and potential problems will be clearer to the EC negotiators; they will have developed expertise in the area which may be lacking where there are no internal rules. An internal QMV 'mistake' is easier to rectify than an international contractual commitment.

[55] See Arts. 149(4) and 150(4) EC (education and vocational training), Arts. 151(5) EC (culture) and 152(4)(c) EC (public health).

The emphasis on parallelism found in the revisions to Article 133, can also be described as an affirmation of the principle of attributed powers. This is most obvious in paragraph 6 but is also implicit in paragraph 3. The link between attributed, or conferred, powers and internal powers was also made by the Court of Justice in Opinion 2/94:

> It follows from Article 3b of the Treaty [now Article 5], which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it. That principle of conferred powers must be respected in both the internal action and the international action of the Community.[56]

In this sense, these additions to Article 133 are declaratory: compatibility and attributed powers are both recognised principles of Community external policy.[57] The innovation here is the link made between internal and external in both cases. Nowhere else in the Treaties are express (attributed) *external* powers explicitly linked to attributed *internal* powers granted elsewhere in the Treaty.[58] Put like this, we can see the extent to which the new express competence created by the revised Article 133 looks more like a 'codification' of existing implied powers (which are directly derived from internal powers) than a truly new set of external powers.

B. Would this Change Actually Extend EC External Competence?

This emphasis on the principle of attributed powers prompts the question: to what extent would the envisaged amendment really extend the scope of Community powers, as opposed to the scope of the Common Commercial Policy? Does the change add to the existing limited powers in the fields of services and intellectual property, or does it merely alter the legal base, with some concomitant decision-making changes? The answer will depend upon the view taken of the scope of existing implied powers in these areas; that is, on the interpretation given to Opinion 1/94.

Although there are differing views on the scope of implied powers in relation to services there appears to be general agreement that implied powers exist in some form. There is no logical reason why the *ERTA* principle should not apply to services other than transport services and as the Court of Justice pointed out in Opinion 1/94, a number of sectoral legislative acts such as the banking directives contain provisions regulating the external dimension.[59] The commentators

[56] Opinion 2/94 *on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, at paras 23-24.

[57] See Art. 3 TEU and Art. 5 EC.

[58] Cf. the approach of the Court of Justice to the scope of association agreements, above n 54.

[59] See for example, Title IV, Dir. 2000/12/EC relating to the taking up and pursuit of the business of credit institutions (Consolidated Banking Directive) OJ 2000 L 126/1.

differ in terms of emphasis rather than fundamentals, in particular on the emphasis given to, and reading of, the precise objectives of the Community's internal competence, and the importance of the existence of internal legislation.

A first (wider) view holds that the existence of internal powers in relation to services implies a general competence to act externally, in order to attain the objectives set by the Treaty. On this view, the restrictive comments in Opinion 1/94 relate to the issue of exclusivity rather than competence *per se*.[60] The implication is that Treaty objectives, from which it is possible to imply the necessary powers, may go beyond the purely internal. If this view is correct, then given the emphasis on internal/external parallelism in the new Article 133, the change is really one of legal base rather than a significant extension of competence.

A second (narrower) view reads Opinion 1/94 as setting tighter limits to implied competence in the services field. On this view, the Community's internal powers in the fields of services (and establishment) have purely *internal* market objectives, and the EC thus only has implied external powers to the extent that external action is necessary to achieve those (internal) objectives. So, the provisions in the Banking Directive on third country banks are necessary because of the Community-wide licensing system that was being introduced.[61] According to this view the need for external measures and thus implied powers will only arise once the Community has legislated to regulate the field internally. Thus, the existence of competence, and not only its exclusivity, depends on the exercise of internal competence. If this view is correct, then the Nice amendment to Article 133 would substantively increase external powers in relation to services agreements. External action may legitimately extend beyond what is directly necessary for the completion of the internal market, and will not depend on legislative action at the internal level, although it must not 'go beyond the Community's internal powers'—the ambiguities of which phrase have already been explored. The existence of internal legislation is thus primarily relevant to the question of voting, with unanimity being required under paragraph 5, second subparagraph where internal rules have not yet been adopted.

Certainly, the debate over the precise approach to the amendment, and the quantity of reservations inserted, for example into paragraph 6, suggest that the Member States felt they were doing more than merely adjusting the legal base for services agreements. Paragraph 6, in particular, implies a reservation to a new grant of competence.

As far as intellectual property rights are concerned, the Court of Justice, in Opinion 1/94, recognised the potential for implied powers in this field, in cases

[60] See for example Tridimas, above n 10 at 48, 54.

[61] See for example Dashwood, above n 45 at 129-130.

where internal legislation has been adopted at Community level.[62] The revised Article 133 will remove any doubts as to Community competence to conclude agreements which, for example, harmonise aspects of intellectual property rights protection even where no internal rules have yet been adopted, although as we have seen, according to paragraph 6 these agreements may not go beyond the scope of those (potential) internal rules. Nevertheless, the adoption of internal Community legislation is not irrelevant. The shifting nature of obligations as the Community legislates within a field is illustrated by the approach taken by the Court of Justice in *Christian Dior* in the context of interpretation of TRIPS.[63] In discussing the obligations incumbent upon national courts the Court distinguishes situations where the case before them concerns a field in which the Community has legislated, from cases where the Community has not—yet—legislated. Where the Community has legislated in an area covered by TRIPS then, although TRIPS cannot create individual rights enforceable in national courts as part of Community law, national courts called upon to apply national rules must do so 'as far as possible in the light of the wording and purpose' of TRIPS. On the other hand,

> in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPS or that it should oblige the courts to apply that rule of their own motion.[64]

We have here an acceptance that the legal effect of an international treaty provision may vary from one Member State to another, if the provision relates to a field in which the Community (although it has competence) has not yet exercised its legislative powers. The passage is all the more striking, as the Court has previously used the need for a uniform interpretation and application of international agreements, as a justification for insisting on its exclusive right to determine their legal effects.[65] A uniform interpretation is not essential (Community law 'neither requires nor forbids') where there are no common

[62] Opinion 1/94 at paras 99-105. This passage of the Opinion is more clearly focused on the (non-)exclusive nature of Community competence to conclude the TRIPS; the Court expressly denies that measures relating to the effective protection of intellectual property rights are 'within some sort of domain reserved to the Member States'. However insofar as the Community has not yet legislated and there are thus no internal legislative acts which could be affected within the meaning of the *AETR* judgement, the Community and Member States are jointly competent to conclude the TRIPS Agreement.

[63] Joined Cases C-300/98 *Parfums Christian Dior SA* v. *Tuk Consultancy BV* and C–392/98 *Assco Gerüste GmbH, Rob van Dijk* v. *Wilhelm Layher GmbH & Co. KG, Layer BV* [2000] ECR I–11307.

[64] *Ibid*. at paras 47–48.

[65] Case 104/81 *Hauptzollampt Mainz* v. *Kupferberg* [1982] ECR 3641 at para 14; the Court was here dealing with an agreement within exclusive Community competence.

rules to be affected. However, the position is different and that national discretion is removed for those aspects of TRIPS in respect of which the Community has legislated, even in cases involving national and not Community rules. Would the whole of TRIPS 'fall within the scope of Community law' following the entry into force of the amended Article 133 EC, which refers to competence to enter into agreements relating to 'the commercial aspects of intellectual property'? Probably not: the competence to conclude agreements in the future cannot be equated to the present exercise of legislative power. But were the Community either to legislate internally in the field in question, or to conclude an international agreement in that field (which it will be able to do alone on the basis of the new Article 133(5) EC), then the principle set out in *Christian Dior* would apply.[66]

VI. The Nature of the Common Commercial Policy

A. Decision-making procedures

The qualified majority vote (QMV) has been a defining characteristic of CCP decision-making, as has the absence of formal involvement by the European Parliament. The Nice amendment would alter the first of these but not the second.

One of the perceived rationales for including services at least within Article 133 was the alleged anomaly of the effective requirement of unanimity in concluding international agreements by virtue of shared competence, whereas decision-making in the case of internal legislation was by QMV. However, the result of the Nice amendment is to limit the use of QMV under Article 133 by requiring unanimity for the conclusion of agreements in four cases:

(1) Where unanimity is required for the adoption of internal rules: this follows the logic of Article 300(2);
(2) Where powers have not yet been exercised by adoption of internal rules: we have already touched on the rationale for this.[67] However, there are some ambiguities here too; what exactly does it mean to say that internal powers have not yet been exercised? Must the internal rules be on the

[66] One may take issue with a number of aspects of this part of the *Christian Dior* judgement: it is not clear to what extent it applies only to Art. 50(6) of TRIPS, a procedural rather than a substantive provision. In addition, the passage cited above does not sit easily with the Court's own extensive view, in the same case at paras 33–39, of its interpretive jurisdiction, confirming its earlier judgment in case C–53/96 *Hermes* v. *FHT* [1998] ECR I–3603. See *inter alia*, Koutrakos, P. 'Mixed Agreements and the Preliminary Reference Procedure' (2002) 7 *EFA Rev* 25; Heliskoski, J. casenote on Joined Cases C–300/98 *Parfums Christian Dior SA* v. *Tuk Consultancy BV* and C–392/98 *Assco Gerüste GmbH, Rob van Dijk* v. *Wilhelm Layher GmbH & Co. KG, Layer BV* (2002) [3] 9 *CMLRev* 159.

[67] See above Sect. V.A.

precise topic of the proposed agreement, or only on the field covered, and how detailed do they have to be? Presumably this provision cannot be given too strict a reading, or the QMV 'norm' will effectively become the exception.

(3) Agreements which fall within the 'cultural exception' in paragraph 6 must be concluded by 'common accord' of the Community and the Member States. Strictly speaking, this is a case of shared competence rather than unanimous voting within the Council, but the effect is the same.[68]

(4) 'Horizontal agreements'. Unanimity also applies 'with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns' any of the three situations just mentioned. The concept of a horizontal agreement is nowhere defined, but it appears to mean an agreement that covers these matters, alongside other elements, such as other services sectors, or trade in goods. It is also not clear what is meant by 'concerns' here; should they be the core or form a substantial part of the agreement, or is it sufficient if they merely appear anywhere in it? Given the breadth of many modern agreements, this would represent a considerable inroad into QMV for the CCP.

The insistence on unanimity in some sectors of course reflects the sensitivities of the Member States. Insofar as agreements in these sectors are currently within shared competence, requiring both Community and Member State participation, the change will not be great. However, the Treaty of Nice was intended to simplify decision-making in view of the forthcoming fifth enlargement, and the expansion in the number of Member States, each with a potential veto, with a greater diversity of interests than the present membership, and a more obvious risk that the interests of individual (especially the smaller) States will become submerged is hardly likely to facilitate decision-making in matters of trade policy.

In its initial Opinion on the IGC in January 2000, the Commission proposed the extension of co-decision to the CCP.[69] However the principle of parallelism was not taken so far. The Commission regards this failure to increase the role of the European Parliament in decision-making under Article 133 as 'regrettable for the democratic accountability of the Union's trade policy',[70] but it is hardly surprising. Nevertheless, there is an argument that the reference to 'the relevant provisions of Article 300', in paragraph 6 subparagraph 2, implies that consultation of the European Parliament will be required, at least in the case of

[68] Indeed in theory it is stronger as a unanimous Council decision may be adopted despite abstention by a Member State.

[69] Commission Opinion on the IGC, above n 17 at 26 and 30.

[70] Commission: DG Trade FAQs, above n 23.

agreements falling within this subparagraph.[71] It should also be noted that the Treaty of Nice would amend Article 300(6) so as to allow the European Parliament (as well as the Council, the Commission or a Member State) to request an Opinion from the Court of Justice on the compatibility of an envisaged agreement with the Treaty.

B. Exclusivity

Perhaps the single most defining characteristic of the CCP has been its exclusivity, based on the jurisprudence of the Court of Justice, and founded on the need for uniform trade rules. The inroads into exclusivity made by the amended Article 133 challenge these assumptions and the established rationale for exclusivity, and indeed for uniformity in the Community's external economic policy.[72] The Treaty of Nice amendments will leave us with a complex picture.

First, we have a distinction made between different types of Community instrument. The new CCP provisions only cover the negotiation and conclusion of agreements; autonomous measures will not be affected and will continue to fall under the respective internal Treaty provisions, even where trade with third countries is involved. As a result, exclusivity will operate differently with respect to international agreements and to autonomous measures.

Second, we have the category of agreements relating to those aspects of services and intellectual property rights that were held by the Court of Justice in Opinion 1/94 to be covered by the traditional CCP. These include agreements concerning cross-border ('Mode 1') services and agreements concerning aspects of intellectual property that affect trade in goods directly, such as measures at border crossing points intended to enforce intellectual property rights.[73] As part of the original CCP, exclusivity applies to them in the same way as it does to agreements on trade in goods. The doctrine of exclusivity as developed by the Court in relation to Article 133(1)–(4) is not affected by the new provisions. Article 133(5) applies to 'agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs [1 to 4]'. It should be pointed out, however, that it will be rare for an international agreement to concern itself solely with 'Mode 1' services or these limited aspects of intellectual property protection;

[71] Under Art. 300(3) EC, consultation of the Parliament is required before the Council concludes an agreement. That Article excludes 'agreements referred to in Article 133(3),' but as we have already seen Article 133(6) second subparagraph may be read as taking this range of agreements outside paras 1-4 and thus outside the scope of this exception to Art. 300(3). Whether it does have this effect depends on exactly what the initial phrase in the subparagraph ('by way of derogation from the first subparagraph of paragraph 5') means: it may be intended to be limited to the issue of exclusivity.

[72] For a more detailed analysis of exclusivity in the Community's external economic policy, on which this section is based, see Cremona, above n 4.

[73] Opinion 1/94 at para 55.

such limited scope is perhaps more likely in the case of autonomous measures, but such measures fall outside Article 133(5) in any case. Most services agreements, like the GATS, will cover all modes of supply and the exclusivity which might be said to apply to cross-border services will thus be tempered by the lack of exclusivity applicable to other modes of supply.

Third, other agreements relating to trade in services and the commercial aspects of intellectual property are to be put under the regime of paragraphs 1 to 4; however, exclusivity is ruled out. The last subparagraph of paragraph 5 states:

> This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.

Community competence is established, but this does not preclude the continuation of Member State competence in these fields. The wording is similar to that used in the context of development cooperation, for example.[74] This new external competence will be shared, but it is clear that the Community will be able to act alone (indeed this may be said to be the whole point of the amendment). Although the subparagraph appears to be directed in the main at the possibility of Member States continuing to enter into agreements in the absence of EC participation, it also covers the possibility of mixed agreements.

The reference to 'Community law and other relevant international agreements' will include agreements to which the EC alone is a party and which bind the Member States by virtue of Article 300(7), as well as other mixed agreements, such as the WTO agreements. This provision is intended to avoid a conflict of norms between Community agreements and Member State agreements, which might give rise to Community responsibility. It also reflects the general loyalty obligation on Member States found in Article 10 EC, and the obligation in Article 307 EC to eliminate incompatibilities between prior agreements of Member States and their Treaty commitments.

Fourth, there is a category of agreements on services where a specific form of shared competence is to continue, under Article 133(6) second subparagraph. This provision does not merely preserve a residual competence for Member States while granting the Community competence to negotiate alone. Rather, the Treaty insists on shared competence in the sense of the joint negotiation and conclusion of agreements by Community and Member States in certain areas. It is clear from this subparagraph that the Community alone will not be able to conclude agreements in these sectors. The literal wording of the text suggests that all agreements must be mixed, so that the *Member States* would also lose the competence to conclude such agreements alone.[75] However it is perhaps unlikely to be applied in this way.

[74] Art. 181 EC.

[75] Herrmann, above n 33 at 22.

As far as exclusivity is concerned, the re-alignment of Community and Member State competence reflected in Article 133(5) and (6) has consequences for the present and the future. The Member States will retain their competence under Article 133(5) and (6), and there is thus no sense in which they will be substantively 'replaced' by the Community within the WTO.[76] However, it is not simply a matter of preserving the existing status quo of shared competence, as determined by the Court of Justice in Opinion 1/94. Where external competence is implied, the scope of exclusive powers may change, as Community competence is exercised in new fields. In Opinion 1/94 the Court held that exclusive implied powers in the field of services might arise, either where legislation gives a specific competence to negotiate with third countries,[77] or where internal harmonisation is 'complete':

> The same [exclusive competence] applies, in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the *AETR* judgement if the Member States retained freedom to negotiate with non-member countries. That is not the case in all service sectors, however, as the Commission has itself acknowledged. It follows that competence to conclude GATS is shared between the Community and the Member States.' [78]

The implication here is that the situation might change: either a new piece of secondary legislation would grant the Community (exclusive) competence to negotiate in a particular field, or the harmonisation may be 'completed'. The *AETR* principle is essentially dynamic.[79]

In contrast, the new Article 133(5) appears to preserve Member State competence to conclude agreements whatever actions are taken at Community level, internally or externally. The solution adopted is to require that Member State agreements 'comply with Community law and other relevant international agreements.' Instead of an expansion of exclusive competence, then, we have the preservation of shared competence, together with a rule designed to avoid conflict.

[76] Compare the position under the GATT following the transfer of CCP competence to the Community: Cases 22–24/72 *International Fruit Company* [1972] ECR 1219.

[77] See for example Art. 23 and 24 of Dir. 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions; OJ 2000 L 126/1.

[78] Opinion 1/94 at paras 96–98; see also paras 102–103 for similar reasoning in relation to TRIPS.

[79] Case 22/70 *Commission* v. *Council (AETR)* [1971] ECR 263. In addition, the new express legal bases for external action added to the EC Treaty by the TEU, with respect to exchange rate policy, environmental policy and development cooperation, were accompanied by a Declaration that these provisions 'do not affect the principles resulting from the judgement handed down by the Court of Justice in the *AETR* case'; see Declaration 10 attached to the TEU. No equivalent Declaration is attached to the Treaty of Nice in relation to the 'new CCP'.

In practice, the change may be more apparent than real. On the one hand, even where legislation is adopted at Community level, minimum harmonisation techniques may leave scope for Member States to adopt external commitments which do not 'affect' the common rules.[80] On the other, compliance with Community law will require that the Member States do not compromise, by means of the unilateral exercise of their treaty-making competence, existing Community legislation or the functioning of the single market. The existence of shared competence implies a constraint upon the exercise of national competence as far as is necessary to avoid undermining the Community interest. However ultimately this constraint is upon the exercise of Member State competence rather than its existence.[81] If the requirement to 'comply with Community law' is read as simply incorporating the *AETR* principle, so that the reserved competence of Member States is to be ever-reduced, as Community legislation encompasses additional aspects of the fields covered by Article 133(5), the result would be a denial of the clear wording of the Article, that 'the right of the Member States to maintain and conclude agreements' shall not be affected by the extension of Community competence. It is better to regard the obligation to respect Community law found in the new Article 133(5) EC as reflecting the obligation articulated many years previously by the Court in *Kramer* and based on Article 10 EC.[82] It is one aspect of what has become known as the duty of cooperation in cases of shared competence.[83]

C. Liberalisation

The incorporation of new fields, including services, within the scope of Article 133, impliedly subjects these areas of activity to the principle of liberalisation found in Article 131. It seems clear that this principle is one of the 'uniform principles' to which Article 133(1) refers. It is not, however, an absolute principle.[84] The Community does not, in Article 131, promise to liberalise unilaterally; effectively, it undertakes to engage in constructive negotiation. Article 131 establishes an objective rather than imposing a binding obligation:

> that provision [Article 131 EC] cannot be interpreted as prohibiting the Community from enacting any measure liable to affect trade with non-member countries . . . its objective of contributing to the progressive abolition of restrictions on international trade *cannot compel the institutions to liberalise imports from non-member countries* where to do so would be contrary to the interests of the Community.[85]

[80] Opinion 2/91 *Convention No 170 of the ILO concerning safety in the use of chemicals at work* [1993] ECR I–1061.

[81] The term 'comply with Community law' appeared as 'respect Community law' in earlier texts of the Nice Treaty.

[82] Joined Cases 3, 4 and 6–76 *Cornelis Kramer and others* [1976] ECR 1279, at paras 42–43.

[83] Opinion 1/94 at para 108.

[84] See further Cremona, above n 4.

[85] Case C–150/94 *UK* v. *Council (import quotas for toys from China)* [1998] ECR I–7235, at para 67 (emphasis added).

Nevertheless, the bringing of services (at any rate, services agreements) within Article 133 does imply that those agreements should aim to support liberalisation of trade in services. Although Article 133(5) only refers to the application of paragraphs 1–4 of that Article, the inclusion of trade in services within Article 133 EC implies at least the influence of the aims set out in Article 131. This is consistent both with the Treaty provisions on capital movements (Article 56 EC), and with Articles V and XIX of GATS. The very close links between capital movements, establishment and services, especially but not only in the financial services sector, suggest that the commitment to liberalization found in the Treaty in respect of capital will be extended to services more broadly.

D. Dynamism

The Nice amendment to Article 133 leaves the way open, both explicitly and impliedly, for further developments of the CCP. The decision to include aspects of external economic policy within the scope of that provision is based not on any inherent concept of a 'CCP' but rather on the desirability of specific procedures, reinforcing the 'open' nature of the CCP.[86] In so doing, it also challenges the passage in Opinion 1/94 in which the Court of Justice rejected the application of Article 133 to GATS 'Mode 4' services (supply of services through the presence of natural persons) on the ground that other chapters of the Treaty deal with the movement of natural persons. There is nothing in the new provision suggesting that Mode 4 services are excluded. Neither is the existence of Treaty chapters on services, capital and establishment a hindrance to the new explicit external competences in Article 133. On the other hand, although it is getting close, Article 133 has not yet become the 'external face' of the internal market; the amendment is too specific to allow for such a contention, and it excludes autonomous measures relating to external trade in services and intellectual property.

As with the existing Article 133(5), the legislature may decide to extend the CCP further. The new Article 133(7) allows the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to 'extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property insofar as they are not covered by paragraph 5.' Thus the dynamic character of the CCP asserted by the Court in *Opinion 1/78* is kept within the control of the Council rather than the Court, and is limited to intellectual property. It is odd that this trade provision may thus be used to cover aspects of intellectual property which are by definition not 'commercial' or 'trade related', but not (for example) trade-related investment issues.

[86] See further Cremona, above n 1.

VI. Conclusion

Should we give a welcome, even if qualified, to the amendment of Article 133 envisaged by the Treaty of Nice? Commentators have been unenthusiastic: the most positive has probably been the Commission's faint praise that 'the progress made in improving the operation of EU's trade policy is modest'.[87] Krenzler and Pitschas call it a 'meagre result'[88] and Herrmann a missed opportunity to strengthen the international identity of the Union.[89] Pescatore has criticised the 'legal bricolage' of the Nice Treaty as a whole, and the changes to Article 133 in particular; in his view they will paralyse the Community's decisional processes and thus hamper an effective defence of the Community's trade interests.[90]

If the criterion for success is the need, identified by Piris, for 'clear, simple, transparent, effective legal rules'[91] then the amended Article can hardly be said to have succeeded. A degree of increased complexity may have been inevitable, in spite of the avowed aim of the IGC to simplify the Treaties, given that the Member States appear to have attempted to reflect as far as possible the existing position in respect of distribution of competence and preserve current decision-making practice. Still, the host of ambiguities that arise whenever an attempt is made really to analyse the legal outcome of the changes, is a surely avoidable result of hurried drafting and the patching together of different compromise texts. Many of these questions (what does 'trade in services' mean?) are central and not merely pseudo-problems or unimportant technicalities. One of the difficulties with the current position is the degree of uncertainty that still exists over Community competence in the fields of services and intellectual property. Although the new provisions remove some of the doubts, their lack of clarity means that their impact—what difference will they actually make to the scope of Community competence—is hard to answer precisely, and that must be a failure. Nevertheless, we should recognise that insofar as the new provisions reflect existing practice, they will probably work in practice, even if they do not actually improve the process.

One of the Commission's objectives in seeking an amendment of Article 133 was to extend qualified majority voting, and avoid the need for mixed agreements, at least over those areas currently covered by the WTO—especially that of services, in respect of which further agreements are likely to emerge from the GATS framework. It is difficult to predict whether QMV will indeed become the norm for services agreements but it seems unlikely: unless a services agreement is narrowly sectoral it is likely to cover a type of service either requiring

[87] See above n 23.
[88] Krenzler and Pitschas, above n 32 at 295.
[89] Herrmann, above n 33 at 28.
[90] Pescatore, P. 'Guest Editorial: Nice—Aftermath' (2001) 38 *CMLRev* 265.
[91] Legal Adviser to the IGC, above n 14.

unanimity under Article 133(5) or joint conclusion as a mixed agreement under paragraph 6, or both. Unanimity is likely to be required for many agreements incorporating intellectual property elements as a result of the far from complete character of internal Community legislation in this field.

For many commentators, the fundamental flaw in the approach adopted by the Treaty of Nice is its acceptance and reflection of the outcome of Opinion 1/94. This assumes a negative view of that Opinion's key conclusion, shared competence in the field of GATS and TRIPS. The new Article not only preserves the existing position, it incorporates it into the commercial policy provision which has long been an exemplar of qualified majority voting and exclusivity. To import unanimity into the CCP risks the decisional paralysis feared by Pescatore. To import shared competence threatens the uniformity of the CCP that forms the rationale for the original development of the doctrine of exclusivity. The two are also linked: as the WTO advances into new areas, debating issues of fundamental concern to Member States, even where joint participation is not actually required the Member States may require consensus in agreeing a common negotiating position as a precondition of participation by the Community acting alone. To that extent, given the retention of shared competence, the problems that required attention will remain and it is a pity that the proposed Protocol on participation in the WTO did not survive in some form. However it is not so clear that shared competence *per se* is a retrograde step for the CCP. Doubtless, the entrenchment of non-exclusive competence in relation to services and intellectual property will require a re-thinking of what 'uniform principles' as the basis of the CCP might mean. A shared conception of the common interest may be more important in future trade relations than formally uniform rules. It is not enough to assert that the Union should speak with not only a single voice but a single mouth as Lamy has recently argued, meaning of course the Commission.[92] There is, I think, a more substantial threat to the development of the CCP than the undermining of exclusivity: the threat of 'deconstruction', of a lack of coherence arising out the formidable complexity of the revised Treaty provisions, the number of different permutations and procedures applicable to different aspects of commercial policy. The arguments that used to take place as to whether a particular agreement fell entirely within the CCP (with its competence and voting consequences) will not disappear but will instead become arguments about the proper scope of and relationship between the different provisions of Article 133 itself. Against this background, we identify the increasing complexity of both internal and external policy agendas and the interface between different aspects of policy. Already it is clear that Article 133 (revised or not) will not serve as a legal base for many trade-related negotiations and agreements, although the inter-dependency of different policy

[92] Pascal Lamy, EC Trade Commissioner, 'Europe's Role in Global Governance: The Way Ahead', speech at Humboldt University, Berlin, 6 May 2002; available on http://europa.eu.int/comm/trade/index_en.htm

objectives is incontrovertible.[93] The challenge—a formidable one—for the next decade will be to shape an external policy that adequately reflects and balances the different interests, legal bases and procedures involved (trade liberalization, environmental protection, competition, sustainable development, conditionality, political stability and security, inter alia) at the same time as maintaining coherence within an enlarged and more diverse Union. In this process the task of the Treaty text is to establish a workable framework for action as much as to provide concrete answers; procedural incoherence will tend to produce substantive incoherence. From this perspective, the addition of an explicit reference to internal Community policies and rules in Article 133(3) might be the most significant of the Article's amendments. Taken as a whole, however, the amended version of Article 133 does little to assist in clarifying these questions, and it is this constitutional failure which is potentially most damaging.

APPENDIX

Article 133 (as Amended by the Treaty of Nice)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.

   The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations.

   The relevant provisions of Article 300 shall apply.
4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

[93] See Opinion 2/2000 (*on the Cartagena Protocol on biosafety*) 6 December 2001 on the trade and environment interface. It has already been seen that transport services have, and will retain a separate legal base, as does the external aspect of competition policy.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

   By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

   The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

   This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.
6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

   In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

   The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.
7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property insofar as they are not covered by paragraph 5.

6

FREE MOVEMENT: THE WORKSEEKER AS CITIZEN

*Michael Dougan**

I. Introduction

This article is concerned with the legal position of Community nationals who move to another Member State in search of employment. Section II will summarise the traditional legal status of the workseeker viewed as an economic factor of production. Section III will explore the new legal status of the workseeker viewed as a citizen of the European Union. Section IV will offer some brief comments on the Commission's 2001 proposal for an umbrella directive on free movement for Union citizens, and its implications for the migrant workseeker. It will be argued, through this analysis, that the institution of Union citizenship, so often criticised for its 'us and them' mentality in the treatment of third country nationals, is equally characterised by a 'haves and have-nots' approach to its own members—thus presenting a model which (albeit for perhaps understandable pragmatic reasons) is not necessarily in the best interests of maximising economic efficiency within the Common Market, places limits on certain of the political aspirations vested in the process of European integration, and questions the depth or at least the methodology of the Community's stated commitment to attaining high levels of social protection.

II. The Workseeker as Economic Factor of Production

A. Rights to Equal Treatment and Residency Under Article 39 EC

Article 39 EC makes no express reference to the situation of those who move between Member States in search of employment.[1] Dicta in *Royer* and *Levin*

* Downing College, Cambridge. Many thanks to Eleanor Spaventa for her valuable comments on an earlier draft.

[1] Art. 7 Dir. 68/360, OJ 1968 L 257/13 makes limited provision for individuals who become unemployed within the host state, then begin to search for work. The Council, when adopting

suggested that the Court nevertheless considered workseekers to fall within the personal scope of the Treaty;[2] and the judgment in *Antonissen* confirmed that the effectiveness of Article 39 would be undermined if Community nationals could enter other Member States only to take up prearranged employment.[3] However, the Court has also held that the rights of workseekers under Article 39 are more limited than those of fully-fledged workers.

First, the Court established in *Antonissen* that workseekers enjoy a right to enter and reside in the host state for a reasonable time, within which to apprise themselves of offers of employment corresponding to their occupational qualifications, and to take the necessary steps in order to be engaged. In the absence of Community legislation, the Member States remain competent to determine the duration of this initial period of residence—which might be three or even six months,[4] but cannot in any event be so short as to jeopardise the workseeker's prospects of finding employment.[5] However, even after that reasonable time has expired, the individual is entitled to remain in the host state if he/she is still seeking employment, and has genuine chances of being engaged.[6] Otherwise, the claimant's right to residence elapses, and the host state may remove him/her from the national territory without relying on the express Treaty derogations concerning expulsion on grounds of public policy, security or health.[7] The fact that the workseeker's precise legal status was not explicitly provided for under the Treaty also generated uncertainty, for example: as to whether he/she was obliged or even entitled to apply for a residence permit under Directive 68/360;[8] and as regards the application of Regulation 1612/68 insofar as it confers rights upon certain family members to enter and reside with the claimant in the host state.[9]

Secondly, the Court established in *Lebon* that workseekers are entitled to equal treatment within the host state as regards access to employment, and thus to challenge (for example) directly discriminatory limitations on the hiring of Community nationals,[10] or indirectly discriminatory language requirements applied in a manner disproportionate to their underlying objective.[11] However,

Dir. 68/360, understood that workseekers should in practice be granted limited permission to reside in other Member States: ter Heide, H. 'The Free Movement of Workers in the Final Phase' (1968–1969) 6 *CMLRev* 466, 476.

[2] Case 48/75 *Royer* [1976] ECR 497, para 31; Case 53/81 *Levin* [1982] ECR 1035, para 17.

[3] Case C–292/89 *Antonissen* [1991] ECR I–745.

[4] Case C–344/95 *Commission* v. *Belgium* [1997] ECR I–1035; Case C–292/89 *Antonissen* [1991] ECR I–745.

[5] E.g. Case C–171/95 *Tetik* [1997] ECR I–341.

[6] Case C–292/89 *Antonissen* [1991] ECR I–745.

[7] E.g. Case C–171/91 *Tsiotras* [1993] ECR I–2925.

[8] Art. 4 Dir. 68/360. Cf. Commission proposal, COM(98) 394 Final.

[9] Art. 10 Reg. 1612/68, OJ 1968 L 257/2. Cp. Commission proposal, COM(98) 394 Final.

[10] E.g. Case 167/73 *Commission* v. *France* [1974] ECR 359.

[11] E.g. Case 379/87 *Groener* [1989] ECR 3967; Case C–281/98 *Angonese* [2000] ECR I–4139.

workseekers are not entitled to rely on Article 7(2) Regulation 1612/68 to claim equal treatment with own nationals as regards social and tax advantages.[12] Article 7(2) has been construed by the Court to include all advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact that they reside on the national territory.[13] This definition covers a vast array of benefits—from discretionary childbirth loans and rights of residence for unmarried partners,[14] to discount railcards and the language used in court proceedings.[15] As such, Article 7(2) has played a crucial role in facilitating the integration of migrant workers and their families into the social fabric of the host state. The Court's justification for excluding workseekers from the personal scope of Article 7(2) was essentially textual: this provision confers rights only upon 'workers', i.e. those already engaged in effective and genuine employment.[16] Yet the Court's approach was clearly inspired by more fundamental policy considerations. The concept of social advantages has also been construed to cover social protection measures: for example, disability allowances;[17] guaranteed old age incomes;[18] and minimum subsistence allowances.[19] By preventing the workseeker from invoking Article 7(2) as regards social advantages in general and social protection measures in particular, the Court was demonstrating its sensitivity to Member State concerns that the Treaty provisions might stimulate free movement in search not so much of employment as of the most generous welfare benefits.[20]

More recent case law has cast doubts over the proper status of the rule in *Lebon*, even as it applies to workseekers within the context of the economic rights to free movement available under Article 39. In particular, the Court in *Sala* seemed to consider that workseekers should now be treated as equivalent to fully-fledged workers, at least for the purpose of relying on Article 7(2) Regulation 1612/68 as regards equal access to social security benefits such as

[12] Case 316/85 *Lebon* [1987] ECR 2811.

[13] E.g. Case 207/78 *Even* [1979] ECR 2019.

[14] Case 65/81 *Reina* [1982] ECR 33; Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283.

[15] Case 32/75 *Cristini* [1975] ECR 1085; Case 137/84 *Mutsch* [1985] ECR 2681.

[16] Also: AG Lenz in Case 316/85 *Lebon* [1987] ECR 2811, paras 48 to 51 Opinion.

[17] E.g. Case 63/76 *Inzirillo* [1976] ECR 2057; Case C–310/91 *Schmid* [1993] ECR I–3011.

[18] E.g. Case 261/83 *Castelli* [1984] ECR 3199; Case 157/84 *Frascogna* [1985] ECR 1739.

[19] Case 249/83 *Hoeckx* [1985] ECR 973; Case 122/84 *Scrivner and Cole* [1985] ECR 1027. Other examples: Case C–111/91 *Commission* v. *Luxembourg* [1993] ECR I–817 (childbirth/maternity allowances); Case C–185/96 *Commission* v. *Greece* [1998] ECR I–6601 (large family allowances); Case C–237/94 *O'Flynn* [1996] ECR I–2617 (funeral expenses); Case 94/84 *Deak* [1985] ECR 1873 and Case C–278/94 *Commission* v. *Belgium* [1996] ECR I–4307 (special unemployment benefits for young people).

[20] E.g. Commission proposal for a directive on a right of residence for nationals of Member States in the territory of another Member State, COM(1980) 358 Final, 3; Reports from the *ad hoc* Committee on 'A People's Europe' EC Bull Supp 7/85, 14.

non-contributory child-raising allowances.[21] However, it seems that the Court had in mind the specific situation of workseekers who have already engaged in effective and genuine employment within the host state. Past case law had established that, although termination of the employment relationship will generally mean that the claimant loses his/her status as 'worker', such individuals may continue to enjoy certain benefits under Article 7(2).[22] *Sala* may thus represent a more nuanced approach to (rather than any direct overruling of) the position in *Lebon*, i.e. whereby individuals who leave their current employment within the host state instead to become workseekers remain within the personal scope of both Articles 39 EC and 7(2) Regulation 1612/68. Certainly, Advocate General Saggio in the subsequent case of *Swaddling* accepted that *Lebon* remains good law insofar as it distinguishes between the protection offered to fully-fledged workers, and the exclusion of Community nationals entering the host state in search of fresh employment.[23] Pending further clarification from the Court, it therefore seems safer to assume that *Lebon* continues to be of relevance at least to new workseekers.

B. Rights Qua Insured Person Under Regulation 1408/71

For the workseeker exercising his or her right to free movement under Article 39 EC, without personal resources and in the apparent absence of any right to equal treatment as regards social advantages under Article 7(2) Regulation 1612/68, the primary source of financial support is to rely on Regulation 1408/71 qua insured person, to claim limited rights to equal treatment, aggregation and exportation as regards social security benefits.[24]

However, the rights conferred by Regulation 1408/71 have important limitations, especially for the migrant workseeker. For example, the claimant must fall within the personal scope of the Regulation—thus excluding individuals who have not been insured under a national scheme for the employed, self-employed or students;[25] and in particular, many individuals who have never

[21] Case C–85/96 *María Martínez Sala* [1998] ECR I–2691, paras 32 and 58. Also: Case C–389/99 *Rundgren* (Judgment of 10 May 2001), para 32; Case C–43/99 *Leclere* (Judgment of 31 May 2001), para 55. Further: O'Leary, S. 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 *ELRev* 68.

[22] E.g. Case 39/86 *Lair* [1988] ECR 3161; Case C–57/96 *Meints* [1997] ECR I–6689.

[23] Case C–90/97 *Swaddling* [1999] ECR I–1075, para 24 Opinion. Cf. Case C–278/94 *Commission* v. *Belgium* [1996] ECR I–4307; English Court of Appeal in *R* v. *Secretary of State for Social Security, ex parte Sarwar and Getachew* [1997] 3 CMLR 648; Hervey, T. *European Social Law and Policy* (London, Longman, 1998) Ch. 5.

[24] Last consolidated text published at OJ 1997 L 28/1; more recent consolidated text available at www.europa.eu.int/eur-lex/en/consleg/index1.html. Further: White, R. *EC Social Security Law* (London, Longman, 1999); Pennings, F. *Introduction to European Social Security Law* (The Hague, Kluwer, 2001).

[25] E.g. Case T–66/95 *Kuchlenz-Winter* v. *Commission* [1997] ECR II–637; Case C–411/98 *Ferlini* [2000] ECR I–8081.

worked before and migrate in search of their first employment.[26] In addition, the situation must fall within the material scope of the Regulation—thus excluding social security benefits falling outside the specified contingencies;[27] and also social assistance payments granted on a discretionary basis.[28]

The Regulation lays down particularly strict rules on unemployment benefit (such as contribution-based Jobseekers Allowance in the United Kingdom).[29] First, the aggregation of periods of employment or insurance completed across the Member States, for the purposes of calculating entitlement to unemployment benefit, is only possible within the Member State where the claimant became unemployed—thus preventing individuals from becoming unemployed in Member State A, then going to seek work in and claim benefits directly from Member State B.[30] The latter is entitled to adopt more favourable aggregation rules than those contained in Regulation 1408/71, provided they comply with the basic Treaty principles of free movement and non-discrimination.[31] Secondly, where the claimant does qualify for unemployment benefit in Member State A, he or she is entitled to export those benefits to Member State B—but only for a maximum period of three months. There are strict procedural requirements for exercising this limited right to financial support whilst searching for work in another Member State.[32] Moreover, if the workseeker fails to return home after the three month period of exported unemployment benefit has expired, he or she will forfeit all entitlement to further financial support within Member State A.[33] This time, the latter may adopt more favourable standards than those contained in Regulation 1408/71 only in exceptional circumstances, for example, where the delay was attributable to illness.[34] In any case, protected family members (whether of a fully-fledged worker, or accompanying the migrant workseeker) are not entitled to export unemployment benefit to support their own search for work within the host state—a restriction which imposes particular financial hardship upon families including third country nationals.[35]

[26] E.g. Case 66/77 *Kuyken* [1977] ECR 2311; though see now Reg. 307/99, OJ 1999 L 38/1.

[27] Art. 4(1). E.g. Case 249/83 *Hoeckx* [1985] ECR 973.

[28] Art. 4(4); Case 79/76 *Fossi* [1977] ECR 667. Cf. hybrid benefits as recognised, e.g. in Case 1/72 *Frilli* [1972] ECR 457.

[29] Further: Wikeley, N. 'Migrant Workers and Unemployment Benefit in the European Community' [1988] *JSWL* 300.

[30] Art. 67. E.g. Case C–62/91 *Gray* [1992] ECR I–2737. Note: exceptions under Art. 71, e.g. Case 76/76 *Di Paolo* [1977] ECR 315; Case C–102/91 *Knoch* [1992] ECR I–4341.

[31] E.g. Case C–277/99 *Kaske* (Judgment of 5 February 2002).

[32] Art. 69. E.g. Case C–215/00 *Rydergård* (Judgment of 21 February 2002). Cf. Case 27/75 *Bonaffini* [1975] ECR 971.

[33] E.g. Case 41/79 *Testa* [1980] ECR 1979.

[34] E.g. Case 139/78 *Coccioli* [1979] ECR 991.

[35] E.g. Case 40/76 *Kermaschek* [1976] ECR 1669; Case C–308/93 *Cabanis-Issarte* [1996] ECR I–2097; Case C–189/00 *Ruhr* (Judgment of 25 October 2001).

Regulation 1408/71 also contains particular provisions on special non-contributory benefits, including those intended to provide supplementary, substitute or ancillary cover for the unemployed (such as Income Support and income-based Jobseekers Allowance in the United Kingdom).[36] On the one hand, such benefits cannot be exported by Community nationals from Member State A so as to support their search for work in Member State B, even for the limited periods and under the restrictive conditions applicable to unemployment benefit-proper.[37] On the other hand, the migrant workseeker might in principle claim equal access to special non-contributory benefits within Member State B itself, qua insured person—avoiding the restrictions imposed by *Lebon* on access to social advantages for workers under Article 7(2) Regulation 1612/68, and notwithstanding the limits applicable to claiming unemployment benefit-proper directly from the host state under Regulation 1408/71.[38] However, the judgment in *Swaddling* suggests that the migrant workseeker will find it difficult in practice to fulfil the requirement of habitual residence which Member States are permitted to impose upon access to special non-contributory benefits (unless the claimant is an own national returning to find employment in his or her state of origin after having exercised a Treaty right to live abroad).[39]

C. *Critical Assessment of the Workseeker's Position*

This system of free movement and residency, equal treatment and financial support for migrant workseekers suffers from numerous flaws.

For example, Article 39 EC has been held to cover part-time workers, who might only perform limited and intermittent services;[40] and to confer upon such workers the right to full equal treatment as regards social advantages in general, and social protection measures in particular.[41] This poses problems of coherency as regards the treatment of workseekers: the small difference of a few hours' economic activity per week while searching for further employment might make the big difference of a secure right to residency and valuable rights to financial support within the host state.[42]

[36] Art. 4(2a).

[37] Art. 10a. Such benefits must be listed in Annex IIa, though this is not in itself conclusive of their proper classification: Case C–215/99 *Jauch* (Judgment of 8 March 2001); Case C–43/99 *Leclere* (Judgment of 31 May 2001).

[38] Art. 3.

[39] Case C–90/97 *Swaddling* [1999] ECR I–1075.

[40] E.g. Case 53/81 *Levin* [1982] ECR 1035; Case 66/85 *Lawrie-Blum* [1986] ECR 2121. Provided the claimant is performing effective and genuine economic services, e.g. Case 196/87 *Steymann* [1988] ECR 6159; Case 344/87 *Bettray* [1989] ECR 1621; Case C–357/89 *Raulin* [1992] ECR I–1027; Case C–3/90 *Bernini* [1992] ECR I–1071.

[41] Case 139/85 Kempf [1986] ECR 1741.

[42] Art. 49 EC service providers / recipients are also entitled to equal treatment within the host state as regards social advantages chargeable to public funds, e.g. Case 63/86 *Commission* v. *Italy*

Another problem is that the Court's blanket refusal to allow workseekers to rely on Article 7(2) Regulation 1612/68 might seem a disproportionate solution to the alleged problem of benefit migration. The stance adopted in *Lebon* appeared to exclude the workseeker not only from access to those subsistence benefits which provide the focus for Member State concerns, but also from the right to seek equal treatment as regards less sensitive matters such as discount railcards, the language used in court proceedings, the right to criminal injuries compensation, and free entry to museums.[43]

Furthermore, there is a clear mismatch between the duration of the right to free movement and residence under Article 39 as interpreted by the Court in *Antonissen* (which might exceed six months); and the duration of the right to export unemployment benefit under Regulation 1408/71 (which lasts only three months, and beyond which any right to further financial support within the state of origin also terminates). The Court in *Antonissen* refused to impose any direct limit on the freedom to reside for the purposes of finding work, by reference to the more restrictive provisions on exporting unemployment benefit. But surely this mismatch between the two concepts will often lead indirectly to the same result, detracting in practice from the theoretical value of the workseeker's supposed rights under Article 39.

Finally, it is possible to query the underlying economic wisdom of the limited framework of financial support and social solidarity established under Community law for migrant workseekers. For example, Clasen has observed that the provision of assistance to the unemployed helps maintain aggregate consumer demand on the market, and enables individuals to search for vacancies commensurate with their abilities and qualifications. These concerns can be particularly important during a period of labour force restructuring at the national level.[44] They would appear just as apposite within a Common Market striving for the efficient allocation of human resources across the previously compartmentalised Member States; and even more so within a European economy suffering from prolonged high levels of unemployment in which the individual may require more time to become engaged in appropriate work.[45] In such

[1988] ECR 29; Case 186/87 *Cowan* v. *Trésor public* [1989] ECR 195. But it seems unlikely that workseekers could rely on Art. 49 qua service recipients to claim equal access to social benefits, since their residence is indefinite / possibly permanent; cf. Case C–70/95 *Sodemare* [1997] ECR I–3395.

[43] Case 32/75 *Cristini* [1975] ECR 1085; Case 137/84 *Mutsch* [1985] ECR 2681; Case 186/87 *Cowan* v. *Trésor public* [1989] ECR 195; Case C–45/93 *Commission* v. *Spain* [1994] ECR I–911 (respectively).

[44] Clasen, J. 'Beyond Social Security: the Economic Value of Giving Money to Unemployed People' (1999) 1 *EJSS* 151.

[45] Cf. Watson, P. 'Free movement of workers and social security' (1981) 6 *ELRev* 290. Also: Art. 2 EC, i.e. the Community's tasks include promoting 'a high level of employment'. In addition: Title VIII on Employment, particularly Art. 127(2) EC, i.e. the objective of a high level of employment

circumstances, facilitating the provision of limited income transfers might represent a useful socio-legal framework for achieving some more satisfactory equilibrium between the supply and demand sides of the supranational labour market.

Moreover, Barnard, Deakin and Hobbs have drawn attention to the importance of social provision as a precondition for the individual's meaningful participation on the market—thus stressing the economic benefits (such as higher productivity and increased efficiency) to be gained from a social policy (including rights to protection against discrimination and to fair treatment at work) which gives real substance to the otherwise often formal freedom to engage in gainful employment.[46] Certainly, the Community institutions themselves now advocate an active and dynamic programme of social protection which encourages participation in the employment market, and thus forms an integral means of enhancing production and promoting competitiveness.[47] Similar reasoning might extend to measures aimed at maximising the capabilities of the migrant Community national actively seeking to engage in gainful economic activity, by meeting his / her subsistence needs and satisfying other reasonable social expectations within the host state.

Viewed from such perspectives, the Community's traditional policy of accommodating Member State concerns about the potential costs of benefit tourism—which results in the workseeker's exclusion from equal treatment as regards social advantages under Article 7(2) Regulation 1612/68, and the alternative provision of only limited rights to financial support under Regulation 1408/71—might well come at the cost of inhibiting the full integration of the Single Market, and undermining the long term competitiveness of the European economy.

III. The Workseeker as Citizen of the European Union

The workseeker's position under Article 39 EC emerges as at best modest, in several respects uncertain, and at worst simply unsatisfactory. Has the situation been significantly affected by the introduction of Union citizenship?

shall be taken into consideration in the formulation and implementation of Community policies and activities. Further: Commission, Action Plan for Skills and Mobility, COM(2002) 72.

[46] Barnard, C. Deakin, S. and Hobbs, R. 'Capabilities and Rights: an Emerging Agenda for Social Policy?' (2001) 32 *IRJ* 464.

[47] E.g. Presidency Conclusions of the Lisbon European Council (23–24 March 2000), and the Nice European Council (7–9 December 2000). Also: Commission, Social Policy Agenda, COM (2000) 379.

A. Development of Free Movement Rights for Citizens

The Court's liberal construction of the original Treaty provisions opened the potential benefits of Community law to individuals whose exercise of the right to free movement does not necessarily play any significant role in promoting market integration or economic prosperity. For example, the inclusion within Article 39 of those earning below the legal minimum wage and dependent on the financial assistance of the host state,[48] and the recognition of residency for students exercising their right of equal access to vocational training across the Community,[49] might seem to surpass any conception of free movement which is underpinned solely by neo-liberal economic theory.

Other institutions have also been working to promote a more socially-orientated approach to free movement within the Community. In particular, the Council adopted three directives extending residency rights beyond the economically active, so as to benefit other categories of Community national: Directive 93/96 on students, Directive 90/365 on the retired, and Directive 90/364 covering anyone unable to rely on another legal basis under the Treaty.[50] But crucially, the preamble to each of these three directives asserts that their beneficiaries should not become an unreasonable burden on the public finances of the host state. To this end, each measure imposes a requirement of financial independence: in the case of Directives 90/365 and 90/364, the claimant must have sufficient resources to avoid becoming a burden on the state's social assistance; in the case of Directive 93/96, the student need only assure the national authorities that he or she has sufficient resources to avoid becoming a burden on the state; under all three measures, the claimant must in any event have sickness insurance in respect of all risks within the state. Enjoyment of the right to residency is conditional upon continuing to fulfil these criteria; but may also be terminated by reference to public policy, security or health concerns.

This process of detaching the principle of free movement from its purely economic rationale and elevating it to the status of an autonomous social right culminated in the introduction of Union citizenship by the Maastricht Treaty.[51] Article 18(1) EC proclaims that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to

[48] Case 139/85 *Kempf* [1986] ECR 1741.

[49] Case C–357/89 *Raulin* [1992] ECR I–1027.

[50] Dir. 93/96, OJ 1993 L 317/59; Dir. 90/365, OJ 1990 L 180/28; Dir. 90/364, OJ 1990 L 180/26.

[51] Extensive studies: Hall, S. *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht, Martinus Nijhoff, 1995); O'Leary, S. *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Dordrecht, Kluwer Law, 1996). More generally: Closa, C. 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 *CMLRev* 1137; O'Keeffe, D. 'Union Citizenship' in O'Keeffe, D. and Twomey, P. (eds.) *Legal Issues of the Maastricht Treaty* (Chichester, Wiley, 1994); d'Oliveira, H.U.J. 'European Citizenship: Its Meaning, Its Potential' in Dehousse, R. (ed.) *Europe After Maastricht: An Ever Closer Union?* (Munich, Law Books in Europe, 1994).

the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect. Article 18(2) EC then provides legislative competence for the Community institutions to adopt measures to facilitate exercise of the citizen's right to free movement.[52] Moreover, Article 17(2) EC states that Union citizens shall enjoy the other rights conferred by the Treaty—including the general principle contained in Article 12 EC of non-discrimination on grounds of nationality, which requires 'perfect equality of treatment' between Community and own nationals in all matters falling within the scope of the Treaty.[53]

B. Free Movement and Equal Treatment for Union Citizens: Some Underlying Policy Dilemmas

When Community nationals were viewed simply as economic factors of production, there was some defensible rationale for drawing distinctions between rights to free movement and equal treatment based on their contribution to market integration and economic prosperity. In fact, we have noted that the workseeker's role qua market actor does not preclude, and in some respects supports, the provision of higher standards of social protection within the host state than those currently available under the auspices of Article 39 EC. Now that the workseeker is viewed as a Union citizen, there are grounds to doubt yet further whether such distinctions can still be supported, and indeed for developing an autonomous justification for full rights to free movement and welfare support.

1. 'Social Citizenship' and Legal Emancipation of the Workseeker

Many commentators argue that provisions such as Article 39 EC prohibiting discrimination between foreign and domestic workers, or Article 141 EC prohibiting pay discrimination between men and women, should be seen as specific manifestations of a more general principle of equal treatment—which represents a fundamental value of the Community legal order, not only as a matter of Common Market economic philosophy but also as a matter of moral and political necessity.[54] For example, the Court has proclaimed that Directive 76/207 on equal treatment for men and women as regards access to and

[52] Also: Arts. 45(1) and 52(2) EU Charter of Fundamental Rights, OJ 2000 C 364/1.

[53] Case C–43/95 *Data Delecta* [1996] ECR I–4661, para 16.

[54] Further: Lenaerts, K. 'L'Égalité de Traitement en Droit Communautaire: Un Principe Unique Aux Apparences Multiples' [1991] *CDE* 3; de Búrca, G. 'The Role of Equality in European Community Law' in Dashwood, A. and O'Leary, S. (eds.) *The Principle of Equal Treatment in EC Law* (London, Sweet & Maxwell, 1997); More, G. 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in Craig, P. and de Búrca, G. (eds.) *The Evolution of EU Law* (Oxford, OUP, 1999).

conditions of employment 'is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'.[55]

Citizenship expands and strengthens the rhetorical vocabulary available to fight against discrimination in the legal framework of rights and obligations provided for individuals under Community law. For example, Advocate General La Pergola in *Stöber and Pereira* maintained that the ultimate purpose of Part Two of the Treaty is 'to bring about increasing equality between citizens of the Union, irrespective of their nationality'.[56] Similarly, Advocate General Léger in *Boukhalfa* observed that

> [i]f all the conclusions inherent in [the concept of citizenship] are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State.[57]

This approach is reinforced by political arguments based on the underlying nature and purpose of Union citizenship: for example, that citizenship is an essential component in building a greater sense of supranational identity, such as seems essential if the Union is to be propelled further down the path of closer European integration; or at least that citizenship is a useful tool in enhancing the democratic legitimacy and popular accountability of the Union's existing institutional framework, such as seems appropriate within the complex European experiment in multi-level governance.[58] For many, these political ambitions imply the emergence of a more inclusive model of 'social citizenship', i.e. whereby the Union furnishes rights not only to those individuals who are able and willing to participate in the objective of economic integration (actively as workers, passively as consumers); but also to those citizens whose relationship to the process of market-building is more tenuous, yet for whom membership of the wider community of itself generates certain expectations of social solidarity and welfare provision.[59]

[55] Case C–13/94 *P* v. *S and Cornwall County Council* [1996] ECR I–2143, para 18. Also: AG Elmer in Case C–249/96 *Grant* v. *South West Trains* [1998] ECR I–621, para 42 Opinion. Cp. Cases C–270–271/97 *Sievers* [2000] ECR I–929.

[56] Cases C–4–5/95 *Stöber and Pereira* [1997] ECR I–511, para 50 Opinion.

[57] Case C–214/94 *Boukhalfa* [1996] ECR I–2253, para 63 Opinion. Also: AG Jacobs in Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.

[58] Further: Preuß, U. 'Problems of a Concept of European Citizenship' (1995) 1 *ELJ* 267; Wiener, A. and della Sala, V. 'Constitution-Making and Citizenship Practice: Bridging the Democracy Gap in the EU?' (1997) 35 *JCMS* 595; Shaw, J. 'The Interpretation of European Union Citizenship' (1998) 61 *MLR* 293. Cf. Commission, European Governance: A White Paper, COM(2001) 428 Final.

[59] Further: Everson, M. 'The Legacy of the Market Citizen' in Shaw, J. and More, G. (eds.) *New Legal Dynamics of European Union* (Oxford, Clarendon, 1995).

Against this background, one can readily appreciate the argument that Article 18 EC should create an independent and directly effective right to free movement for all citizens—without the need to perform some effective and genuine economic activity; and without the need to prove even financial independence (thus rendering redundant the conditions imposed by the three residency directives concerning sufficient resources and sickness insurance).[60] Such an expansive interpretation of Article 18 bears clear relation to wider debates about the evolving character and ambitions of the European integration project: for example, Advocate General Ruiz-Jarabo Colomer in *Shingara* argued that the creation of Union citizenship represented a considerable qualitative step forward in that it separated free movement from its functional role in the attainment of the Internal Market, and raised it to the level of a genuinely independent right inherent in the political status of citizens of the Union.[61] According to this analysis, the workseeker's right to residence should improve dramatically as a result of the introduction of Union citizenship, overtaking the limited rights available under Article 39 EC (as interpreted in *Antonissen*).

When it comes to welfare provision, Article 2 EC states that the Community shall have the task, *inter alia*, of promoting a high level of social protection, and raising the standard of living and quality of life throughout the Community.[62] This objective finds resonance in the Nice Charter, which voices the aspiration that everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages; and that to combat social exclusion and poverty, the Union recognises the right to social assistance so as to ensure a decent existence for all those who lack sufficient resources.[63]

However, the Treaty itself places inherent limits on attaining the strong levels of equal treatment argued for by the Advocates General/welfare competence envisaged by any 'social citizenship' agenda. For example, as regards flanking policies like education and health (insofar as they do not fall incidentally within a core competence such as the Internal Market), the Community is limited to the adoption of incentive measures and barred from adopting harmonising legislation.[64] Moreover, as regards sectors such as consumers' and workers' rights, such Community regulation as does exist is usually characterised by differentiated rather than uniform standards of protection for

[60] E.g. O'Keeffe, D. and Horspool, M. 'European Citizenship and the Free Movement of Persons' (1996) XXXI *The Irish Jurist* 145.

[61] Cases C–65 and 111/95 *Shingara* [1997] ECR I–3343, para 34 Opinion. Also: AG Cosmas in Case C–378/97 *Wijsenbeek* [1999] ECR I–6207.

[62] Cp. Art. 136 EC (proper social protection and combating exclusion).

[63] Art. 34 Charter of Fundamental Rights. The full extent of these rights is determined by reference to Community and national law.

[64] Arts. 149(4) and 152(4) EC. Note: Case C–376/98 *Germany* v. *Parliament and Council* [2000] ECR I–8419.

individuals.[65] More specifically, Community policy towards social security measures has traditionally been dominated by the coordination rather than approximation of the national legal orders, leaving in place significant variations between the rights of persons working or residing in different Member States;[66] albeit coupled with ad hoc supervision to ensure that the Member States do not erect unjustified barriers to free movement within their welfare systems.[67] Despite academic calls for more radical intervention (for example: to equalise levels of social security contributions and benefits across the Member States; or even to confer upon the Community a direct competence to raise and dispense welfare funds),[68] Treaty action in the field of social protection now focuses on soft-law measures which encourage convergence around basic common values, facilitate the exchange of information about best practice, and stress the benefits of modernisation to ensure the long term viability of the European social model.[69] Article 137 EC does provide an autonomous legal basis for the Community to adopt directives in the field of social policy, including (by unanimity in Council) social security and other forms of social protection for workers. However, the Treaty of Nice will amend Article 137 so as to exclude the adoption of harmonising measures as regards combating social exclusion and modernising social protection for citizens other than workers; and to require that, in any case, Community action in the social sphere should not affect the rights of Member States to define the fundamental principles and maintain the basic financial equilibrium of their own social security systems. Nice will also amend Article 18, to provide that secondary legislation adopted by the Community to facilitate exercise by Union citizens of their right to free

[65] Further: Dougan, M. 'Minimum Harmonisation and the Internal Market' (2000) 37 *CMLRev* 853.

[66] E.g. Case 41/84 *Pinna* [1986] ECR 1. Consider also: Dir. 98/49 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, OJ 1998 L 209/46.

[67] E.g. Case C–302/98 *Sehrer* [2000] ECR I–4585; Case C–262/97 *Engelbrecht* [2000] ECR I–7321; Case C–157/99 *Peerbooms* (Judgment of 12 July 2001). Note also: legislation outlawing other forms of discrimination as regards social security, e.g. Dir. 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

[68] Further: Laske, C. 'The Impact of the Single European Market on Social Protection For Migrant Workers' (1993) 30 *CMLRev* 515.

[69] E.g. Council Rec. 92/441 on common criteria concerning sufficient resources and social assistance, OJ 1992 L 245/46; Council Rec. 92/442 on the convergence of objectives and policies in the area of social protection, OJ 1992 L 245/49. More recently and in light of Art. 137 EC (introduced at Amsterdam), e.g. Presidency Conclusions of the Lisbon European Council (23–24 March 2000), and of the Nice European Council (7–9 December 2000); Dec. 50/2002 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, OJ 2002 L 10/01. Nice would further facilitate such inter-state cooperation, e.g. by recognising under Art. 137 EC express Community competence to support and complement Member State activities as regards combating social exclusion and modernising social protection.

movement shall not apply to the domestic systems of social security or social protection.

The prospects for constructing a genuinely 'European welfare system' might therefore seem as remote as ever.[70] But there is an alternative means of promoting the Union's aspirations in the field of 'social citizenship'. Advocate General Jacobs has stressed the fundamental importance of the principle of non-discrimination on grounds of nationality as a means of fostering 'that sense of common identity and shared destiny without which the 'ever closer union among the peoples of Europe' . . . would be an empty slogan'.[71] Using the Article 12 EC principle of equal treatment on grounds of nationality, it would be possible to assimilate migrant citizens into the pre-existing social protection systems of the Member States—so that, even if levels of contribution and support still differ according to place of work or residence, every migrant citizen would nevertheless be entitled to receive the same basic levels of welfare assistance as own nationals. According to this argument, the workseeker's position should again improve dramatically as a result of the introduction of Union citizenship, this time overtaking the limited access to social advantages available under Article 7(2) Regulation 1612/68 (as interpreted in *Lebon*).

2. *Benefit Migration and Domestic Retaliation*

'Social citizenship' thus generates a powerful argument in favour of rights to free movement and equal treatment for all Union citizens. However, such a proposal also prompts certain concerns. For example, some commentators have queried the equity of expecting Member States to accommodate and support Community nationals who are not economically active or financially independent.[72] For present purposes, we are more interested in the fears expressed by other commentators that the (admittedly well-meaning) ideal of free movement and equal treatment for all Union citizens might provide the stimulus for a destructive race to the bottom as regards welfare provision across the Community.

There has been much academic debate in recent years about the operation of regulatory competition within the Internal Market.[73] The primary Treaty

[70] Further: Majone, G. 'The European Community Between Social Policy and Social Regulation' (1993) 31 *JCMS* 153; Leibfried, S. and Pierson, P. 'Social Policy: Left to Courts and Markets?' in Wallace, H. and Wallace, W. (eds.) *Policy-Making in the European Union* 4th edn. (Oxford, OUP, 2000); Faist, T. 'Social Citizenship in the European Union: Nested Membership' (2001) 39 *JCMS* 37.

[71] Cases C–92 and 326/92 *Phil Collins* [1993] ECR I–5145, para 11 Opinion. Also: Case C–274/96 *Bickel and Franz* [1998] ECR I–7637, paras 23 to 24 Opinion.

[72] E.g. Tomuschat, C. note on the *Sala* Case (above n 21) (2000) 37 *CMLRev* 449. Cf. Steiner, J. 'The Right to Welfare: Equality and Equity Under Community Law' (1985) 10 *ELRev* 21.

[73] Further: Reich, N. 'Competition Between Legal Orders: A New Paradigm of EC Law?' (1992) 29 *CMLRev* 861.

provisions on free movement guarantee the principle of open market access as between the Member States, but otherwise respect the competence of each Member State to enact its own (potentially divergent) standards of market regulation for the sake of social welfare protection. In theory, this results in a competition between legal orders: differences in regulatory standards as between the Member States encourage mobile economic factors to locate in the jurisdiction most favourable to their needs; Member States then compete to attract the maximum share of Community goods, persons, services and capital by adapting existing domestic legislation to meet the expressed/perceived needs of these market actors.

On the one hand, some commentators welcome this model of regulatory competition within the Common Market: before, states were permitted to operate (in effect) as regulatory monopolies, manufacturing inefficient legal products which failed to correspond to the true needs of their consumers; now, the principles of free movement guarantee that the regulatory choices made by each Member State remain mutually exposed to the discipline of market forces.[74] On the other hand, it has been pointed out that the medium and large businesses best placed to exploit the Treaty's free movement principles are most likely to relocate in Member States with lower welfare legislation and thus reduced compliance costs. Such 'social dumping' in turn raises the spectre of a 'race to the bottom', i.e. whereby the Member States are forced to lower their own welfare standards and compliance costs in the hope of attracting investment from mobile economic factors, and of minimising competitive disadvantages for their own undertakings. This in turn sparks a vicious cycle of (de-)regulatory competition which threatens to undermine standards of welfare protection throughout the entire Community.[75] In the present context, such a critique instead implies that the Treaty has created the conditions for the operation of a 'reverse' competition between legal orders: the Member States lower their existing standards of social provision in an attempt to become the least attractive destination for the perceived scourge of welfare tourists, i.e. Union citizens taking advantage of free movement rights which dispense with the need for any effective economic activity or independent financial means, and equal treatment as regards access to social advantages intended to provide subsistence support.[76]

There are several potential objections to this line of argument. First, empirical evidence to support the occurrence of regulatory competition or social

[74] Further: Van den Bergh, R. 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law' (1998) *5 MJ* 129.

[75] Further: Deakin, S. and Wilkinson, F. 'Rights vs. Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *ILJ* 289.

[76] E.g. Fries, S. and Shaw, J. 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *EPL* 533; Douglas-Scott, S. 'In Search of Union Citizenship' (1998) 18 *YEL* 29.

dumping is highly contested.[77] In particular, there seems little reason to believe that free movement in search of the most generous welfare benefits is a significant practical problem within the European Union. The Commission has recently observed that significant barriers (some legal and administrative; others social, cultural and linguistic) inhibit the widespread exercise of free movement and residency rights within the Single Market, and mean that cross-border migration occurs on a relatively limited scale.[78] Is £53.05 per week on Income Support sufficient incentive to overcome these obstacles, and draw significant numbers of benefit tourists into the United Kingdom?[79] Enlargement into Central and Eastern Europe will accentuate differences in wealth and welfare provision across the Member States; but the enlargement negotiations are likely to result in some compromise formula which will postpone full application of the free movement *acquis* vis-à-vis the new Member States.[80] However, when it comes to policy formation, popular perception often counts for more than empirical reality—and the popular perception of welfare tourism may be sufficient to overcome this apparent drawback in the regulatory competition model.[81]

Secondly, the alleged dangers of regulatory competition within the Single Market and (in particular) the threat of a destructive race to the bottom as regards welfare provision across the Member States are usually challenged by reference to the Community's harmonisation programme. The supranational adoption of secondary legislation guarantees the maintenance of common standards of legislative protection for vulnerable social interests. Sometimes such standards are exhaustive, depriving Member States of their ability to adopt independent regulatory choices, and fatally undermining the legal infrastructure which supports competition between legal orders within the Single

[77] Contrast: Editorial Comments, 'Are European Values Being Hoovered Away?' (1993) 30 *CMLRev* 445; with Barnard, C. 'Social Dumping and the Race to the Bottom: Some Lessons For the European Union From Delaware?' (2000) 25 *ELRev* 57. Also: Case C–212/97 *Centros* [1999] ECR I–1459; discussed by Deakin, S. 'Regulatory Competition Versus Harmonisation in European Company Law' in Esty, D. and Geradin, D. (eds.) *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford, OUP, 2001).

[78] Commission, Action Plan for Skills and Mobility, COM(2002) 72. Further: O'Leary, S. 'The Free Movement of Persons and Services' in Craig and de Búrca, above n 54. The referee for this paper drew attention to additional disincentives for the supposed welfare tourist, e.g. the expense of moving itself, the likely higher cost of day-to-day living in Member States with higher welfare benefits, and the loss of networks of family / friends who often provide benefits in kind (free accommodation, childcare etc).

[79] This is the standard rate payable to single persons aged 25 years and over, with no children or relevant illness / disability, applicable since April 2001.

[80] Commission, The Free Movement of Workers in the Context of Enlargement, Information Note: 6 March 2001; Press Release IP/01/561 of 11 April 2001.

[81] Consider, e.g. English Court of Appeal in *R* v. *Secretary of State for Social Security, ex parte Sarwar and Getachew* [1997] 3 CMLR 648.

Market.[82] Sometimes such standards are merely minimum, providing a cross-border floor of rights above which the Member States remain free to furnish higher levels of protection that satisfy more demanding local needs, but in any case neutralising the risk of a race to the bottom in existing standards of welfare protection.[83] However, this guarantee does not operate within the particular context of social security/assistance. We have already noted that the Community's current approach in this field is dominated by a policy of limited coordination and ad hoc intervention; the Nice amendments suggest that the prospects for any more advanced harmonisation of social protection remain remote. Thus, the perceived threat of a race to the bottom in welfare provision might still be accommodated within the legal framework required to support any more extensive rights to free movement and equal treatment for Union citizens.

Thirdly, regulatory competition presupposes an effective process for translating the economic pressures generated by mobile actors into corresponding policy choices on the part of the Member States. But the reality of this interaction is more complex and unpredictable: for example, it may be difficult for businesses (or individuals) to gather the information required to make an 'economically wise' decision about the relative benefits of different types of governmental regulation across different Member States; similarly, government policy-making is influenced not only by the simple economic logic of regulatory competition, but also by a host of other considerations (such as the electoral preferences of the citizen body), and the intervention of other institutional actors (such as pressure groups lobbying for particular regulatory strategies). Such factors distort the theoretical model of competition between legal orders, and make it difficult to assert that it leads inexorably either to social dumping or a race to the bottom.[84] For present purposes, this suggests a potent critique: the Member States would find it politically impossible to reduce welfare support for their own citizens, on the back of alleged benefit migration by other Community nationals taking advantage of their rights to free movement and equal treatment. If cross-border welfare tourism proved to be a sufficiently serious phenomenon, whether in terms of empirical reality or popular perception, and in the absence of a Community-level harmonisation strategy to alleviate its adverse consequences, a more likely response would be amendment of the Treaty so as specifically to exclude certain categories of Union citizen from the benefits

[82] E.g. Case 60/86 *Commission* v. *United Kingdom* [1988] ECR 3921; Case C–215/97 *Bellone* [1998] ECR I–2191.

[83] Deakin, S. 'Two Types of Regulatory Competition: Competitive Federalism Versus Reflexive Harmonisation. A Law and Economics Perspective on *Centros*' (1999) 2 *CYELS* 231; Barnard, C. and Deakin, S. 'Market Access and Regulatory Competition' in Barnard, C. and Scott, J. (eds.) *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002).

[84] Further: Pelkmans, J. and Sun, J.M. 'Regulatory Competition in the Single Market' (1995) 33 *JCMS* 67; Esty, D. and Geradin, D. 'Regulatory Co-opetition' in Esty and Geradin, above n 77.

of free movement, or certain categories of social assistance from the principle of equal treatment.[85]

In any case, some form of domestic retaliation must be taken seriously as the potential consequence of any over-ambitious attempt by the Union to fulfil its aspirations in the field of 'social citizenship' by granting unconditional rights to free movement and residency to its own citizens, then simply assimilating them into the pre-existing systems of national social protection against the will of the Member States.

Against this background, one can appreciate the assumption made by many commentators that Article 18 EC merely codifies the existing Treaty articles on the economically active, and the three directives on the financially independent. Its primary legal effects are to give the latter measures the guarantee of primary Community law, and to provide a legal basis for the future elaboration of more extensive guarantees of free movement through the adoption of secondary legislation—but, in and of itself, Article 18 does not create any new and directly effective rights.[86] For example, continued Member State resistance to the idea of benefit migration persuaded Advocate General La Pergola in *Kaba* to assert that the right of residency under Article 18 must still presuppose the exercise of an economic activity, or the availability of sufficient resources.[87] Support for this approach may also be derived from the judgment of the Court of First Instance in *Kuchlenz-Winter*,[88] and from English caselaw such as *Phull* and *Mouncife*.[89] According to this analysis, the workseeker's right to residence and equal treatment should remain exactly as before, doing nothing to overcome the constraints imposed under Article 39 EC and judgments such as *Antonissen* or *Lebon*.

C. *Interpretation of the Citizenship Provisions by the Court of Justice*

For years, the Court avoided expressing any firm opinion on whether Union citizenship offered anything new by way of rights to free movement, residence or equal treatment, beyond the existing protection granted to the economically active relying on the traditional Treaty articles, or the financially independent

[85] Cf. Case C–262/88 *Barber* [1990] ECR I–1889; Protocol concerning Art. 141 of the Treaty establishing the European Community (the '*Barber* Protocol' agreed at Maastricht).

[86] E.g. Wilkinson, B. 'Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union' (1995) 1 *EPL* 417.

[87] Case C–356/98 *Kaba* [2000] ECR I–2623, paras 51 to 61 Opinion. Also: AG Geelhoed in Case C–413/99 *Baumbast* (Opinion of 5 July 2001; Judgment pending). Further: Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil (presented to Commission on 18 March 1997).

[88] Case T–66/95 *Kuchlenz-Winter* v. *Commission* [1997] ECR II–637.

[89] *Phull* v. *Home Secretary* [1996] Imm AR 72; *Mouncife* v. *Home Secretary* [1996] Imm AR 265.

relying on the three directives.[90] However, recent caselaw has begun to provide more useful guidance about the nature and scope of the legal effects produced by the citizenship provisions.

In this regard, a convenient starting point is the judgment in *Grzelczyk*.[91] Under Belgian law, payment of the minimex (minimum subsistence allowance) to foreign nationals was conditional upon their classification as 'workers' within the personal scope of Regulation 1612/68, and thus entitled to rely on Article 7(2) to claim equal treatment as regards social advantages. On this ground, the national authorities refused benefits to a French citizen residing in Belgium and completing his final year of university studies. The claimant had already supported himself through the initial years of his degree by a combination of part-time work and credit facilities, but it was accepted for the purposes of the reference that he was unable to qualify as a worker under Article 39. The Court was asked whether there were other grounds upon which to challenge Belgium's directly discriminatory restriction on the access of certain Community nationals to this social benefit. The fact that the claimant was undertaking a course of university study within the host state might have suggested an analysis based simply upon the provisions of Directive 93/96. But the Court chose to follow another line of reasoning, boldly asserting that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[92] It then went on to set out two main principles which flow from the citizenship provisions: first, Article 18 (in principle) creates a general right to free movement and residence for all Union citizens; secondly, Articles 17 and 12 (in principle) confer a general right to equal treatment for all Union citizens lawfully resident in another Member State.

This provides a useful framework for our analysis, even though we shall see that the issues of residency and equal treatment cannot be so easily separated. Do the citizenship provisions (in particular, Article 18) enhance the workseeker's existing rights to free movement and residence? And / or do the citizenship provisions (in particular, Articles 17 and 12) enhance the workseeker's existing rights to equal treatment?

1. Rights to Free Movement and Residence Under Article 18 EC

In *Kaba*, the Court observed that Article 18(1) EC does grant Union citizens the right to move and reside freely within the Member States, but expressly refers

[90] E.g. Case C–193/94 *Skanavi* [1996] ECR I–929; Cases C–4–5/95 *Stöber and Pereira* [1997] ECR I–511; Case C–299/95 *Kremzow* [1997] ECR I–2629. Similarly in later cases, e.g. Case C–348/96 *Calfa* [1999] ECR I–11; Case C–378/97 *Wijsenbeek* [1999] ECR I–6207; Case C–192/99 *Kaur* (Judgment of 20 February 2001); Case C–100/01 *Olazabal* (Opinion of 25 April 2002; Judgment pending). Further: Reich, N. 'Union Citizenship: Metaphor or Source of Rights?' (2001) 7 *ELJ* 4.

[91] Case C–184/99 *Grzelczyk* (Judgment of 20 September 2001).

[92] *Ibid*. para 31.

to the limitations laid down under primary and secondary Community law. Thus, the citizen's right to free movement and residence could not be considered unconditional.[93]

Previous cases had already highlighted certain of these limitations. For example, the Court held in *Wijsenbeek* that the Member States remained competent to require claimants exercising any right to free movement under Article 18 to produce an identity card or passport upon entry into the national territory (as provided for under Directive 68/360 on workers and Directive 73/148 on establishment and services; and under the three residency directives).[94] The Court has also confirmed, both implicitly in cases such as *Shingara* and *Calfa* and explicitly in its judgment in *Yiadom*, that the express Treaty derogations permitting the Member State to expel individuals from its national territory on grounds of public policy apply as much to Article 18 as to Articles 39, 43 and 49 EC.[95]

In several post-Maastricht judgments, the Court had occasion to interpret and enforce the financial resources provisions of the three residency directives—suggesting that these measures remained applicable despite the introduction of Union citizenship, and thus imposed additional conditions upon exercise of the right to move and reside freely across the Member States.[96] Moreover, in its judgment in *Snares*, the Court explicitly contemplated the possibility that a Community national might properly be refused residency rights in another Member State, where he/she was not in receipt of an appropriate pension within the terms of Directive 90/365.[97]

Grzelczyk gave the Court an opportunity further to explore and clarify this crucial issue. On the one hand, the Court clearly assumed that Article 18(1) was the primary legal basis upon which the claimant was entitled to free movement and residency under Community law. On the other hand, the Court went on to hold that the provisions of the three residency directives were indeed included among the 'limitations and conditions' referred to in the proviso to Article 18(1). In particular, the Court observed that each of the directives makes enjoyment of the right to residency subject to the requirement of financial independence, albeit that the specific provisions applicable to students under Directive 93/96 are less stringent than those applicable to other claimants under Directives 90/364 and 90/365. However, the Court continued to assert that the conditions imposed by all three measures should themselves be read subject to a principle of limited financial solidarity between Community and own

[93] Case C–356/98 *Kaba* [2000] ECR I–2623, para 30. Note Case C–466/00 *Kaba II* (pending).

[94] Case C–378/97 *Wijsenbeek* [1999] ECR I–6207.

[95] Cases C–65 and 111/95 *Shingara* [1997] ECR I–3343; Case C–348/96 *Calfa* [1999] ECR I–11; Case C–357/98 *Yiadom* [2000] ECR I–9265.

[96] Case C–96/95 *Commission* v. *Germany* [1997] ECR I–1653; Case C–424/98 *Commission* v. *Italy* [2000] ECR I–4001.

[97] Case C–20/96 *Snares* [1997] ECR I–6057, para 50.

nationals—particularly as regards temporary difficulties, and especially if the claimant's financial position changes for reasons beyond his or her control. Nevertheless, referring to the relevant recitals in the preamble to each directive, the Court also held that this nascent sense of mutual social solidarity could not in any case justify the migrant Union citizen becoming an unreasonable burden on the public finances of the host state. In that event, the host state was entitled to consider that the claimant no longer fulfilled the conditions of his or her right to residence, and therefore to take appropriate steps to withdraw (or refuse to renew) his or her residence permit. Like Advocate General Alber, the Court seemed prepared to allow the Member States a certain margin of discretion to determine exactly when the migrant Union citizen should be considered an unreasonable burden upon the public purse.[98] The Court merely observed that the claimant's recourse to social assistance within the host state could not justify automatic rescission of the right to residence.

This analysis suggests that economic activity or financial independence remain preconditions even for exercising the right to residency under Article 18—albeit that the relevant qualifying provisions of both the Treaty and the three directives are now given a relatively generous interpretation. In turn, this implies that Union citizens who no longer fulfil the preconditions of economic activity or financial independence may find their residency revoked by the host state—without recourse to the express Treaty derogations on grounds of public policy, security and health. It is true that the Court referred primarily to the Member State's competence as regards revocation or non-renewal of the residence permit—a purely evidentiary document the validity of which is not constitutive of the right to residence conferred directly by the Treaty.[99] However, the fact that the Member State may revoke or refuse to renew the residence permit, where the claimant ceases to satisfy the substantive terms of his or her Community entitlements, implies that the underlying right to residency itself may also be terminated.[100]

[98] AG Alber in Case C–184/99 *Grzelczyk* (Opinion of 28 September 2000), paras 119 to 125.

[99] E.g. Case 48/75 *Royer* [1976] ECR 497; Case C–85/96 *María Martínez Sala* [1998] ECR I–2691; Case C–459/99 *MRAX* (Judgment of 25 July 2002).

[100] The precise timing / mechanism of the Member State's permitted response remains uncertain. As regards Dirs. 90/364 and 90/365, the Member State may require revalidation of the residence permit after the first two years of residence, and thereafter its renewal every five years. It has not yet been clarified by the Court whether Union citizens governed by these measures and who become 'unreasonable financial burdens' whilst in possession of a valid residence permit can have this document revoked / their right to residency terminated even before the date for its next renewal. As regards Dir. 93/96, the Member State may limit the validity of the student's residence permit to either the duration of the course (in the case of short periods of study), or one year (renewable annually for the duration of longer courses). In this situation, the host state might in practice have insufficient time to act against students who become 'unreasonable financial burdens', before their residency rights for study purposes would have expired anyway: Lhernould, J.P. 'L'accès aux prestations sociales des citoyens de l'Union européenne' [2001] *Droit Social* 1103.

Of course, *Grzelczyk* has not answered all the questions raised about the direct effect and potential scope of Article 18 (especially since it was really a case about equal treatment, and the Court's observations on residency were incidental to its wider analysis in this regard). And so, Article 18 may yet be seen to create certain new rights to residency. For example, Advocate General Geelhoed in *Baumbast* argued that Article 18 should create a directly effective right to residency for 'special cases' where the Union citizen is economically active and / or financially independent but falls outside the traditional Treaty articles and the three directives on purely technical grounds.[101] It is also possible that Article 18 will generate 'lesser' forms of protection for the migrant Union citizen than a fully-fledged right to residency. For example, *Yiadom* suggests that all citizens—regardless of the basis upon which they enter or reside in the national territory (*in casu*, as someone allegedly involved in facilitating the illegal entry of third country nationals)—may claim the protection offered by Community law against expulsion on the specific grounds of public policy or security.[102] Similarly, *Elsen* supports the proposition that all citizens may challenge non-discriminatory hindrances erected by their home state which might deter exercise of the right to free movement under Article 18 (*in casu*, by refusing to grant pension credits in respect of periods spent raising children in other Member States unless the parent had also pursued an occupational activity there).[103]

But in any event, and pending further clarification from the Court, it might seem that the workseeker's free movement rights as they existed under Article 39 EC have not changed very much as a result of the citizenship provisions. Just as the migrant student's residency under Article 18 is constrained by the existing limits imposed under Directive 93/96 (the requirements of sufficient resources, and health insurance); so too the migrant workseeker's residency under Article 18 is constrained by the existing limits imposed either under Directive 90/364 (where the workseeker nevertheless possesses independent financial means), or alternatively under Article 39 (for so long as the claimant satisfies the *Antonissen* requirements of actually seeking work, and having genuine chances of being engaged). In each case, the Member State may ultimately choose to expel without having recourse to the express Treaty derogations on public policy, security and health.[104]

[101] Case C–413/99 *Baumbast* (Opinion of 05 July 2001; Judgment pending).

[102] Case C–357/98 *Yiadom* [2000] ECR I–9265. Compare Toner, H. 'Judicial Interpretation of European Union Citizenship: Transformation or Consolidation?' (2000) 7 *MJ* 158.

[103] Case C–135/99 *Elsen* (Judgment of 23 November 2000). Also: Case C–28/00 *Kauer* (Judgment of 7 February 2002); cf. AG Alber in Case C–255/99 *Humer* (Opinion of 8 February 2001; Judgment of 5 February 2002). Cf. Case C–18/95 *Terhoeve* [1999] ECR I–345.

[104] Cf. AG La Pergola in Case C–356/98 *Kaba* [2000] ECR I–2623, para 57 Opinion. Also: English Court of Appeal in *R* v. *Home Secretary, ex parte Vitale* [1996] 2 CMLR 587.

2. Rights to Equal Treatment Under Articles 17 and 12 EC

In the meantime, the migrant workseeker could try a different route: even if the right to residency has not been much improved by Article 18, nevertheless the right to equal treatment may well be enhanced through the combined effects of Articles 17 and 12 EC (albeit still not equivalent to the rights enjoyed by a fully-fledged worker).

The starting point here is the case of *Sala*, where the Court held that a Spanish national who had been authorised to reside in Germany by the host state fell within the personal scope of Article 17 on Union citizenship. As such, she was entitled to rely on the Article 12 prohibition of discrimination on grounds of nationality as regards all situations falling within the material scope of Community law; and in particular, to challenge certain restrictions on the payment of a non-contributory child-raising allowance.[105] *Sala* itself concerned a claimant who was lawfully resident at the host state's discretion, or at least as a matter of its obligations under an international convention. But in *Grzelczyk*, the Court confirmed that the same principles apply to Union citizens lawfully resident in another Member State as a matter of Community right—including exercise of the fundamental freedoms contained in Articles 39, 43 and 49 EC; and reliance upon the right to move and reside freely under Article 18.

For workseekers, this offers an equally exciting possibility. The argument runs thus. Their limited right to residence under Article 39 and *Antonissen* qua economic factor of production, and (as seems likely) even under Article 18 qua citizen, is nevertheless sufficient to activate Articles 17 and 12. The ensuing principle of equal treatment for migrant Union citizens embraces not only social advantages in general (for example, as regards the use of languages in court proceedings);[106] but also social protection measures in particular (such as the child-raising allowance in *Sala*, and the minimex allowance at issue in *Grzelczyk*). This is true despite the rule in *Lebon* that workseekers cannot rely on Article 7(2) Regulation 1612/68 to claim equal treatment as regards social advantages; and provides access to financial support over and above any rights the workseeker might enjoy qua insured person under Regulation 1408/71. On its face, the workseeker might therefore seem to enjoy an economic right to residence as before; but his/her citizen's right to equal treatment has improved significantly.[107]

Indeed, the workseeker's newfound social emancipation need not stop there. In *Ferlini*, the Court held that the scale of fees payable in respect of medical and hospital maternity care could not be considered a 'social advantage' within

[105] Case C–85/96 *María Martínez Sala* [1998] ECR I–2691; Tomuschat, C. (2000) 37 *CMLRev* 449.

[106] Case C–274/96 *Bickel and Franz* [1998] ECR I–7637; Bulterman, M. (1999) 36 *CMLRev* 1325.

[107] Cp. Weatherill, S. and Beaumont, P. *EU Law* 3rd edn (London, Penguin, 1999), 664–67; Lhernould, above n 100, 1106–1107.

Article 7(2) Regulation 1612/68, even in respect of a fully-fledged worker under Article 39 EC. However, such fees did fall within the scope of Article 12 EC, enabling the claimant to challenge indirectly discriminatory requirements which increased the level of payments he was expected to meet. Moreover, it was irrelevant for this purpose that the scale had been established not by the Member State, but by a group of private healthcare providers, since the latter exercised power over individuals and could adversely affect enjoyment of the fundamental Treaty right to free movement.[108] Insofar as the migrant workseeker is lawfully resident within the host state and likewise entitled to rely on Article 12 EC, it might now appear possible for these Union citizens also to claim equal treatment as regards such 'social disadvantages' (concerning payment for the provision of valuable welfare services), and to do so even in horizontal situations (at least those involving the collective private regulation of social provision).[109] If so, being a Union citizen would have distinct advantages over aspiring to become an economically active factor of production.

However, this combination of a conditional Community right to residency and an unconditional Community right to equal treatment would pose certain problems. First, insofar as the Court has indeed accepted that Article 18 EC creates only limited rights to free movement over and above existing provision for the economically active or financially independent, this necessarily implies a correspondingly restrictive approach to any Article 12 principle of non-discrimination as regards social advantages for Union citizens. After all, the effect of a 'strong' principle of equal treatment might otherwise be to challenge the (inherently discriminatory) requirements of economic activity or financial resources imposed on migrant Community nationals as a precondition for their residency within the host state; and thus to establish an indirect right to free movement for all Union citizens which bypasses the limits apparently imposed under Article 18.[110]

Secondly, even the guarantee of lesser rights to equal treatment may lead the Member States to apply the criteria for residency more strictly than often appears to be the case at present. On its face, a more secure right to equal treatment as regards social advantages would appear to make the citizen's right to residency more meaningful in practice than before. This seems particularly true as regards the migrant workseeker, given the limited sources of financial support provided for under Regulation 1408/71. But many Member States currently recognise residence for Union citizens beyond their strict Community obligations—one suspects because the public purse is not obliged to support

[108] Case C–411/98 *Ferlini* [2000] ECR I–8081. Cp. Case C–415/93 *Bosman* [1995] ECR I–4921. Note also the possibility of wider horizontal application after Case C–281/98 *Angonese* [2000] ECR I–4139; compare AG Cosmas in Case C–411/98 *Ferlini* [2000] ECR I–8081, paras 71 to 79 Opinion.

[109] Cf. AG Cosmas in Case C–411/98 *Ferlini* [2000] ECR I–8081, para 68 Opinion.

[110] Cf. AG La Pergola in Case C–356/98 *Kaba* [2000] ECR I–2623, para 54 Opinion.

them.[111] This magnanimity might well run dry, and the Member States begin to enforce only their bare Community obligations, if judgments such as *Sala* meant that they were now obliged to finance these extra guests. Thus, the individual's exercise of some Community right to equal treatment as regards social advantages might well become the trigger for the Member State to adopt a more stringent approach to the lawful residency of Union citizens.[112]

In any case, the Court has already made clear that Union citizenship does not in fact necessitate complete equality of treatment. Certain forms of discrimination are insulated from the effects of Article 12 because they fall outside the scope of application of the Treaty. Thus, for example, reverse discrimination in wholly internal situations is not incompatible with Community law even in the light of Articles 17 and 12 EC.[113] Other forms of discrimination are protected against the impact of Article 12 because the latter provision is residual in nature: it applies 'without prejudice to any special provisions' contained in the Treaty.[114] Thus, if unequal treatment between Community and own nationals is permitted under another more specific Treaty provision, it will not infringe the general principle of equal treatment posited under Article 12—as, for example, when Member States rely on the facility under Articles 39(3), 46(1) and 55 EC to exclude foreign nationals from employment in certain public service posts, or from participating in the exercise of official authority.[115] The Court seems implicitly to have accepted that this competence to discriminate again remains unaffected by the introduction of Union citizenship, or the general principle of equal treatment for lawful residents established in *Sala*.[116]

[111] Further: O'Keeffe and Horspool, above n 60; O'Leary, S. 'The Principle of Equal Treatment on Grounds of Nationality in Art. 6 EC: A Lucrative Source of Rights for Member State Nationals?' in Dashwood and O'Leary, above n 54.

[112] Further: Vincenzi, C. 'European Citizenship and Free Movement Rights in the United Kingdom' [1995] *PL* 259; Fries and Shaw, above n 76. Consider, e.g. *R* v. *City of Westminster, ex parte Castelli* (1996) 28 HLR 616; *Remilien and Wolke* [1998] 1 All ER 129.

[113] Cases C–64–65/96 *Uecker and Jacquet* [1997] ECR I–3171. Cf. Cases 35–36/82 *Morson and Jhanjan* [1982] ECR 3723. Cf. Case C–60/00 *Carpenter* (Opinion of 13 September 2001; Judgment of 11 July 2002).

[114] E.g. Case C–20/92 *Hubbard* [1993] ECR I–3777; Case C–193/94 *Skanavi* [1996] ECR I–929. The Court has sometimes been less dogmatic about the application of Art. 12 EC vis-à-vis more specific Treaty provisions laying down identical rules on nationality discrimination, e.g. Case C–398/92 *Mund & Fester* [1994] ECR I–467; Case C–43/95 *Data Delecta* [1996] ECR I–4661.

[115] E.g. Case 36/75 *Rutili* [1975] ECR 1219. Compare AG Jacobs in Cases C–92 and 326/92 *Phil Collins* [1993] ECR I–5145, paras 12 to 13 Opinion; AG La Pergola in Case C–43/95 *Data Delecta* [1996] ECR I–4661, para 12 Opinion.

[116] E.g. Case C–114/97 *Commission* v. *Spain* [1998] ECR I–6717; Case C–355/98 *Commission* v. *Belgium* [2000] ECR I–1221; Case C–283/99 *Commission* v. *Italy* (Judgment of 31 May 2001). Also: AG La Pergola in Case C–85/96 *María Martínez Sala* [1998] ECR I–2691, para 21 Opinion; Case C–356/98 *Kaba* [2000] ECR I–2623, para 54 Opinion. Cf. the situation as regards political rights: Evans, A. 'Union Citizenship and the Constitutionalisation of Equality in EU Law' in La Torre, M. (ed.) *European Citizenship: An Institutional Challenge* (The Hague, Kluwer, 1998).

The Treaty itself has therefore established a legal framework capable of accommodating certain limitations on the commitment to equal treatment for Union citizens. *Grzelczyk* provides an interesting example of how these various principles interact, and an instructive illustration of the potentially serious implications which might follow as regards the migrant individual's prima facie right to claim social advantages in general / financial support in particular.

Grzelczyk itself concerned the equal treatment of migrant students. In its previous judgments in *Lair* and *Brown*, the Court had held that a student with rights to free movement and residence for the purposes of pursuing vocational training under Article 12 EC enjoyed a right to equal treatment as regards tuition fees; but was not entitled to equal treatment as regards maintenance grants, i.e. because these fell outside the material scope of Community law, and thus beyond the general prohibition of discrimination on grounds of nationality.[117] This caselaw was subsequently ratified and codified by the provisions of Directive 93/96, according to which the migrant student must declare that he or she possesses independent financial means, and cannot claim any right to equal treatment as regards maintenance grants. Subsequent developments led commentators to query whether both the reasoning in *Lair* and *Brown*, and the corresponding provisions of Directive 93/96, were not ripe for reconsideration.[118] First, the Maastricht Treaty extended Community competence over educational policy so as arguably to bring maintenance grants within the material scope of the EC Treaty, and thus within the sphere of application of Article 12 even for the migrant Community national qua student.[119] Secondly, the judgment in *Sala* enunciated the principle that lawful residence in another Member State activates the general right to equal treatment, *inter alia*, as regards social assistance measures, and thus seemed to reinforce the migrant student's right of access to maintenance grants now also qua Union citizen.

But *Grzelczyk* does not entirely support these arguments. On the one hand, the Court specifically cast doubt upon the proposition that migrant students are barred from claiming any right to maintenance grants under Article 12 *in principle*, i.e. by indeed redrawing the boundaries of the material scope of Community law, and thus revising the inherent limits to application of the general prohibition of discrimination on grounds of nationality upon which *Lair* and *Brown* were reasoned. On the other hand, the Court clearly assumed that migrant students remain barred from claiming any right to maintenance grants

[117] Case 39/86 *Lair* [1988] ECR 3161; Case 197/86 *Brown* [1988] ECR 3205. Also: Case C–357/89 *Raulin* [1992] ECR I–1027. Further: Case 152/82 *Forcheri* [1983] ECR 2323; Case 293/83 *Gravier* [1985] ECR 593; Case 24/86 *Blaizot* [1988] ECR 379.

[118] E.g. Arnull, A. Dashwood, A. Ross, M. and Wyatt, D. *Wyatt and Dashwood's European Union Law* 4th edn (London, Sweet & Maxwell, 2000) Ch. 28.

[119] Further: Lenaerts, K. 'Education in European Community Law After Maastricht' (1994) 31 *CMLRev* 7; Shaw, J. 'From the Margins to the Centre: Education and Training Law and Policy' in Craig and de Búrca, above n 54.

under Article 12 *in practice*, i.e. by considering that the provisions of Directive 93/96, specifically requiring independent financial resources and ruling out the availability of maintenance grants, remain applicable to the Union citizen, and thus sanction the host state to adopt/retain limited inequalities in the treatment of migrant students, and ultimately to terminate the right to residency itself.[120] This legislative qualification to the prohibition of discrimination on grounds of nationality was accommodated into the legal framework of the Union citizen's rights via the proviso to Article 18(1)—a more specific Treaty provision which thereby ousted the purely residual application of Article 12.

3. Application to Migrant Workseekers Qua Union Citizens

The Court's reasoning may have changed, but the end result remains the same: by merely shifting from one method to another of insulating discrimination from the censure of Article 12, migrant students are still unable to claim full equal treatment with own nationals. The question is whether migrant workseekers might find themselves in a similar position: must the *Sala* right to equal treatment as regards social advantages, prima facie conferred by Article 12 upon Union citizens lawfully resident in another Member State, still give way in practice to the more specific rules applicable under other Treaty provisions?

The starting point is probably Regulation 1408/71, since the rights and limitations this measure lays down in respect of social security benefits should remain applicable to the migrant workseeker qua insured person, and also qua Union citizen by virtue of the proviso to Article 18(1). It therefore seems unlikely that the citizenship provisions will, of themselves, overturn existing restrictions on the coordination of domestic social security legislation, for example, as regards the aggregation and exportation of unemployment benefit such as contribution-based Jobseekers Allowance. But where the migrant workseeker has exhausted the scant rights to financial support available under Regulation 1408/71, or is otherwise unable to rely on the Community coordination system, this would seem to present an ideal forum for application of the *Grzelczyk* notion of financial solidarity, i.e. so as to provide access to any relevant domestic sources of minimum subsistence support on equal terms with own nationals while the claimant legitimately continues his/her search for gainful employment.

In particular, there seems no good reason why the workseeker's right to equal treatment under Articles 17 and 12 EC should be further constrained by the more specific rules traditionally applicable under Articles 39 EC and 7(2) Regulation 1612/68 (as interpreted in *Lebon*).

[120] Also: AG Alber in Case C–184/99 *Grzelczyk* (Opinion of 28 September 2000), paras 110 to 111.

Advocate General Cosmas in *Wijsenbeek* argued that the Union's constitutional commitment to enhancing the status of its own citizens implies the need to reinterpret existing restrictions upon free movement, so as better to fulfil the individual's legitimate expectations of becoming more closely engaged in the process of European integration.[121] In this regard, the textual basis for the restrictive *Lebon* interpretation of Article 7(2) is not particularly strong, especially when compared to the express and unequivocal provisions of Regulation 1408/71 as regards unemployment benefit for insured persons, or of Directive 93/96 as regards financial independence and maintenance grants for students. Article 7(2) may not specifically grant workseekers a right to equal treatment in social advantages; but it certainly does not rule out the possibility that workseekers could still seek such equal treatment under other provisions of Community law—including Article 12. Moreover, the Court itself has on several occasions appeared responsive to this line of argument. Consider, for example, the situation of established persons under Article 43 EC and service providers/recipients under Article 49 EC: they also fall outside the personal scope of Article 7(2) Regulation 1612/68; but the Court is nevertheless prepared to guarantee their right to equal treatment as regards social advantages—and now to do so by reference to their status as Union citizens entitled to rely upon Article 12.[122] Similarly, the Court in *Grzelczyk* observed that, even if the migrant student was barred in express terms from claiming full equal treatment as regards financial resources in general/maintenance grants in particular, nothing in Directive 93/96 specifically precluded its beneficiaries from receiving social security benefits. This legislative gap provided the Court with the opportunity to coat a valuable gloss over the black-letter of the Directive: the claimant was at least entitled to expect a degree of financial solidarity with nationals of the host state as regards temporary difficulties, by claiming equal access to the Belgian minimex under Article 12, so as to enjoy a basic level of subsistence.

These factors suggest a similar analysis for migrant workseekers. The *Lebon* interpretation of Article 7(2) Regulation 1612/68 presents an entirely unpersuasive obstacle to proper application for the benefit of migrant workseekers of the general principle of equal treatment for Union citizens propounded in *Sala*. Furthermore, workseekers should, by definition, pose only a temporary burden on the public finances of the host state before beginning to engage in some gainful economic activity. The general trend away from passive benefits (paid merely by virtue of the fact that one is unemployed) towards active assistance

[121] Case C–378/97 *Wijsenbeek* [1999] ECR I–6207, paras 86 and 97 to 116 Opinion. Similarly: AG Geelhoed in Case C–413/99 *Baumbast* (Judgment pending), para 110 Opinion of 5 July 2001.

[122] Art. 43, e.g. Case 197/84 *Steinhauser* v. *City of Biarritz* [1985] ECR 1819; Case C–168/91 *Konstantinidis* [1993] ECR I–1191; Case C–337/97 *Meeusen* [1999] ECR I–3289. Art. 49, e.g. Case 63/86 *Commission* v. *Italy* [1988] ECR 29; Case 186/87 *Cowan* v. *Trésor public* [1989] ECR 195; Case C–45/93 *Commission* v. *Spain* [1994] ECR I–911. In particular: Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.

(paid in return for proof that the claimant is actively seeking and genuinely prepared to undertake fresh employment) reduces the risk of fraud by migrant workseekers, whose very right to residence already depends upon fulfilling similar conditions. So, it might seem entirely appropriate that the rigours of not only the de jure 'financial resources' required of those relying on the residency directives, but also the de facto 'financial resources' expected of workseekers relying on Article 39 EC, should be mellowed by the spirit and influence of Union citizenship.

But it may yet be premature to assume that the Member States must guarantee full and unlimited access to social advantages. Three scenarios are worth considering.

First, the Court held in *Grzelczyk* that the student's right to residency was ultimately conditional upon having independent financial means. So, the host state might eventually decide that the claimant has become an unreasonable financial burden upon the public purse, take steps to terminate his or her residency, and therefore curb any further claims against domestic welfare benefits. Might this idea extend beyond the three residency directives to cover other categories of Union citizen, including the migrant workseeker? Any such transposition cannot be exact. The workseeker's right to residency is not subject to any (de jure) condition that the claimant possesses independent financial means. So, the host state may not decide to terminate the claimant's free movement within its domestic territory on the sole grounds that he/she has exercised or continues to exercise the Article 12 right to equal treatment as regards social assistance. Instead, for so long as the claimant satisfies the requirements under Article 39 for a Community right to residency (actively seeking employment and having genuine chances of becoming engaged), he or she should also be entitled to claim equal treatment as regards welfare benefits, consonant with the *Grzelczyk* principle of limited financial solidarity. Even after the claimant ceases to comply with the *Antonissen* formula for enjoyment of a right to residency under the Treaty, he or she may still be considered lawfully resident within the host state at its own discretion, and thus still protected against discrimination as regards access to social assistance, in accordance with the principle articulated in *Sala*. Only if and when the host state takes appropriate steps to remove the claimant from its domestic territory does the status of 'lawful resident' terminate, and with it any entitlement to equal treatment under Articles 17 and 12. In such circumstances, the Union citizen's expectation of financial solidarity has been exhausted, and de facto the individual becomes an unreasonable financial burden upon the public purse.

Thus—provided the Court does not feel bound to submit the general right to equal treatment under Article 12 to the more specific terms of Article 7(2) Regulation 1612/68 as interpreted in *Lebon*—the workseeker stands to benefit more from *Sala* and *Grzelczyk* than the migrant student, or other citizens relying on Directives 90/364 or 90/365. But ultimately, in each situation, the limited nature of the Community right to residency places inherent constraints upon

the Treaty principle of non-discrimination as regards social assistance within the host state.

Secondly, it remains possible that the Member States will find an alternative and less onerous means of protecting themselves against the allegedly excessive demands of migrant Union citizens, and thus of limiting their vicarious responsibility for discharging the Community's aspirations in the sphere of 'social citizenship'. *Sala* and *Grzelczyk* both involved direct discrimination on grounds of nationality as regards the provision of welfare benefits to migrant Community nationals, in respect of which the opportunities for justification under the Treaty system are strictly limited.[123] But what if the host state were to introduce preconditions for the payment of social protection benefits to the non-economically active which instead entail indirect discrimination on grounds of nationality against the migrant Union citizen—such as a requirement of habitual residence within the domestic territory? In such cases, there would be greater scope for justification under the Treaty, i.e. by reference to a legitimate public interest objective, and the principle of proportionality.[124]

The Court has accepted that, in principle, certain social security benefits involve a sufficiently close connection between entitlement to the relevant payment and the social environment of the Member State to justify imposing some form of residency requirement.[125] Moreover, we have already seen that Regulation 1408/71 contains particular provisions on special non-contributory benefits such as Income Support, permitting the Member State to restrict payment to those habitually resident within its domestic territory. In most of the decided cases, these requirements have operated to the detriment of own nationals attempting to settle in, and export benefits to, another Member State;[126] but they may also limit the sources of financial support available to other Union citizens, especially the migrant workseeker newly arrived within the host state.[127]

However, as regards social protection measures falling outside the scope of the particular provisions on special non-contributory benefits contained in Regulation 1408/71, the Court has often been hostile to domestic rules which purport to condition the enjoyment of certain rights upon a sufficient relationship of proximity to the host state, and seek thereby to insulate the social advantages available under national law from the full logic of the integration

[123] E.g. Case 15/69 *Ugliola* [1969] ECR 363. However, consider the critique by AG Jacobs in Case C–136/00 *Danner* (Opinion of 21 March 2002; Judgment pending). Further: Case C–20/92 *Hubbard* [1993] ECR I–3777; Case C–43/95 *Data Delecta* [1996] ECR I–4661; Case C–323/95 *Hayes* [1997] ECR I–1711; Case C–122/96 *Saldanha* [1997] ECR I–5325.

[124] E.g. Case C–274/96 *Bickel and Franz* [1998] ECR I–7637. Also: Case C–379/87 *Groener* [1989] ECR 3967; Case C–398/92 *Mund & Fester* [1994] ECR I–467; Case C–29/95 *Pastoors* [1997] ECR I–285; Case C–224/00 *Commission* v. *Italy* (Judgment of 19 March 2002).

[125] E.g. Case 313/86 *Lenoir* [1988] ECR 5391.

[126] E.g. Case C–20/96 *Snares* [1997] ECR I–6057; Case C–297/96 *Partridge* [1998] ECR I–3467.

[127] E.g. Case C–90/97 *Swaddling* [1999] ECR I–1075 (especially AG Saggio, para 23 Opinion).

process. This is true, for example, of residency requirements which either inhibit the exercise of free movement rights by own nationals moving abroad;[128] or indirectly discriminate against migrant Community nationals in their relations vis-à-vis the relevant Member State.[129]

The Court will have the opportunity to address this issue further in the case of *D'Hoop*. Under Belgian law, special unemployment benefits (consisting of cash assistance to claimants, and financial incentives for their prospective employers) were offered to young people searching for their first job who had completed their secondary education in Belgium. Secondary education completed in another Member State was taken into account only if the claimant was the family member (as defined by Regulation 1612/68) of a migrant Community worker under Article 39 EC. D'Hoop, a Belgian national who had completed her secondary education in France then returned to Belgium for her university studies, was refused the special unemployment benefits. One might have analysed this situation as involving the imposition by a Member State of non-discriminatory obstacles to the free movement of its own citizens, insofar as the latter were denied access to social benefits as a direct consequence of having exercised their Community right under Article 18 EC to live and study abroad.[130] Advocate General Geelhoed preferred to treat the situation as involving indirect discrimination on grounds of nationality, which D'Hoop was entitled to challenge because her situation was not wholly internal to Belgium.[131] The claimant could thus be assimilated to other migrant Community nationals unable to qualify as protected family members under the auspices of Regulation 1612/68 and Article 39, but nevertheless falling within the scope of Articles 17 and 12 EC qua Union citizens. From that perspective, the case might as well have concerned a foreign workseeker, i.e. who completed his or her secondary education in the state of origin, and was later disbarred on that ground alone from claiming special unemployment benefits whilst searching for a job within Belgium.

The Commission argued that, avoiding any overt discrimination on grounds of nationality, Belgium might be permitted to restrict its financial obligations towards migrant Union citizens depending on the proximity of their links with the host state: for example, by providing special unemployment benefits to those who had completed their most recent (perhaps university or other

[128] E.g. Case C–215/99 *Jauch* (Judgment of 8 March 2001). Especially under Art. 10 Reg. 1408/71, e.g. Case 24/74 *Biason* [1974] ECR 999; Case 92/81 *Caracciolo* [1982] ECR 2213; Case C–356/89 *Newton* [1991] ECR I–3017. Also under Art. 7(2) Reg. 1612/68, e.g. Case C–57/96 *Meints* [1997] ECR I–6689; Case C–35/97 *Commission* v. *France* [1998] ECR I–5325; cf. Case C–33/99 *Amado* (Judgment of 20 March 2001); Case C–43/99 *Leclerc* (Judgment of 31 May 2001).

[129] E.g. Case C–111/91 *Commission* v. *Luxembourg* [1993] ECR I–817; Case C–299/01 *Commission* v. *Luxembourg* (Judgment of 20 June 2002). Consider also: Case 152/73 *Sotgiu* [1974] ECR 153; Case C–29/95 *Pastoors* [1997] ECR I–285; Case C–350/96 *Clean Car Autoservice* [1998] ECR I–2521; Case C–355/98 *Commission* v. *Belgium* [2000] ECR I–1221.

[130] Cp. Case C–135/99 *Elsen* (Judgment of 23 November 2000).

[131] Cp. Case C–281/98 *Angonese* [2000] ECR I–4139.

vocational) studies within the national territory; but not necessarily to the broader category of Community nationals who finished their education elsewhere in the Union and later moved to Belgium in search of work. Without analysing whether any such objective justification could ever be accepted in principle, Advocate General Geelhoed merely pointed out that there was a real link between this particular claimant and the Belgian employment market, such as to render the disputed legislation disproportionate in practice.[132]

If the Court should choose to tackle this crucial issue head-on, the previous judgment in *Commission* v. *Belgium* (1996) might at first glance lead us to expect a laissez-faire approach to national rules which condition the access of foreign nationals to special unemployment programmes upon some tangible economic nexus with the host state as provided for under Article 39 EC and Regulation 1612/68—the bare minimum required to sustain free movement for workers and their families as factors of production within the Common Market.[133] However, this case was decided without reference to the potential impact of Union citizenship, and before the crucial legal developments effected by *Sala* and *Grzelczyk*. Indeed, what is perhaps more relevant about the *Commission* v. *Belgium* case is that the Court appeared to take a dim view of the Member State's attempt to justify some requirement of prior education or residency within the domestic territory as regards the payment of social assistance for unemployed individuals, once they were accepted to fall within the personal scope of the Treaty rules prohibiting discrimination on grounds of nationality—as all migrant workseekers should now be, by virtue of their newfound status as Union citizens.

D'Hoop thus provides a test-case for the Court's commitment to promoting both a genuinely dynamic Community labour market, and a more convincing equality of treatment for migrant Union citizens. Will the Member States continue to be entitled to protect and privilege the employment opportunities of their own nationals/those habitually resident or educated within the domestic territory? Or will other Community nationals now also gain access to the wider infrastructure of social support which might enhance their capacity to participate meaningfully in the economic life of the host state? At the very least, one would expect intensive judicial scrutiny over indirectly discriminatory clauses imposed upon the availability of social assistance benefits.[134] It is even possible that the Court would simply reject attempts to objectively justify domestic

[132] Case C–224/98 *D'Hoop* (Opinion of 21 February 2002; Judgment pending).

[133] Case C–278/94 *Commission* v. *Belgium* [1996] ECR I–4307. Note, in particular, the analysis of AG Ruiz-Jarabo Colomer, paras 60 to 78 Opinion.

[134] Cf. caselaw concerning risks of seriously undermining the financial balance of domestic social security systems, e.g. Case C–158/96 *Kohll* [1998] ECR I–1931; Case C–368/98 *Vanbraekel* (Judgment of 12 July 2001); Case C–157/99 *Peerbooms* (Judgment of 12 July 2001). Also: caselaw concerning maintenance of a coherent taxation system, e.g. Case C–204/90 *Bachmann* [1992] ECR I–249; Case C–279/93 *Schumacker* [1995] ECR I–225; Case C–107/94 *Asscher* [1996] ECR I–3089; Case C–264/96 *ICI* [1998] ECR I–4695.

requirements which amount to little more than an ill-disguised attempt to save money at the expense of migrant Union citizens.[135]

Thirdly and in any case, the philosophy of 'unreasonable financial burdens' (whether manifested through the revocation of more generous residency rights, or via the imposition of objectively justified links of residency or education within the host state) should not apply to general social advantages such as discount railcards and the language used in court proceedings, i.e. where the introduction of common Union citizenship has cemented the principle of social solidarity between Community and own nationals, and as regards which it is hard to identify any countervailing Member State concerns legitimately addressed to the alleged dangers of benefit migration.

IV. The Commission's Proposed Directive on Free Movement For Union Citizens

After the introduction of Article 18 EC by the Maastricht Treaty, the Commission and Council came under increasing pressure to consolidate and rationalise the fragmented and complicated legislative regime on free movement for persons, taking into account the new political environment of the European Union and the social expectations generated by the institution of Union citizenship.[136] The Commission responded in summer 2001 by publishing a proposal for an umbrella directive on free movement for Union citizens.[137] This initiative is also intended to facilitate the Lisbon objective of combining economic growth with social inclusion,[138] as part of a broader programme for reforming existing Community rules on the mobility of persons and services, and constructing a common immigration policy on the treatment of third country nationals.[139]

[135] Cp. Case C–55/00 *Gottardo* (Judgment of 15 January 2002).

[136] E.g. Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil (presented to the Commission on 18 March 1997); European Parliament, Resolution on the second Commission report on citizenship of the Union, OJ 1998 C 226/61; Economic and Social Committee, Opinion on Commission proposals concerning free movement of workers, OJ 1999 C 169/24.

[137] Commission proposal for a Directive on the rights of Union citizens and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 Final.

[138] Presidency Conclusions of the Lisbon European Council (23–24 March 2000).

[139] Consider, e.g. Council Resolution concerning an action plan for mobility, OJ 2000 C 371/4; Rec. 2001/613 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, OJ 2001 L 215/30; Commission, Action Plan for Skills and Mobility, COM(2002) 72. Also: Commission proposal for a Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 127 Final; Commission proposal for a Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 Final.

A. General Scheme of the Commission Proposal

The proposed directive would repeal much of the existing legislation on free movement for persons, and introduce a new framework comprising four basic levels of residence and equal treatment for Union citizens.

First, economically active citizens (workers and the self-employed) would continue to enjoy extensive rights to free movement across the Community territory; and also full rights to equal treatment within the host state (including access to social protection measures). Secondly, financially independent citizens (including the retired and students) would also continue to enjoy extensive rights to residency. Indeed, certain requirements currently imposed upon such claimants would be relaxed: for example, the amount of resources considered to be 'sufficient' would and could no longer be specified; the individual need only make a bona fide declaration of their financial independence rather than provide positive evidence; and verification of that claim would be permitted only if he or she actually seeks social or medical assistance. However, '[i]n order not to entail undue financial burdens on host Member States', these citizens would enjoy only limited rights to equal treatment—being unable to draw upon welfare benefits within the host state; and in the case of students, being specifically excluded from equal treatment as regards maintenance grants.[140] Thirdly, other citizens would enjoy a right to free movement lasting six months (subject only to possession of a valid identity card or passport, and to the possibility that the host state might require claimants to report their presence within the domestic territory). The Commission intends this to cater primarily for the 'modern, high mobility lifestyles' emerging across the Member States.[141] During their six months' residence, the individuals in question again could not claim equal treatment as regards social assistance measures. Finally, Union citizens who have been lawfully and continuously resident in the host state for four years would become 'permanent residents': they would no longer need to satisfy conditions relating to economic activity or financial independence; they would also enjoy full rights to equal treatment, including access to welfare provision; and they could no longer be expelled from the national territory, even on grounds of public policy, security or health.

The proposal also contains numerous other reforms, for example: to simplify the rules on entry formalities and residence documents; to extend the rights of family members, especially in the event of divorce; and to bolster the substantive and procedural safeguards provided under Community law against expulsion on grounds of public policy etc.

[140] Article-by-Article Commentary, especially Art. 21.

[141] Para 2.3 Explanatory Memorandum.

B. The Commission Proposal and the Migrant Workseeker

For present purposes, the most significant aspect of the Commission's proposal is that it does not specifically consider the status of Community nationals who enter another Member State in search of employment.[142] This creates potential problems, since the apparent effect of the Commission's proposal would be to reduce certain of the rights currently enjoyed by such workseekers under the Treaty.

First, it seems that the workseeker's entitlement to free movement would be limited to six months (since more extended residency rights are reserved to those actually engaged in gainful economic activity). If so, this would purport to reduce the rights currently available to workseekers under Article 39 EC as interpreted in *Antonissen*, and perhaps also under Article 18 in the light of the approach in *Grzelczyk*, i.e. whereby a claimant may be actively looking for work and have genuine chances of being engaged, and thus remain entitled to lawful residence within the host state, for a period longer than six months. On the other hand, the Court's reasoning in *Antonissen* was based, at least in part, upon the current absence of Community secondary legislation specifying more precisely the duration of the migrant workseeker's residency within the host state. It might thus be argued that future adoption of the Commission proposal would merely fill this regulatory gap, and legitimately replace (rather than squarely contradict) the Court's default caselaw.[143] In any case, the Commission proposal would specify for the first time that the families of migrant workseekers also benefit from the free movement provisions: in their own right if they are Union citizens themselves; as protected family members if they are third country nationals accompanying the workseeker within the host state.

Secondly, as regards the workseeker's right to equal treatment, the Commission recognises the desirable distinction between social advantages generally (to which all citizens should have access) and social security or assistance benefits in particular (to which only the economically active should have access in their capacity as migrant citizens). So, the workseeker would still lack any right to equal treatment as regards social protection within the host state, even qua Union citizen. In the light of the judgments in *Sala* and *Grzelczyk*, it is again possible that the Commission proposal would represent a backward step. The Court has already recognised a general principle of equal treatment for those lawfully resident within the host State, which in practice manifests itself as a right at least to limited financial solidarity between Community and own nationals as regards access to welfare benefits. This is certainly true as regards those citizens relying on Directives 90/364, 90/365 and 93/96; and I have argued that a similar analysis can and should apply to other categories of citizen,

[142] There are special provisions for workers who become unemployed within the host state: Art. 8(7) draft Directive.

[143] Case C–292/89 *Antonissen* [1991] ECR I–745, para 21.

including migrant workseekers relying on Articles 39 and 18 EC. For all such claimants, the Commission proposal expects less of the host state than the developing caselaw of the Court.

There is significant authority for the proposition that, when it comes to adopting harmonising measures as regards complex or sensitive issues which require integration to proceed by stages rather than through a definitive settlement, the Court permits the Community institutions a relatively wide margin of discretion.[144] In particular, certain inequalities in the treatment of different categories of people may be objectively justified by the difficult nature of the tasks involved in exercising legislative prerogatives under the Treaty—particularly where such inequalities result from pre-existing differences between the national legal orders rather than from inconsistencies introduced afresh by Community regulation.[145] Against this background, it might seem unlikely that the Commission proposal (if adopted in its current form) would be readily amenable to judicial review. After all, we have seen that securing greater free movement and equal treatment for Union citizens has the potential seriously to aggravate domestic sensibilities concerning benefit migration, and might thus seem an objective best served by the process of political negotiation to find an acceptable compromise between the Member States.[146]

However, there are also good grounds for arguing that Article 18 has created a non-retrogression obligation: the Community legislature may only facilitate the exercise of free movement rights for the future; it may not restrict the scope of rights which citizens already enjoy under the present regime. So, even if one accepts that the Community cannot be expected or required to create full and unconditional rights to residency or equal treatment for all Union citizens, one can still recognise that the black letter of the Commission proposal could have tangible detrimental effects on the existing rights of at least one category of citizen—the migrant workseeker. At least to that extent, perhaps the Commission proposal should therefore be considered amenable to judicial review.[147] Alternatively, the Court might simply construe the enacted directive as a non-exhaustive text, supplemented by additional rights to residency and equal treatment which derive teleologically from the primary Treaty provisions

[144] E.g. Case 37/83 *Rewe-Zentral* v. *Direktor der Landwirtschaftskammer Rheinland* [1984] ECR 1229; Case C–63/89 *Les Assurances du Crédit* [1991] ECR I–1799; Case C–233/94 *Germany* v. *Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I–2405; Case C–166/98 *Socridis* [1999] ECR I–3791.

[145] E.g. Case C–479/93 *Francovich II* [1995] ECR I–3843; Case C–193/94 *Skanavi* [1996] ECR I–929. Cf. Case 41/84 *Pinna* [1986] ECR 1; Case 20/85 *Roviello* [1988] ECR 2805; Case 313/86 *Lenoir* [1988] ECR 5391. Further: Tridimas, T. *The General Principles of EC Law* (Oxford, OUP, 1999), 62–65.

[146] Cf. AG La Pergola in Case C–356/98 *Kaba* [2000] ECR I–2623, para 55 Opinion.

[147] Cf. Case C–344/95 *Commission* v. *Belgium* [1997] ECR I–1035: domestic rules permitting expulsion of workseekers after fixed period, even if still looking for employment and had genuine chances of becoming engaged, breached Art. 39 EC.

themselves.[148] In either event, the Commission could hardly claim to have achieved complete success in its stated goal of consolidating and rationalising the law on free movement for persons, in line with the enhanced social and political expectations generated by Union citizenship.

C. *Parallel Reform of Regulation 1408/71*

In any case, the Commission tacitly assumes that the workseeker's main source of financial support within the host state should continue to be Regulation 1408/71. In this regard, the 2001 proposal for an umbrella directive on free movement for Union citizens should be read in conjunction with the Commission's 1998 proposal for overhauling the current Community system of social security coordination.[149]

If enacted, this reform would cure many of the defects afflicting Regulation 1408/71.[150] For example: the personal scope would be expanded to include all those insured under national law; and the material scope would be broadened to cover social security benefits not listed in the present contingencies—though social assistance would remain excluded. Of particular interest to the workseeker, the period for exporting unemployment benefit from the state of origin to the host state would increase from three to six months, i.e. in line with the duration of the right to residence envisaged under the new umbrella directive; though still out of step with the free movement rights potentially available under Article 39 EC and *Antonissen*. Moreover, the migrant workseeker receiving unemployment benefit under the new exportation rules would also become entitled within the host state to equal treatment with own nationals as regards non-cash benefits (such as training) which facilitate access into work. This proposal might seem particularly important, given the new emphasis placed by Community social policy upon increasing the opportunities available under domestic law for the unemployed to fill skills gaps and sectoral labour shortages.[151]

However, one can envisage further ways of improving the coordination system under Regulation 1408/71, and of thereby creating more genuine opportunities for free movement. For example, the Community legislature could usefully abolish the forfeiture principle, whereby failure by the migrant

[148] In similar fashion to *Antonissen* itself. Note also: preamble to draft Directive refers to underlying need to avoid Union citizens becoming 'unreasonable burden' on public finances of host state, i.e. identical to preamble to Dir. 93/96 used in *Grzelczyk* to justify departure from strict terms of legislation.

[149] Commission proposal for a Council Regulation on coordination of social security systems, COM(98) 779 Final.

[150] Further: Sakslin, M. 'Social Security Coordination: Adapting to Change' (2000) 2 *EJSS* 169; Eichenhofer, E. 'How to Simplify the Coordination of Social Security' (2000) 2 *EJSS* 231; Pennings, F. 'The European Commission Proposal to Simplify Regulation 1408/71' (2001) 3 *EJSS* 45.

[151] E.g. Presidency Conclusions of the Lisbon European Council (23–24 March 2000).

workseeker to return to his or her state of origin within the three (or six) months permitted under the Regulation will terminate all remaining rights to unemployment benefit.[152] In any case, certain Member States have been lukewarm in their response to the Commission's 1998 proposals—partly because they contain politically sensitive provisions relating to the treatment of third country nationals—so it is uncertain when these reforms will finally be enacted into legislation.[153]

V. Concluding Remarks

The general thrust of both the Court's caselaw and the Commission's proposal seems to reflect a philosophy of compromise between what Union citizenship could or should yield, and what the political and financial sensibilities of the Member States are prepared to tolerate. When transposed into the specific context of migrant workseekers, this analysis suggests that traditional constraints on the rights of free movement and residency under Article 39 EC (as interpreted in *Antonissen*) remain applicable despite the introduction of Article 18 EC. However, the combined effect of Articles 39, 18, 17 and 12 might be to overcome, or at least alleviate, the limits to equal treatment as regards social advantages for workseekers under Article 7(2) Regulation 1612/68 (as interpreted in *Lebon*).

On the one hand, the judgment in *Sala* suggested a general principle of equal treatment for Union citizens lawfully resident in another Member State, which embraced even social security and assistance benefits. Such a principle corresponds to aspirations that the Union should foster a greater sense of 'social citizenship', which in practice would mean assimilating Community nationals into the host state's welfare system on the same terms as own nationals. On the other hand, the current limits to Community competence as regards both an unlimited right to residence for Union citizens and the creation of any more advanced form of European welfare state demand that the Court remains responsive to legitimate Member State interests in protecting the integrity of their social protection systems, especially bearing in mind the desire to avoid a destructive race to the bottom or other forms of domestic retaliation as regards residency rights and benefits provision. It thus seems that the *Sala* general principle of equal treatment should now be read subject to the compromise embodied in *Grzelczyk*: the idea of a right to limited financial solidarity, subject to the

[152] Cf. previous Commission proposals for reform of unemployment benefit rules, OJ 1980 C 169/22; OJ 1996 C 68/11.

[153] Further: Roberts, S. 'The UK's Response to the Proposal to Extend the Coordination of Social Security to Third Country Nationals' (2000) 2 *EJSS* 189. Cf. Presidency Conclusions of the Laeken European Council (14–15 December 2001), para 29; and of the Barcelona European Council (15–16 March 2002), para 33.

need to avoid Union citizens becoming an unreasonable financial burden within the host state.

If this analysis extends beyond migrant students and other citizens relying on the residency directives to cover also the migrant workseeker, it would appear that *Lebon* is defunct as regards general social advantages (railcards, court proceedings etc). As for social protection measures in particular (and without prejudice to the particular provisions of Regulation 1408/71): either the effects of *Lebon* are now deferred, because the citizen has a right of access to financial assistance within the host state, at least while he or she is actively looking for work and has genuine chances of becoming engaged; or the effects of *Lebon* must be rendered more covert, by the adoption of restrictions which indirectly discriminate against migrant workseekers, but can be objectively justified by compelling reasons of public interest.

More broadly, this only modest improvement upon the previous legal position of the migrant workseeker suggests that Union citizenship perpetuates and legitimises certain inequalities of opportunity against and between Community nationals. Longstanding academic suspicions might yet be confirmed, that the institution of Union citizenship will emerge doubly flawed by distinctions drawn on the basis of both nationality and economic worth or financial status, such as to alienate some of the least wealthy and most vulnerable members of Member State communities from participating in the construction of a European civil society. To adopt the phraseology of Article 17 EC itself: Union citizenship shall complement but not replace national citizenship—especially when it comes to furnishing individuals with the basic means of realising their own economic and personal potential, and of developing some mutual sense of social solidarity.

POSTSCRIPT

The judgment in Case C–224/98 *D'Hoop* was delivered on 11 July 2002. The court held that Belgian rules linking grant of the tideover allowance to the completion of secondary education within the domestic territory disadvantaged own nationals simply because they had exercised their freedom under Article 18 EC to move to another Member State to pursue their education. The Court did not adopt an *Elsen*-style analysis based on non-discriminatory obstacles to free movement. Nor did it pursue an approach based on the Article 12 EC prohibition of discrimination on grounds of nationality, assimilating D'Hoop to other migrant Union citizens. The Court reasoned rather in terms of discrimination between own nationals who stay within the domestic territory, and those who choose to move and be educated abroad. Such inequality was also contrary to the principles underpinning Union citizenship, which guarantee the same treatment in law as regards exercise of the Article 18 right to free movement. Having established a prima facie breach of the Treaty, the Court went on to consider the issue of justification. Since the purpose of the allowance was to facilitate for

young people the transition from education to employment, it was in principle legitimate for the Member State to ensure the existence of a 'real link' between the applicant and the geographic employment market. The Court thus went further than Advocate General Geelhoed in ratifying explicitly the Member State's competence to shield its special unemployment benefits from the full force of free movement law. However, the Court also held that the place where the applicant completed his/her secondary education was in practice a disproportionate criterion: it was not necessarily representative of an effective connection between the applicant and the employment market; and (as the facts of this case demonstrated) it excluded other potentially representative elements. No further guidance was offered on the sorts of factors which could/should be taken into consideration.

Insofar as *D'Hoop* was a test-case of the Court's commitment to integrating migrant Union citizens into the social fabric of the host state, the results must be carefully delimited. First, it is necessary to identify the categories of claimant touched by the ruling. Notwithstanding the Court's careful classification of Belgium's infringement, recognition of the Member State's discretion to restrict the availability of special unemployment benefits would seem to apply not only to own nationals returning to their state of origin after being educated abroad, but also to Community workseekers newly arrived in the host state (the latter being even less likely in practice to be able to invoke 'other representative elements' in support of their claim). But it is not clear that the Court intended the same approach to extend to the children of migrant workers relying on Regulation 1612/68, whose right to claim tideover allowance was apparently settled in *Commission* v. *Belgium* (1996), and as regards whom the applicability of Article 39 EC may in itself be sufficient to override the Member State's discretion. Secondly, it is necessary to distinguish the Court's treatment of the particular benefit under dispute in *D'Hoop* from the wider issue of social assistance for migrant workseekers. The specific social purpose of the Belgian tideover allowance could objectively justify the Member State's insistence on a 'real link' between claimant and domestic employment market. But one could argue that more general income support benefits do not perform the same social purpose: they are intended to guarantee a decent standard of living for all, commensurate with the need to respect human dignity. It is therefore unclear that the Member States should be permitted to insist here upon any such 'effective degree of connection' between workseeker and host society. For many unemployed migrants, *D'Hoop* thus does little to clarify their legal rights to equal treatment qua Union citizens. But having ratified the basic notion of some territorial link between access to the labour market and interim financial support, the Court has now invited upon itself the difficult task of defining the rationale behind the provision of subsistence benefits and other categories of welfare payment, and then of setting appropriate limits on the national legislature's discretion to combat allegedly inequitable claims against the public purse through the imposition of indirectly disciminatory qualifying criteria.

7

THE CHARTER OF FUNDAMENTAL RIGHTS AND BEYOND

Jacqueline Dutheil de la Rochère *

I. Introduction

Rounding off a highly innovative process of elaboration, the European Union's Charter of Fundamental Rights was officially proclaimed by the European Parliament, the Commission and the Council as planned at the Nice Summit, on 7 December 2000. According to the Cologne European Council of 3 and 4 June 1999, 'it will then have to be considered whether and, if so, how the Charter should be integrated into the treaties'. Indeed, this is one of the points which, under the terms of Declaration 23 annexed to the Nice Treaty, will have to be considered during the ongoing process of institutional reform.

Many academic studies have discussed how this Charter came to exist, the way it was developed and its content. It does not therefore seem necessary to repeat this discussion. Rather, this article will first examine the Charter as it stands today, and the way it is currently applied in practice, before examining any future status it may acquire.

II. The Charter Today

I will dwell particularly on its legal aspects although certain political considerations are necessarily involved and must be brought into the equation to avoid confusion or misinterpretation. Today, the Charter assumes at least three different aspects. On a formal level, it has been inserted into an instrument called an '*inter-institutional agreement*' and published in the Official Journal.[1] The inter-institutional agreement, whose existence was recognised for the first time in a declaration inserted in the Final Act of the Nice Conference,[2] is the product of a practice which has become customary in the Community. The European Parliament, Council and Commission may sign agreements to help

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[1] OJ 2000 C 364 /1.

[2] Declaration on Art. 10 of the Treaty establishing the European Community; above n 1 at 77.

them implement the provisions of the EC Treaty, provided the agreements do not alter these provisions. The agreements bind those institutions as between themselves. It was in this way that the Charter came to exist; before being solemnly proclaimed by the three institutions, the Charter was subject to a process of elaboration very different from the way this type of agreement is usually made.

A second aspect of the Charter comes from the very principles assigned to the body in charge of putting it together, a body which subsequently named itself the 'Convention'. According to the conclusions of the European Council meeting at Cologne, the Charter should 'contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law.'

This paragraph clearly employs the exact wording used by the European Court of Justice in its famous decisions asserting the protection of fundamental rights by the European Community[3] and which was taken up first in Article F.2 of the Treaty on European Union (Maastricht), then in Article 6(2) TEU (Amsterdam). The Cologne mandate does not stop there; the Charter was prescribed as an instrument that 'should also include the fundamental rights that pertain only to the Union's citizens', and in drawing up such a Charter 'account should furthermore be taken of economic and social rights . . . insofar as they do not merely establish objectives for action by the Union'. There is however a case for arguing that the Charter, clearly making the overriding importance and relevance of fundamental rights more visible—to adopt another phrase from the Cologne mandate—performs another function. It essentially represents a formulation or a *re-statement* of the general principles of EC law and rights of the European Union as set out for any judge in the various sources listed by the mandate in question.

Finally, the proclamation of a Charter of Fundamental Rights drawn up by a Convention formed of representatives of Heads of State or Government, the European Parliament, national parliaments and the European Commission is of great political or even constitutional significance, even though the document still carries no legal obligations.[4] Bills of rights serve as a justification for the exercise of political power, since they express its *raison d'être*. This characteristic of states' power applies equally to other political organisations, such as the European Union. A bill of rights also serves to set out the foundations of the polity composed of the various people who recognise these rights. Hence, the proclamation of the EU Charter of Fundamental Rights, despite having no binding legal force, remains a major step in the 'constitutionalisation' of the

[3] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 36/75 *Rutili* [1975] ECR 1219; Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097.

[4] The Charter was written 'as if' it would one day be legally binding.

European Union, as a democratic political entity. As a simple political document, the Charter has authority to give new wind to the course and institutions of the European Union.

This triple characteristic of the Charter, without placing more importance on one than on any other, is apparent in the way the Charter is applied in practice today.

A. How the Charter is Applied by Decision-making Institutions

The Charter was published as an inter-institutional agreement between the European Parliament, the Council of the EU and the Commission. This type of act binds the institutions subscribing to it morally and politically, even if it generates no rights or legal obligations for third parties, Member States or other subjects of EC law. The European Commission and Parliament have stated how they interpret their commitment to the Charter, particularly with regard to making binding rules.

1. The Commission

In two communications on 15 September and 11 October 2000, the Commission indicated that the Charter would sooner or later form part of the treaties and that the Charter would have effects from the day it was proclaimed, including in law. This opinion was reinforced by the Commission's President Prodi, in the speech he gave at the proclamation of the Charter: 'For the Commission, this proclamation means that the institutions are committed to respect the Charter in all the Union's acts and policies'. On 13 March 2001, the European Commission took the decision that, in future, whenever a legislative or regulatory measure (directive or regulation) is proposed, it should first of all be checked to ensure that it is compatible with the Charter.[5] Any legislative or regulatory measures which have a specific fundamental rights' dimension must include an additional recital in the Preamble to state that the act respects the rights and principles set out in the Charter. This formula may if necessary be supplemented with precise references to the articles in question. Proposed legislation is now cross-checked against the Charter in this way, particularly when it concerns asylum and immigration policy and cooperation in criminal matters, which the Tampere European Council placed as priorities. Examples of this are two recently proposed directives, one concerning the status of third-country nationals who are long-term residents[6] and the other laying down minimum standards on the reception of applicants for asylum in Member States.[7] As stated in their preamble, these two proposals specifically concern the

[5] SEC (2000) 380/3.
[6] COM (2001) 127.
[7] COM (2001) 181; OJ 2001 C 213/286.

fundamental rights set out in the Charter—the economic and social rights of asylum seekers and long terms resident, the right to non-discrimination and the right to judicial protection.

It is for the Council and Parliament, as co-legislators, to examine the Commission 's proposals and to verify that they respect the provisions of the Charter.

2. The European Parliament

The attitude of the European Parliament towards the Charter was expressed by its president during the speech she gave at the signing ceremony: '[A] signature represents a commitment (. . .). I trust that all the citizens of the Union will understand that from now on (. . .) the Charter will be the law guiding the actions of the Assembly (. . .). From now on it will be the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of citizens throughout the Union.' It seems that the European Parliament will, as the Commission, if not more so, ensure that, in the decision making-process, the Charter is carefully observed.

With second Pillar documents, it is the Council which will have the task of making any necessary references to the Charter, since the Commission has no direct power of initiative[8] and the Parliament is merely informed.[9] So far as third Pillar documents are concerned, the Commission does however have certain powers to make proposals,[10] e.g. draft Framework Decision to introduce a new European arrest warrant.

It should be noted that national authorities could also draw on the Charter in their rule-making; certain bodies of authority have already done so.[11]

B. How is the Charter Applied by Judges?

The fact that the Charter has no legally binding value in no way prevents national or Community judges from referring to it. On numerous occasions, the European Court of Justice has developed, from texts of various sources, its fundamental rights case law on the basis of what it considered to be the general principles of Community law. *A fortiori*, the Charter would seem to be the most complete statement of these general principles, especially in those areas where it goes beyond merely reproducing primary or secondary law and revisits the ECHR; when the Charter is venturing into new territory, it draws on important international texts and common constitutional traditions of the Member

[8] Art. 14(4) TEU.

[9] Art. 21 TEU.

[10] Art. 34(2) TEU.

[11] The French *Comité d'éthique* has already done so in its report of October 2000 concerning the law on bio-ethics.

States. Advocates General have already, and on various occasions, demonstrated their willingness to use the Charter in this way, although the judges remain cautious.

1. The Attitude of Advocates General

Highly significant is the fact that a number of Advocates General take the Charter as a statement of the fundamental principles of Community law. An example of this is the Opinion of Advocate General Tizzano on a reference from England's High Court of Justice on how to interpret Directive 93/104 on the reform of working hours and, more precisely, about when workers are entitled to annual paid leave.[12] The Advocate General observed that:[13]

> [i]n proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved—Member States, institutions, natural and legal persons—in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.[14]

This represents a very definite assertion that the Charter sets out the fundamental rights applicable to all Community's actors (not merely relations between the institutions), and that it can be used for interpreting a directive, despite the fact that it has not been incorporated into the treaties.

The view offered by Advocate General Jacobs in a case that concerned whether or not biotechnological inventions could be patented, was equally strong:[15]

> [t]here can be no doubt in my view that the rights invoked by the Netherlands are indeed fundamental rights, respect for which must be ensured in the Community legal order. The right to human dignity is perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter of Fundamental Rights of the European Union, which states that human dignity is inviolable and must be respected and protected. The right to free and informed consent both of donors of elements of the human body and of recipients of medical treatment can also properly be regarded as fundamental; it is also now reflected in Article 3(2) of the EU Charter which requires in the fields of medicine and biology respect for 'the free and informed consent of the person concerned, according to procedures laid down by law. It must be accepted that any Community instrument infringing those rights would be unlawful.[16]

[12] Case C–173/99 *BECTU* v. *Secretary of State for Trade and Industry*, Opinion of 8 February 2001.

[13] Para 28 of the Opinion.

[14] Art. 31(2) of the Charter.

[15] Case C–377/98, *Kingdom of the Netherlands* v. *European Parliament and Council*, Opinion of 9 October 2001.

[16] Para 197.

A little further on the Advocate General quotes, in addition to the Charter, the Council of Europe's Convention on human rights and biomedicine.[17] In this case, however, he argues that 'patent law is not the appropriate framework for the imposition and monitoring of such a requirement'.[18]

Lastly, the views of Advocate General Léger, in a case about the right of access to documents (which Article 42 of the Charter establishes as a fundamental right)[19] are also of reference:

> Naturally [he says], the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States[20]. . . . As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.[21]

In other cases, Advocates General have used the terms of the Charter more subtly. In a case involving an EU official, for instance, Advocate General Mischo referred to the distinction between marriage and a union between two people of the same sex.[22] In actual fact, the Advocate General drew conclusions from Article 9 of the Charter and its 'explanations' which utterly contradict the liberal approach of the authors of the Charter; he also omitted to refer to Article 21 of the Charter which prohibits discrimination based on sexual orientation. This shows how the Charter may be interpreted in very differing ways.

In another case involving a European Parliament official, Advocate General Jacobs used the Charter in support of his arguments:[23]

> [t]he Charter of fundamental rights of the European Union. . . while itself not legally binding, proclaims a generally recognised principle in stating in Article 41(1) that 'Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.[24]

[17] Para 210.

[18] Para 211.

[19] Case C–353/99 P *Council* v. *Hautala* et al., Opinion of 10 July 2001.

[20] Para 80.

[21] Para 83.

[22] Case C–122/99 P and C–125/99 P *D.* v. *Council*, Opinion of 22 February 2001, see in particular para 97.

[23] Case C–270/99P *Z.* v. *European Parliament*, Opinion of 22 March 2001.

[24] Para 40.

Advocate General Alber made reference to a relatively new right established in Article 36 of the Charter, the right of access to services of general economic interest.[25] However, the Court's ruling makes no mention of the Charter. Finally, Advocate General Stix-Hackl has had occasion to make use of the Charter in one of her Opinions. In a footnote, she refers to Article 31(1) of the Charter,[26] which states that '[e]very worker has the right to working conditions which respect their health, safety and dignity'.[27]

In all the cases cited above, the Charter is not used as an autonomous source of Community law but rather as a useful and particularly complete statement of the fundamental rights that judges have to protect. One can see that Advocates General quote the rights set out in the European Convention on Human Rights (such as the right of property, right of private life) and some new rights (the right to dignity, the right to integrity of the person in the field of medicine and biology, social rights, the right to good administration, the right of access to documents, etc.) interchangeably, and their Opinions are often more forceful when theorising about the new rights. The most explicit opinions underline the clear authority of the Charter to serve as a substantial reference for all actors on the European Community stage: Member States, institutions and natural or legal persons.[28] Advocates General show no reluctance to apply the Charter as a statement of European Union's fundamental rights. They regard them as part of the legal body contributing to the formulation of general principles, as regularly carried out by judges of the Court of Justice. In other words, the Charter has not been relegated to the status of an inter-institutional agreement, with no legally binding effects.

2. A Cautious Approach from the Judiciary?

As yet, the European Court of Justice has not taken any explicit stance on the Charter. The Court of First Instance, initially adopted a 'wait and see' approach, but has recently made a firm affirmation of the importance of the Charter in elaborating the law.

The Court's initial trepidation in committing itself on the Charter's legal effects was reflected in its ruling in *Mannesmannrohren-Werke AG* v.

[25] Case C–340/99 *TNT Traco* [2001] ECR I–4109; Opinion of 1 February 2001, see in particular para 94.

[26] Case C–94/00 *Commission* v. *Italy*; Opinion of 31 May 2001, note 11.

[27] See also AG Stix-Hackl's Opinion of 12 July 2001 in Case C–413/19 *Nilsson*, Opinion of AG Geelhoed of 5 July 2001 in Case C–413/19 *Baumbast and R.* v. *Secretary for the Home Department*, about the right to privacy in one's private and family life (para 59); also his Opinion of 12 July 2001 in Case C–313/99 *Mulligan e.a.* v. *Minister of agriculture and food Ireland and Attorney General*, about the right of property (para 28); AG Léger of 10 July 2001, in Case C–309/99 *Wouters*, about the rule of law; AG Jacobs of 21 March 2002, in Case C–50/00 P *Union de Pequeños Agricoltores* v. *Council*, about right to an effective remedy and a fair trial.

[28] In particular AG Tizzano Opinion in *BECTU*, above n 12.

Commission. That case revolved around a question of competition law, and the privilege against self-incrimination.[29] The applicant asked the Court of First Instance to have regard to the Charter of fundamental rights of the European Union in determining the case, on the ground that 'the Charter constituted a new point of law concerning the applicability of Article 6(1) of the Convention to the facts of the case.'[30]

In fact, given the differences in the case law of the courts of Luxembourg and Strasbourg with regards to self-incrimination, this would have been an opportunity to test the reach of article 52(3) of the Charter.[31] The Court decided that the Charter, proclaimed as it was on 7 December 2000, 'can therefore be of no consequence for the purposes of review of the contested measure, which was adopted prior to that date.'[32] It could be argued *a contrario* that this shows an implicit acceptance that the Commission will have to respect the Charter with regard to acts adopted after the latter was proclaimed.

On January 2002, in a case dealing with competition again, the Court of First Instance made a clear reference to Article 41 (1) of the Charter of Fundamental Rights which confirms 'the right to a sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the member States.'[33]

More significantly, on 3 May 2002, in *Jégo-Quéré*,[34] the same Court referred to Article 47 of the Charter of Fundamental Rights on the right to an effective remedy, in order to justify the admissibility under Article 230 EC of the recourse of a legal person against a regulation ; the fact that the legal person was directly and individually concerned was under discussion. The Court states as follows:

> in addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union (n. 42) . . .On the basis of the foregoing, the inevitable conclusion must be that the procedures provided for in . . . [the EC treaty- relevant articles are quoted-] . . . can no longer be regarded in the light of Articles 6 and 13 of the ECHR and Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an affective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation (n. 47).

[29] Case T–112/98 *Mannesmannrohren-Werke AG* v. *Commission* [2001] ECR II–729.

[30] *Ibid*., para 15.

[31] 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention . . . the meaning and scope of those rights shall be the same as those laid down in the said Convention'.

[32] Para 76.

[33] T–54/99 max. *mobil Telekommunikation Service GmbH* v. *Commission*, judgment of 30 January 2002, point 48.

[34] T–177/01, *Jégo–Quéré et Cie SA* v. *Commission*, judgment of 3 May 2002.

For the first time, on a question of crucial importance as regards the rights of individuals under EC law, i.e. the right to a recourse, the Charter is used as a direct source of law, and not only as a complementary illustration of existing principles. It remains to see if the European Court of Justice will follow the same track when it decides on the appeal.

More strikingly, in its ruling in the *BECTU* Case, the Court of Justice, did not mention the Charter and drew instead on the Community Charter of the Fundamental Social Rights of Workers referred to in both Article 136 of the EC Treaty and Directive 93/104 to conclude that the right to paid annual leave 'must be regarded as a particularly important principle of Community social law'.[35] Similarly, in the *TNT Traco* Case, the Court of Justice made no mention of Article 36 of the Charter (the right of access to services of general economic interest) although the Advocate General suggested it might do so.[36] It may be that neither case was appropriate for making a first reference to the Charter. Equally, the judges may have been somewhat wary of a text which, whilst not removing their ability to discover new fundamental rights which they could introduce in law as general principles of Community law, does limit their ability to do so. Further, it is a complex and synthetic text which raises very delicate problems of interpretation.

Several pending preliminary references which turn on questions of fundamental rights may give the Court of Justice cause to express an opinion on the legal effects of the Charter in Community law.[37] Indeed, the Commission has cited the Charter in its interventions where relevant. In one instance, the Court was asked by the *Verwaltungsgericht Stuttgart* whether German military service, which is mandatory only for men, complies with Community law. Considering that Articles 20, 21 and 23 of the Charter have been invoked in the case, it could thus provide the Court with an opportunity—if it deems it relevant—to speak out on the thorny question of how the Charter should be applied by the Member States and on the interpretation of Article 51(1).[38]

National courts are probably no less active with regard to the Charter—but it is difficult to find out about these decisions. The Constitutional Tribunal of

[35] Para 43.

[36] See above.

[37] For example: Case C–466/00 *Arben Kaba* v. *Secretary of State for the Home Department*; Case C–63/01, *Evans Regions and Motor Insurers Bureau*, about the right to legal protection and a fair trial for all the rights and freedoms guaranteed by EU law (Art. 47 of the Charter); Case C–187/01, *Procédure pénale* v. *Hüseyin Gözütok*, it is the first reference on a Third Pillar issue, based on Art. 35 TEU, which questions how to apply the principle *non bis in idem* across the European Union as a whole and not within a single State (Art. 50 of the Charter).

[38] Art. 51(1) reads: 'The provisions of this Charter are addressed to. . . the Member States only when they are implementing Union law'; versus the explanations of Art. 51, 'when they act in the context of Community law'.

Spain, for example, in a ruling on 30 November 2000 about how to protect personal data, cited article 8 of the Charter in support of its argument that the protection of personal data constitutes a fundamental right.[39]

C. The Charter's Political Influence

The constitutional—or perceived constitutional—significance of the Convention, which drafted the Charter, stemming largely from its structure, lends the Charter a particularly potent legitimacy. This explains its political influence, independently of any considerations as to its legal value. At the boundaries of the legal and the political, we see that the European Ombudsman—who was heard by the Convention when the Charter was being drawn up—has, since the Charter's proclamation, used it as a point of reference.[40] The Court of Auditors, which was not involved at all in the elaboration of the Charter, could deem itself affected by the Charter, e.g. by Article 42. But the crucial question is whether the Charter will become a unique and binding reference for every issue of liberty, democracy, respect for human rights and the fundamental rights in the European Union. To this end one can distinguish three circles of actors that the Charter may influence to varying degrees: the Member States, the candidate Countries, and the management of the external policy of the European Union.[41]

1. The Member States

When considering respect for human rights and fundamental freedoms among the Member States, it is worth examining two provisions of the Treaty on European Union which are similar and yet quite distinct. Article 6(2) states that the Union respects human rights and fundamental freedoms as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. One tends to perceive the Charter from this perspective. According to Article 6(2) TEU and Article 51(1) of the Charter, which are both based on the case-law of the Court of Justice, Member States are bound to respect fundamental rights insofar as their actions fall under Community law or Union law [42] In contrast, Article 6(1) TEU takes a wider perspective. It indicates that 'the Union is founded on the

[39] STC 292/2000, de 30 de novembre de 2000 recurso de inconstitutionalidad num 1463–2000. A reference to Arts. 7 and 52 of the Charter has also been made by the Italian Constitutional Court: Corte Constituzionale, Sentenza n.135, Anno 2002, 1–11, at 9 and 10.

[40] Notably Art. 41 on the right to good administration and Art. 42 on the right of access to documents.

[41] Von Bogdandy, A. 'The European Union as a human rights organisation? Human rights and the core of the European Union', 37 (2000) *CMLRev* 1307, 1318.

[42] Art. 51(1) of the Charter uses the word 'only'.

principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.' As for Article 7 TEU—which is being modified following the Nice treaty—this article imposes a system of political sanctions against any Member State that is guilty of a 'serious and persistent breach. . . of the principles mentioned in Article 6(1)'. This Article asserts that human rights and fundamental freedoms must be respected by Member States not 'only' insofar as they implement Community law or Union law, but in all their actions and behaviour in internal and external orders.

Moreover, the aim of these provisions is different: it is not just about legally enforcing certain rights (Article 6(2)), it is also about putting the Member States through a general test of democracy (Articles 6(1) and 7). Whatever the differences of wording between Article 6(2), which has been influential over the way Advocates General read the Charter, and Articles 6(1) and 7, it would seem difficult to dispute that the Charter is a common reference for putting into practice all of these Articles. Indeed, this is the stance adopted in September 2000 by the group of three wise men who did not hesitate to refer to the Charter when ruling on the fate of Austria in proceedings prior to a possible implementation of Article 7, despite the fact that the wording of Charter had not yet been finalised.

The political impact of the Charter, which is seen as a point of reference for all actions of the Member States, including those falling outside the sphere of Community law, may partly explain the extraordinary increase of complaints and petitions which the Commission receives from private individuals, as well as written and verbal questions from MEPs. Even when the Charter is not expressly cited by those actors, it may have been a motivating incentive. Actions of this kind aim to alert the Commission to alleged violations of fundamental rights in a particular Member State. There is, for instance, the new law about sects in France,[43] the religious freedom of Buddhist communities in Greece,[44] and the question about indicating one's religion on identity cards, also in Greece. Before the Commission can consider any legal intervention in its role as guardian of the treaties it must first of all ask itself whether the questions put to it do in fact fall under the reach of Community law.[45] A massive influx of complaints about concrete cases could be seen to suggest a more serious and persistent problem of fundamental rights being infringed by an individual Member State, which would justify intervention by the Commission outside of the judicial context (Article 7 TEU).

[43] Q P–1546/01, by MEP Sichrovski, not yet published in OJ.

[44] Q E–2200, by MEP Cappato, OJ 2001 C 151/2.

[45] Cases 5/88 *Wachauf* [1989] ECR 2069 and C–260/89 *ERT* [1991] ECR I–2925, as well as the problems of interpretation surrounding Art. 51(1) of the Charter.

2. The Candidate Countries

According to the terms of the so-called 'Europe agreements' and as a prerequisite to accession to the EU, candidates must take on the *acquis communautaire* which includes fundamental rights as general principles of Community law (Article 6(2) TEU). They also have to comply with a 'political conditionality', which almost exactly reflects the general test of democracy set out in Article 6(1) of the TEU. It would therefore seem likely that the Charter has the authority to be a reference for both these matters. When the Charter was being put together, the candidate countries were heard by the Convention. They stated their support for the process which would lead to the adoption of the Charter whilst also stressing that this Charter should in no way increase the contractual commitments (e.g. social rights) they accepted in the Europe Agreements. Whatever their reservations, Article 49 of the TEU sets the principles established in Article 6(1) (i.e. test of democracy and respect of human rights) as a condition of entry into the European Union. The Charter clearly has the authority to be a reference when this democracy test is applied to the candidates, the only difference being that Member States must comply immediately, whereas candidate states may adapt to it in stages.

3. The Management of the Union's External Policy

States outside the Union form the third circle of actors that the Charter may influence. They are not legally bound by the Charter, unlike Community institutions, which, when they negotiate external agreements, must respect the Charter as an inter-institutional agreement and as a statement of the general principles of Community law. Politically, one can expect that the Charter will influence external relations with the European Community and the EU. Article 11 of the TEU states that whenever the EU defines and implements a foreign and security policy, it must particularly strive to 'develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'. Article 177(2) EC uses almost exactly the same wording to define similar aims for the Community policy of development co-operation. If one accepts the argument outlined above that there should be no difference between Articles 6(1) and 6(2) TEU in the definition of human rights and fundamental freedoms, then it can be asserted that the Charter, as a catalogue of fundamental rights, should provide the European Community and the European Union with a clear response to accusations that their idea of fundamental rights internally is different from when they are acting externally. Diplomatic action must of course respect the sovereignty of the partners in question, and some rights or freedoms which are practicable within the EU, may not be outside it. The Charter expresses the values of European society as determined by the political, economic and social standards, or even by the elements of civilisation of this society; the Charter may, however, act as a reference. Various initiatives can

be seen to reflect this role of the Charter, such as the Commission Communication to the Council on fair trade, which attempts to generalise labels for imported products (e.g. chocolate) stating that the manufacture of the product has not involved the labour of children under the age of 16.[46] Thus, ethical labels would be an illustration of an international implementation of Article 32 of the Charter.

These very different ways in which the Charter is applied may illuminate the debate surrounding its future status.

III. What is the Future Status of the Charter?

The Declaration on the Future of the Union adopted during the Nice Conference provides that the reform process should in particular include an examination of the Charter's status. The first possibility which has already been advocated by some would be to do nothing. Legally, and in the light of what has been discussed above, this idea is not so foolish. Everything would remain just as before, perhaps even better than before, thanks to the Charter. The Charter would still influence rule-makers in the European Union, just as the ECHR influenced the British legislature before it was incorporated into the British legal order via the *Human Rights Act* in 1998. Case law would continue to evolve smoothly and we can imagine that the Charter would gradually be used in politics as a reference for democracy and fundamental rights. In this respect, we could see a parallel with the role that the 1789 '*Déclaration des droits de l'homme et du citoyen*' played in France and further afield before being incorporated into the preamble of the French Constitution of 1946, and then of 1958.

However, one may question whether it is actually possible for the Charter to retain its current status. At the European pre-Summit in Biarritz, and again at the Nice Conference, the Heads of State or Government rejected the idea of allowing the Charter to be immediately integrated into the treaties; even a mere reference to the Charter in Article 6(2) TEU, as one of the accepted inspirations for the formulation of the general principles of Community law, was excluded. On the other hand, the question of the Charter's future status is written into Declaration 23 annexed to the Nice Treaty. This political declaration has a specific meaning: in the context of the next 2004 institutional reform, the status of the Charter will have to be addressed. The Laeken Declaration on the future of European Union (December 2001) raises the question of the future integration of the Charter in the treaties. If it is decided that steps must be taken to integrate the Charter into the treaties, it is worth exploring the range of options and their consequences.

[46] COM (1999) 619.

A. A Simple Declaration

The minimalist solution would be to introduce the Charter via a simple declaration annexed to the Treaty on European Union. The Charter would be presented as a text drafted by a Convention and proclaimed at Nice by the three political institutions. The whole Charter would be included, with its preamble and the general clauses (Articles 51 to 54). Legally, the difference between the present situation and a proclaimed Charter, would be negligible. If the Charter were introduced in a declaration annexed to the Treaty, the impact would be mostly political; it would mean that the Member States were keen to achieve the goal defined by the Cologne European Council, because they believed in the formulation of fundamental rights and recognise the work carried out by the Convention.

B. A Reference to the Charter in Article 6(2) TEU

This solution was, as it is well known, already envisaged before the Nice conference (December 2000). The Charter would have been mentioned after the reference in Article 6(2) to the general principles of Community law, and in such a way that its inclusion would have enriched the previous system and not disrupted it. The whole Charter would have appeared in an annex, e.g. in the form of a declaration, well identified at a specific time. This solution, which is the simplest one, would have had the advantage of making the judges less wary of the Charter, without in any way changing its role in influencing the Union legislature. The Charter's political authority would have probably been reinforced. There are certain precedents where inter-institutional agreements were subsequently incorporated into the treaties, but this was generally done with a protocol (cf. Protocol on how to apply the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam).

C. Fully Incorporating the Charter into the Treaties

One could recall that the integration of a catalogue of fundamental rights was already suggested in the project on the Treaty on European Union adopted by the European Parliament on 14 February 1984 and based on the Spinelli report.[47] Whatever constitutional status the European Union may assume, the idea of incorporating the Charter into the Treaties, thereby giving the former the same legal force as the latter,[48] raises a whole string of legal issues, not to mention the 'constitutionalising' significance of a chapter on fundamental rights inserted in the future treaty. Only the legal issues will be here addressed.

[47] Five years later, on 12 April 1989, the European Parliament adopted a Declaration of freedom and fundamental rights; OJ 1989 C120/51.

[48] The 'explanations' could be annexed to the treaty in a declaration.

1. Substance

Several issues of incompatibility between the Charter and the Treaties may emerge. It would seem difficult, dangerous even, to amend the substance of a text like the Charter, which was written in peculiar circumstances. Who would have the competence? Moreover, this would also run the risk of undoing the balance that was so painstakingly worked out. It would be better to adapt the Treaty itself. This would seem particularly relevant for the articles on citizenship, which would have to be amended and in some cases done away with to avoid duplication with the Charter. In contrast, it would not seem necessary to modify an article such as Article 13 EC—about non-discrimination—as its content is more limited than Article 21 of the Charter, which addresses the same topic. The aims of these two articles are different. The article in the EC Treaty is an enabling clause which gives authority to rule-makers under particular procedural circumstances and within a defined area of competence. By contrast, clauses in the Charter merely decree a ban on discrimination, but across a wider sphere. One could take many other examples—equal rights for men and women, social rights (e.g. the right to strike) or new rights that do not feature in the Treaties. If the Charter were inserted in the Treaties, it would retain its current terms, without granting the EC/EU any new legislative powers.

The preamble, which serves to set out the intentions of the Charter's authors, does not present any particular problems. It could either be kept as it is or, for presentation reasons, be incorporated into the preamble of the constitutional Treaty, if the latter were rewritten.

2. General Provisions

The question of the Charter's general provisions is a more difficult one: should they be kept unaltered, or should they be wholly or partly amended? If the general provisions of the Charter were to be inserted in the Treaties unaltered, i.e if they became legally binding and, in all probability, subject to the jurisdiction of the Court of Justice, this would in reality result in a treaty within a treaty. Indeed, if the general clauses were kept, clarification would be needed with regard to the relationship between the substantive content of the Charter and existing international conventions, particularly the European Convention on Human Rights[49] or the constitutions of the Member States,[50] not to mention that Article 51 concerning the application of the Charter would appear meaningless if the latter were integrated into the Treaties. On the other hand, it would be equally problematic to abolish the Charter's general provisions and apply Community law to its substantive articles; the Charter was adopted as a whole and many Member States would veto any move to do away with the

[49] Arts. 52(2) and 53 of the Charter.
[50] Art. 53 of the Charter.

clause setting out the scope of the rights and the level of protection offered. Some observations about several questions which the general provisions aim to resolve will serve to illustrate this point.

—How the Charter fits in with the EC and EU Treaties

Article 51(2) provides that the Charter should not establish 'any new power or task for the Community or the Union'. One can take this to mean that the Charter cannot modify the rule-making powers of the Community or the Union. Abolishing this clause could generate uncertainty about the scope of these powers at a time where their clarification is expected (see the Laeken Declaration in the future of European Union).

Moreover, Article 52(2) of the Charter states that the rights recognised by the Charter 'which are based on the Community Treaties or on the Treaty on European Union shall be exercised under the conditions and within the limits defined by those treaties'. The aim of consistency is clear and laudable, but the phrasing of 'which are based on' seems ambiguous, to say the least. Should it be considered, for example, that the rights of non-discrimination set out in Article 21 of the Charter 'are based on' the EC Treaty when cases such as discrimination based on colour, language or belonging to an ethnic minority do not feature in Article 13 of the Treaty? The same applies to those cases of discrimination which are cited in both texts but about which the Council has not yet taken any measures under Article 13 EC; should 'the conditions and . . . the limits' defined by the Treaties apply to these cases also? There are other instances, more intricate still, where the provisions of the Charter are based not on the treaties but, according to the 'explanations', on the case law of the Court of Justice or the Court of First Instance. This is particularly the case with Article 41, which concerns the right to good administration, or with the clear requirements of Article 41(2). Would the limitations set out in Article 52(2) apply here? One ends up wondering if things would not actually be simpler if Article 52(2), with all its ambiguities, were abolished. Indeed, judges would certainly appreciate the consistency between all those provisions thus included in the Treaty.

—How the Charter fits in with the European Convention on Human Rights

This issue was discussed at length by the Convention. The result was Article 52(3). It states that when the Charter contains rights 'which correspond to rights guaranteed by the Convention for the Protection of Human Rights', the meaning and scope of these rights is the same, although EU law will prevail if the protection offered is greater than that of the ECHR. Interpreting this article is problematic for several reasons. First, it is difficult to find exact matches between the rights protected under the Charter and those cited in the ECHR. The 'explanations'—elaborated under the responsibility of the President of the Convention and which have no defined status—have only partly succeeded by setting out lists. Hence, for instance, Article 5 of the Charter outlaws slavery and elaborates the text of the ECHR by prohibiting trafficking in human beings.

Article 9 of the Charter regarding the right to marry also goes beyond the ECHR insofar as it introduces the possibility of unions between same sex couples. Article 47 of the Charter sets out the right to a fair trial in much more detailed terms than Article 6(1) of the ECHR. More complex still are those instances where the right described by the Charter has several sources, which include the ECHR. For example, Article 8 of the Charter which concerns the protection of personal data is based on Article 8 ECHR on the right to privacy in one's private life and correspondence, but also on a Convention of the Council of Europe and on a EC Directive. In all these cases, do the Charter and the ECHR 'correspond'?

In view of these apparent difficulties of interpretation, one may ask whether, once the Charter has been incorporated into the Treaties, it would be a good idea to retain this ambiguous Article with, however, clear intention to foster the convergence of judicial interpretations of the Luxembourg and Strasbourg Courts. One might add, without attempting to end the debate, that only a part of the Charter's provisions (approximately one third) cover areas addressed by the ECHR. To prevent divergence in the areas where there is substantial interference, the best solution would surely be for the EU to accede to the ECHR, and the possible ways of achieving such a solution are being very seriously examined by the Council of Europe. The presence of a Charter of fundamental rights within the basic Treaty of the European Union would in no way prevent the EU from acceding to the ECHR. Indeed, many States whose constitutions include bills of rights are party to the ECHR.

—How the Charter fits in with International law and the National law of the Member States

As for the level of protection offered by the Charter, Article 53 provides that:

> nothing in the Charter should be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

This Article creates the possibility for the Charter to derogate from Community law. Incidentally, it raises again the question of whether it should be maintained, were the Charter integrated into the treaties.

As regards general international law, Article 53 asserts that the Charter should not be understood as restricting or adversely affecting human rights as recognised by international agreements. This assertion seems perfectly in line with a monist analysis of the relationship between Community law and international law, which implies the primacy of international law. Similarly, with regard to treaties to which the Community or the Union take part, Article 53 only confirms the rule of international law whereby none of the entities involved can, by

adopting an act of their own—in this case the Charter—evade the international responsibilities to which they previously agreed. With respect to agreements signed by all EU Member States, primarily the ECHR, it is clear that these do not bind the Community or the Union. The Community or the Union were therefore in no way bound to introduce a provision stating that the Charter should be interpreted in a way that is compatible with those agreements. It was, rather, a voluntary move on the part of the Member States. This incidentally, is similar to Article 307 EC, whereby Member States have accepted a commitment to draw on all appropriate means to eliminate incompatibilities between the Treaty and agreements they may have concluded before membership.

The question of the relationship between the Charter and national constitutions raises more immediate practical difficulties. Article 53 reiterates the same formula with regards to national constitutions. It provides for the obligation to interpret the Charter in a way that does not restrict or adversely affect human rights as recognised, in their respective fields, by the Member States' constitutions. At first glance, it seems hard to reconcile the primacy given here to national constitutional rules with the very strong affirmation in the *Internationale Handelsgesellschaft* case law which excludes the possibility of Community law being overruled by any national rule of law whatsoever,[51] including any rule of constitutional law. An answer could be that the Charter provides that it will not override national constitutions 'in their respective fields of application' (Art. 53). But this conciliatory answer is irrelevant. First of all, it weakens the Community principle of primacy; secondly, it does not go far enough to meet the perspectives of the Member States' constitutional jurisdictions. National constitutional law requires a general application. In other words, where basic freedoms are concerned, it is particularly difficult to draw the line between what falls into the domain of the Charter and what should be covered by any given constitution. Indeed, the situation also varies from constitution to constitution. The case law of the German and Italian constitutional courts confirms the proposition that national constitutional law covers the whole area of fundamental rights. Classic rulings of these courts never say that national constitutional rules cease to apply where Community law applies. On the contrary, they affirm that the national constitutional protection continues to apply, in order to ensure that the protection offered is satisfactory.[52]

With respect to fundamental rights, cases where EU law has directly clashed with national constitutions have hitherto been relatively rare, but they are likely to increase as a result of the Charter, and all the more so if the Charter is integrated into the treaties. The wording of Article 53, which reflects neither the

[51] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[52] In Italy, *Granital SpA* v. *Administrazione delle Finanze*, Dec. 170 of 8 June 1984; In Germany, the *Bundesverfassungsgericht* decisions in *Wunsche Handelsgeslleschaft* ('*Solange II*') [1987] 3 CMLR 225 and *The Constitutional Review of EC Regulation on Bananas* ('*Solange III*'), 7 June 2000, (2000) *EuZW*, 702.

classic Community attitude of primacy of EC law over national law, nor the point of view expressed by the constitutional jurisdictions about the protection of fundamental rights, further complicates the debate. The constitutional amendments made before the modified EC/EU treaties were ratified and the national mechanisms of ex-ante control over the constitutionality of laws do not anticipate all the potential areas of contradiction.

3. Scrutiny

When the Charter was drawn up, it was often enough said that a document individuals were unlikely to rely upon in court was of little use in protecting fundamental rights. If the Charter were incorporated into the treaties it would probably be subject to EC/EU judicial control, including direct actions and preliminary references. Considering that the conditions of admissibility of annulment proceedings are relatively restrictive (Article 230 EC), the question has been asked whether an appeal route should be created for subjects of EC/EU law to challenge any violation of the Charter by any EC/EU act concerning them, including regulatory measures. This idea ties-up with the suggestion of establishing a hierarchy of norms in the simplified Treaties, with a view to allowing a distinction between statutory and legislative acts. One might also suggest that the EC/EU system and the protection of rights guaranteed by the Charter could include a mechanism of 'constitutionality' control, triggered by a popular initiative, as available in several national constitutions. Other than the practical issue of how such a course of action would be organised, this could however risk worsening the already very serious problem of congestion in the Luxembourg Court.

Those would appear to be the possible scenarios for the future of the Charter, based on current and still very recent experience of how it has been applied. The most ambitious solution of incorporating the Charter into the treaties is far from being the most certain. If the Charter were retained, certain general provisions would probably have to be revised, although it should be remembered that these played a large part in the global balance which was reached and in the acceptance of the substantive elements of the Charter by certain Member States. As for the content, it should not be touched except at the risk of undoing it completely.

8

THE PUBLIC SECTOR AS A GOOD EMPLOYER: THE APPLICATION OF THE ACQUIRED RIGHTS DIRECTIVE TO PUBLIC AUTHORITIES

Amandine Garde [*]

I. Introduction

Advocate General Mayras described a public authority as 'that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the powers of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens'.[1]

This quotation has an eighteenth century flavour and is difficult to adapt to the complex legal and economic system of the European Community the extraordinary remit of which has extended to many activities traditionally reserved to the State and to public authorities. The scope of this remit blurs the distinction between what could be termed the exercise of a public power and what could be termed the exercise of an economic function. The 'Europeanization of public service provision'[2] has thus rendered the definition of a 'public authority' elusive. One of the areas where such a definition has been particularly problematic is the protection of employees' rights in the event of the transfer of an undertaking.

Directive 77/187[3] was adopted in 1977 as part of the Commission's Social Action Programme, and was subsequently revised in 1998[4] and codified in 2001.[5] The Directive confers several specific rights to employees: first, employment contracts or employment relationships are transferred automatically with the same terms and conditions (Article 3); secondly, dismissals by reason of the

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[1] Case 2/74 *Reyners* [1974] ECR 631, at 665.

[2] Szyszczak, E. 'Public Service Provision in Competitive Markets' (2001) 20 *YEL* 35.

[3] Subsequently referred to as 'the Directive', OJ 1977 L 61/26.

[4] Dir. 98/50, OJ 1998 L 201/58.

[5] Dir. 2001/23, OJ 2001 L 82/16.

transfer alone are prohibited (Article 4); finally, employees representatives have the right to be informed and consulted on a transfer (Article 7). The precise scope of application of the Directive is a controversial issue that has given rise to endless litigation and criticism. Most of the literature so far has focused on the meaning of 'the transfer of an undertaking'.[6] Another less explored, but equally important, issue is whether the Directive should apply to economic activities only, or whether it should apply 'to all authorities, public or private, notwithstanding the activities, they are involved in'.

II. The Economic/Public Divide: the Evolution of the Court's Case law

In its original version, Article 1(1) only stated that 'this Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'. In the case of *Redmond Stichting*[7], the Court took a broad, purposive approach to the undertaking that could fall within Article 1(1), stating that an undertaking did not need to operate for profit to fall within the scope of the Directive. On the facts of the case, a Dutch local authority ceased to subsidise a foundation that provided assistance to Surinamese and Antilles drug addicts. At the same time, it decided to switch the subsidy to another foundation that provided assistance to drug addicts in general. The two foundations subsequently partially merged and a certain number of employees were transferred from one body to another.

The Court held *inter alia* that this transfer fell within the scope of the Directive despite the fact that the foundations were non-profit-making organisations.

> Article 1(1) of the Directive is to be interpreted as meaning that the expression "legal transfer" covers a situation in which a public authority decides to terminate the subsidy paid to one legal person as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim.[8]

[6] See in particular Case 24/85 *Spijkers* [1986] ECR 1119; Case C–392/92 *Schmidt* [1994] ECR I–2435; Case C–13/95 *Süzen* [1997] ECR I–1259; Joined Cases C–127/96, C–226/96 & C–74/97 *Hermandez Vidal* [1998] ECR I–8179; Joined Cases C–173/96 & 247/96 *Sanchez Hidalgo* [1998] ECR I-8237; Case C–234/98 *Allen* [1999] ECR I–8643; Case C–172/99 *Oy Liikenne* [2001] ECR I–745; Case C–51/00 *Temco*, judgment of 24 January 2002, nyr. This case law has been widely commented upon. Recently, see in particular McMullen, J. 'Sidestepping Süzen' (1999) 28 *ILJ* 360; Davies, P. 'Transfers—the UK will have to make up its own mind' (2001) 30 *ILJ* 231; Garde, A. 'Recent Developments in the law relating to transfers of undertakings' (2002) 39 *CMLRev* 523 Now published (pages 523–550).

[7] Case C–29/91 *Redmond Stichting* [1992] ECR I–3189.

[8] Para 21.

The Court upheld its findings in the subsequent case of *Commission* v. *United Kingdom*,[9] in which the United Kingdom was criticised for limiting the application of its legislation implementing the Directive to commercial ventures only. 'The fact that an undertaking is engaged in non-profit making activities is not itself sufficient to deprive such activities of their economic character or to remove the undertaking from the scope of the Directive.'[10]

On the one hand, the *Redmond Stichting* case law clarified that the Directive could apply even to non-profit-making activities; on the other hand, it reaffirmed that its scope was limited to activities of an economic nature. Somehow unavoidably, the question arose in the case of *Henke* as to the extent to which the Directive could apply to public authorities.[11]

Mrs Henke had been working for two years as secretary to the mayor's office of the German municipality of Schierke, when this municipality and others formed the administrative collectivity of Brocken. The municipality of Schierke transferred its administrative functions to the collectivity of Brocken, with which Mrs Henke was offered employment. She decided, however, to turn this offer down on the ground that she could only take on a post in Schierke itself because she had to look after her child. The municipality consequently terminated her contract of employment and Mrs Henke brought proceedings for a declaration that she had been dismissed contrary to the German legislation implementing the Directive.

The Court held that the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities could not constitute the transfer of an undertaking within the meaning of the Directive. It reached this conclusion on the basis of two arguments. First, it identified one of the aims of the Directive as 'protecting employees from the potentially unfavourable consequences of changes in the structure of undertakings, resulting from economic trends at national and Community level', which did not include the reorganisation of the public administration.[12] Secondly, it supported its findings by comparing the different language versions of the Directive. The terms used in most of the Community languages to designate the subject of the transfer[13] or the beneficiary of the transfer[14] relate to economic entities only rather than the reorganisation of a public administration, and none of the other languages contradict this interpretation.

The reasoning of the Court in this case was particularly brief. Nevertheless, it has since been endorsed by the Community legislature, together with the

[9] Case C–382/82 *Commission* v. *UK* [1994] ECR I–2435.

[10] Paras 44 to 46.

[11] Case C–268/94 *Henke* [1996] ECR I–4989.

[12] After amendment, Second Recital.

[13] Virksomhed, Unternehmen, entreprise, impresa, onderneming, empresa, yritis, företag . . .; and bedrift, Betrieb, établissement, stabilimento, vestiging, estabelecimento, centro de actividad . . .

[14] Indehaver, Inhaber, chef d'entreprise, imprenditore, ondernemer, empresario, empresario . . .

cases of *Redmond Stichting* and *Commission* v. *United Kingdom*. New Article 1(1)(c) provides that

> the Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of the Directive.

The conclusion to be drawn from *Henke* is simply that the Directive can apply to any undertaking, notwithstanding its legal status—public or private—provided that it exercises an economic activity. However, in this case, the Court did not lay down any specific criteria to decide when a public entity exercised an economic activity as opposed to when it acted in the exercise of its sovereign powers.

This question arose in the two relatively recent decisions of *Mayeur*[15] and *Collino*,[16] in which it was held that the scope of the *Henke* exclusion had to be interpreted restrictively.

Mr Mayeur was employed by a non-profit-making association that promoted the opportunities offered by the City of Metz. To that end, the association published and distributed a magazine, for which Mr Mayeur raised funds. The activities of the association were transferred to the City of Metz; Mr Mayeur was dismissed. The Court was asked whether the Directive could apply in such circumstances.

The French Government argued that, although the association was subject to the rules of private law, it performed a public service of general interest. In support of that contention, the Government stated that: the association was created on the initiative of the Mayor of Metz; it was directed by elected representatives; and, it was publicly funded. Consequently, the transfer of its activity to the City of Metz amounted to the reorganisation of the structures of a public administration within the meaning of *Henke*. The Court strongly rejected these arguments and held that the services provided by the association were economic in nature and could not be regarded as deriving from the exercise of public authority. In so doing, it implicitly confirmed that the scope of the Directive could only be limited in cases concerning the reorganisation of the structures of the public administration or the transfer of administrative functions between public administrative authorities.

The judgment in *Collino* was based on a similar reasoning. A telecommunication services operation managed by a public body—the ASST—was transferred to a private company: Telecom Italia. Mr Collino and Ms Chiappero were previously employed by the ASST and claimed that they were entitled to

[15] Case C–175/99 *Mayeur* v. *Association Promotion de l'Information Messine (APIM)* [2000] ECR I–7755.

[16] Case C–343/98 *Collino and Chiappero* v. *Telecom Italia SpA* [2000] ECR I–6659.

the same terms and conditions of employment with their new employer, Telecom Italia.

The Court dismissed the argument of the Italian Government that the Directive could not apply. Relying on its settled competition case law, it found that the management of public telecommunications equipment and the placing of such equipment at the disposal of users on payment of a fee amounted to an economic activity.[17] Furthermore, it held that the fact that the operation of a public telecommunications network was entrusted to a body forming part of the public administration could not prevent that body from being classified as a public undertaking.[18] Finally, the circumstance that the decision to transfer was taken unilaterally by the State, rather than on the basis of a contractual agreement, was not decisive.[19] The applicability of the Directive could not be ruled out.

It is arguable that *Mayeur* and *Collino* merely refine the *Henke* test, rather than depart from it in any way. They expressly state what *Henke* implies, namely that if a public authority is involved in an economic activity it may fall within the scope of the Directive notwithstanding its legal status or the way in which it is funded.

These three cases seem at first to lay down a clear distinction between the exercise of public authority and the exercise of economic activities. However, that distinction is not straightforward.

III. The Economic/Public Divide: the Analogy with Competition law

Professor Hepple argued in a 1990 Commission report that the definition of 'undertaking' under Articles 81, 82 and 86 EC should be transposed to transfer cases,[20] and it seems that the Court has (impliedly at least) recognised that an analogy should be drawn between transfer and competition cases to decide when the Directive should be applicable to a public law body. This is certainly a useful starting point, but such an analogy may be of limited use.

Article 81 of the Treaty applies only if there is an agreement, decision or concerted practice between *two or more undertakings*. The notion of an 'undertaking', even if it is crucial to the scope of Article 81 EC, has been left undefined in the Treaty. The Court has interpreted it extensively: 'the concept of

[17] Case 41/83 *Italy* v. *Commission* [1985] ECR 873; Joined Cases C–271/90, C–281/90 and C–289/90 *Spain and Others* v. *Commission* [1992] ECR I–5833.

[18] Case C–69/91 *Decoster* [1993] ECR I–5335 and Case C–92/91 *Taillandier* [1993] ECR I–5383.

[19] Case C–29/91 *Redmond Stichting* v. *Bartol* [1991] ECR I–3189.

[20] Hepple, B. 'Report for the Commission of the European Communities Directorate-General Employment, Industrial Relations and Social Affairs—Main shortcomings and proposals for revision of Council Directive 77/187/EEC', December 1990.

an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[21] This definition emphasises that it is the nature, rather than the form, of the activity that is the primary consideration. A consequence flowing from this functional approach is that a particular entity may be acting as an undertaking when carrying out certain of its functions but not others.[22]

The Court's case law on public authorities in the context of competition law illustrates the 'split personality' of States, in so far as it draws a distinction between 'a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market'.[23] Claims of sovereign immunity from the competition provisions of the Treaty are therefore confined to acts that are those of Government rather than trade. It is only when a body is conducting activities 'in the exercise of official authority' that competition law does not apply.[24] For instance in *Eurocontrol*,[25] the Court held that competition rules were not applicable to a body entrusted with the supervision of airspace. Its activities were in fact 'connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority'.[26]

The Court went one step further in *Cali*,[27] where the public authorities had entrusted a body governed by private law with anti-pollution surveillance in the oil port of Genoa. Notwithstanding the fact that the body was governed by private law,[28] the Court upheld the statements it made in *Eurocontrol*:

> Anti-pollution surveillance (. . .) is a task in the public interest which forms part of the essential functions of the State as regards the protection of the environment in maritime areas. Such an activity is connected by its nature, its aims and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition.[29]

[21] Case C-41/90 *Höfner and Elser* [1991] ECR I–1979, para 21. See also Joined Cases C–159/91 and 160/91 *Poucet and Pistre* [1993] ECR I–637, para 17.

[22] See further Buendia Sierra, J.-L. *Exclusive Rights and State Monopolies under EC law* (Oxford, OUP, 1999), 55.

[23] Case C–118/85 *Commission* v. *Italy* [1987] ECR 2599, para 7.

[24] Case 30/87 *Corinne Bodson* v. *Pompes Funèbres des Régions Libérées SA* [1988] ECR 2479.

[25] Case C–364/92 *SAT Fluggesellschaft mbH* v. *Eurocontrol* [1994] ECR I–43. For examples where the Court refused to exempt public bodies from the scope of competition law, see Case C–41/90 *Höfner and Elser* [1991] ECR I–1979 and Case C–387/93 *Banchero* [1995] ECR I–4663.

[26] Para 30.

[27] Case C–343/95 *Diego Cali & Figli Srl* v. *Servizi ecologici porto di Genova SpA* [1997] ECR I–1547.

[28] See also Case C–118/85 *Commission* v. *Italy* [1987] ECR 2599: 'It is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights', para 8.

[29] Paras 22 and 23.

Advocate General Jacobs has recently confirmed the need for such a 'differentiated approach':

> It is settled case-law that public bodies engaging in economic activities may be regarded as undertakings. On the other hand, activities in the exercise of official authority are sheltered from the application of the competition rules. Furthermore, the notion of 'undertaking' is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest falls outside the competition rules.[30]

A. The Limits of the Analogy Between the Meaning of an Undertaking in Competition and in Transfer Cases

Such a functionalist approach is far from being immune from controversy.[31] Nevertheless, the Court seems to have embraced the same 'differentiated approach' in both competition law and transfer cases.[32] The three cases of *Henke*, *Mayeur* and *Collino* confirm that the test is whether a public body acts in the exercise of its public prerogatives or whether it exercises an economic activity. However, social policy is of a different nature than competition law, which makes this analogy inappropriate.

In the first place, the Court should not systematically rely on its competition case law to define the notion of 'undertaking' within the meaning of the Directive on Acquired Rights. The aims of competition law and social policy are different, and the Court itself has acknowledged it. In *Allen*, for instance, the question arose as to whether the Directive could apply to two subsidiaries belonging to the same corporate group and having common ownership, management, premises and work.[33] In particular the two subsidiaries denied that their employees were entitled to any of the rights guaranteed by the Directive in the case of a transfer from one to the other, as they had to be considered as a single undertaking for the purpose of the Directive.

This argument was based on an analogy with the *Viho* case, in which the Court held that a distribution agreement between two firms belonging to the same corporate group was not capable of triggering the application of Article 81 EC.[34] The Court clearly distinguished the cases of *Allen* and *Viho* and rejected the analogy. It is true that:

[30] Opinion in Case C–475/99 *Ambulanz Glöckner*, judgment of 25 October 2001, nyr, para 72.

[31] See Szcycsak, above n 2, for a discussion relating to the litigation on the application of 'services of general economic interests' contained in Art. 86 EC.

[32] The Court has even relied expressly on some of its competition law cases in *Collino* (telecommunication services = economic activity).

[33] Case C–234/98 *Allen* [1999] ECR I–8643.

[34] Case C–73/95 *Viho* [1996] ECR I–5457. Appeal against the judgment of the CFI in Case T–102/92 [1995] ECR II–17.

> *for the purpose of the application of the competition rules*, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities (emphasis added).[35]

By way of contrast, however, the main purpose of the Directive clearly is to protect the rights of employees in cases of transfers. First of all, the Directive was adopted as part of the Commission's Social Programme of 1974. Moreover, it is obvious from its Preamble and its title. Finally, all the cases of the Court interpreting the Directive insist on the importance to safeguard employees' rights in the event of a transfer. In *Allen* itself, the Court held that the purpose of the Directive was:

> to ensure, so far as possible, that the rights of employees [were] safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor.[36]

The focus in interpreting the Directive should be the effect of the transfer on the employees of the undertaking, which is likely to be identical whether or not the transfer takes place between subsidiaries of the same corporate group. This is particularly true in cases such as *Allen* where the employment conditions were different with the two consecutive employers.

In the second place, the relationship between competition law and social policy has evolved quite rapidly in the last few years. More and more, the Court takes social policy requirements into account before deciding whether the competition provisions of the Treaty should apply. In *Albany*, for instance, the Court, in upholding the Dutch social security system, clearly stated that social and competition policies were two competing aims of the Community, which meant that social policy should no longer be subordinated to the aims of competition.[37] Otherwise, the coherence of the social legal order of the Community would be under threat. As they are both mentioned in Article 2 of the Treaty, competition law and social policy should now be placed on an equal footing.[38] In fact, the Court has even taken the argument one step further and acknowledged that in some cases social policy should take precedence over the competition policy of the Community.[39]

[35] Case T–102/92, para 50.

[36] Para 20.

[37] Case C–67/96 *Albany* [1999] ECR I–5751.

[38] Paras 59 and 60 of the *Albany* case. For a general account of the relationship between the meaning of undertaking in competition law and social policy, see Hennion-Moreau, S. 'La notion d'entreprise en droit social communautaire' *Droit Social* (2001) 957.

[39] Joined Cases C–270/97 and C–271/97 *Deutsche Post AG* v. *Elisabeth Sievers and Brunhilde Schrage* [2000] ECR I–929. The Court stated: 'the economic aim pursued by Article 119 of the Treaty [now Article 141], namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right' (para 57).

IV. The Economic/Private Divide: the Protection of Employees' Rights

Advocate General Lenz suggested an alternative approach in *Henke* but the Court did not follow his reasoning. He submitted that the primary purpose of the Directive should be the main consideration in deciding whether it should apply to public authorities. This is especially necessary since the apparently clear distinction established by the Court is bound, in practice, to lead to a high degree of uncertainty in at least two respects.

First, it may be extremely difficult in some cases to decide when a public authority is exercising its public prerogatives and when it is exercising an economic activity. In the case of *Henke*, in particular, the only certainty was that the municipality of Schierke had become part of the administrative collectivity of Brocken. However, neither the judgment of the Court nor the Opinion of the Advocate General contained any details concerning the exact nature of the contracts that had been transferred to the administrative collectivity in question. The Advocate General clearly pointed out that contracts of an economic nature may have been taken over, but the Court disposed very swiftly of his argument by holding that 'even if it was assumed that [activities involving the exercise of public authority] had aspects of an economic nature, they could only be ancillary'.[40] This statement is not particularly convincing; in most cases, it is likely that a public authority will both exercise public prerogatives and carry out economic activities.

Secondly, it may be that a private undertaking with a view to profit will carry out in even only a few years what is today regarded as the exercise of public authority. Advocate General Lenz gave the example of the privatisation of prisons. The privatisation of certain types of services within the prison system is not entirely new; for some time prisons have contracted out for specific services such as medical care, counselling and education. However, the privatisation of whole facilities is new to the modern prison system. The fact that some prisons are now built and even operated by private corporations has raised some concern.[41] In particular, municipal employee unions fear that the pressure to make profits will result in the cutting down of costs, which will ultimately affect their working conditions.[42] As prisons undoubtedly represent the exercise of public authority, it is likely that the Directive would not apply on the basis of the Court's case law if a public body transferred the management of a prison to a

[40] Para 17.

[41] See Morris, N. 'The Contemporary Prison' in Morris, N. and Rothman, D. (eds.) *The Oxford History of Prisons—The Practice of Punishment in Western Society* (Oxford, OUP, 1998), 227.

[42] See, for example, the statements that Mark Healy from the Prison Officers Association made to the Trades Union Congress on 17 September 1998: 'the workers in private prison are paid less than their public sector counterparts, they work longer hours, they have less holidays, and you can go on and on and on. In short, it is yet another example of the private sector exploiting workers'.

private entity. However, it is suggested that the Directive should apply to such cases since its primary aim is to safeguard the rights of employees in the case of a change of employer. The scope of application of the Directive should be determined not only irrespective of the legal nature of a given body—public or private, but also notwithstanding its activity—economic or not, as this is the only way to ensure that employees' rights are sufficiently protected.

If the Court had reached the conclusion that employees' rights on transfer should be protected notwithstanding their sectors of activity, it would not have contradicted the text of the Directive as it stood before it was amended in 1998. At the time, Article 1 did not draw any distinction between public and private entities or between the exercise of public authority and the exercise of an economic activity. It is true that it referred to 'undertakings', but this concept should, as stated above, be interpreted more broadly for the purpose of the Directive than in competition law.

This approach would also have been in conformity with the Court's case law. It has adopted a broad purposive interpretation to the Directive in order to protect employees' rights. In the recent case of *Temco*, for example, it has restricted even further the scope of the requirement that there be 'a legal transfer'.[43] Volkswagen entrusted the cleaning of a number of its production plants to BMV, which subcontracted the cleaning work to its subsidiary GMC. It subsequently terminated its contract with BMV and instructed Temco to provide the same services. The question arose as to whether the Directive could apply to such subcontracting situations. The Court had already decided on several occasions that the absence of a direct contractual link between the transferor and the transferee could not as such preclude the existence of a transfer within the meaning of the Directive.[44] The primary purpose of the Directive to protect employees' rights, as well as the uncertainties resulting from the comparison of the different language versions of the Directive, justify that the concept of 'a legal transfer' should cover situations where there is no direct contractual link between consecutive employers. However, the Court took its reasoning one step further in *Temco* where, for the first time, four rather than only three employers were involved in the transaction:

> The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect'.[45]

The same teleological reasoning should benefit all employees working in the public sector as well.

[43] Case C–51/00 *Temco*, judgment of 24 January 2002, nyr.

[44] See, for instance, Case 324/86 *Daddy's Dance Hall* [1988] ECR 739; Case C–29/91 *Redmond Stichting* [1992] ECR I–3189; Case C–13/95 *Süzen* [1997] ECR I–1259.

[45] Para 32. Advocate General Geelhoed suggested an alternative approach to subcontracting (paras 33 to 40 of his Opinion). See Garde, above n 6.

V. The Specificity of the Employment in the Public Sector

The French and Italian Governments argued in *Mayeur* and *Collino* respectively that the specificity of the public service justified that public sector employees should be treated differently. Public sector employees would be better off overall than their counterparts in the private sector, as they benefit from more security of employment, and automatic promotion and other advantages that private sector employees do not enjoy. The argument that this difference justifies that the Directive should not apply to employees in the public sector is not acceptable. In any case, it is impossible to sustain when privatisation takes place and employees lose the advantages they previously enjoyed.[46] Furthermore, the specificity of the public service should not have as a consequence that some employees of the public sector are any less protected than employees in the private sector. The distinction between public and private sectors is too formal to serve as a useful guide to the applicability of the Directive. The Court seems to have acknowledged it to some extent in stating that the legal nature—public or private—of an undertaking is not relevant as such in deciding whether the Directive is applicable.

In other areas of social policy, protective provisions are applicable notwithstanding whether the activity at stake is linked to the exercise of public authority. For instance, Article 1(3) of the Working Time Directive states that 'this Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391'.[47] Moreover, the Directive was revised in 2000 to extend its scope of application to previously excluded categories of employees, the rationale being precisely to avoid discriminations between employees depending on the sector of activity they are engaged in.[48] It is arguable that the Community legislature is keen to avoid discrimination between different categories of workers more generally. It is true that Article 2(1)(d) of the Directive states that '"employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law'.[49] It is also true that the Court has justified this lack of a Community definition of the term 'employee' by relying on the fact that the Directive is of partial harmonisation only and therefore does not require a uniform interpretation of this concept.[50]

[46] Advocate General Alber forcefully made this point in *Collino*.

[47] Dir. 93/104/EC of 23 November 1993, OJ 1993 L 307/18. Art. 2 of Dir. 89/391 states that 'this Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.' (OJ 1989 L 183/1).

[48] Dir. 2000/34/EC, OJ 2000 L195/41.

[49] Other terms such as 'representatives of employees' (Art. 2(1)(c)), 'contract of employment' and 'employment relationship' (Art. 2(2)) are also defined at national level.

[50] Case 105/84 *Mikkelsen* [1985] ECR 2639 and Case 19/83 *Wendelboe* [1985] ECR 457. In *Collino*, the Court emphasised, after holding that a transfer such as that in the main proceedings could theoretically fall within the material scope of the Directive, that it could only be relied upon

The Directive was amended in 1998 with the idea in mind that employees should not be excluded from the scope of the Directive on the basis that they are atypical workers. Article 2(2) now states:

> Member States shall not exclude from the scope of the Directive contracts of employment or employment relationships solely because:
>
> a) of the number of working hours performed or to be performed,
> b) they are employment relationships governed by a fixed-duration contract of employment. . ., or
> c) they are temporary employment relationships . . . .

In any case, public sector employees should not be marginalised under the pretext that they might be better protected in matters other than transfer situations.

VI. Conclusion

The aim of this article has been to show that Directive 77/187 should be applicable to any undertaking, broadly defined. Public sector employees should benefit from the same protection on transfers as private sector employees, notwithstanding in which activity the body they work for is engaged.

Acceptance that the Directive should be applicable to all sectors of activity would not mean that the Directive should necessarily apply in every single case. Other conditions must be satisfied, most importantly a transfer of an undertaking must have taken place on the facts of the case.[51] An overall assessment is required,[52] and the transfer of an activity alone is not sufficient to trigger the application of the Directive.[53] In labour intensive sectors of activity, a major part of the workforce must have been taken over,[54] whereas for other sectors of

by persons who are protected in the Member State concerned as employees under national labour law (para 36). The lack of a Community definition has been fiercely criticised 'as it may deprive some of the workers who need it most of the protection that the Directive provides and consequently 'frustrate the aims of those who drafted the Directive' (Hepple, above n 20).

[51] In *Mayeur*, the Court stated in the last stage of its reasoning that it could not conclude as to whether the Directive should apply. The Court decided that the activity was economic in nature, and therefore the applicability of the Directive could not be ruled out. However, it also insisted on the fact the mere fact that the activity engaged in by the two consecutive employers was similar did not justify the conclusion that an economic entity had been transferred, as an entity cannot be reduced to the activity entrusted to it (para 49). It therefore left it to the referring court to assess whether a transfer of an undertaking had actually taken place on the facts of the case.

[52] Case 24/85 *Spijkers* [1986] ECR 1119.

[53] Case C–13/95 *Süzen* [1997] ECR I–1259. This case has been seen as a retreat from the more extensive interpretation adopted by the Court in Case C–392/92 *Schmidt* [1994] ECR I–2435.

[54] See Joined Cases C–127/96, C–229/96 and C–74/97 *Hernandez Vidal* [1998] ECR I–8179 and Joined Cases C–173/96 and C–247/96 *Sanchez Hidalgo* [1998] ECR I–8237.

activity, assets must have transferred.[55] New Article 1(1)(b) confirms that 'there is a transfer within the meaning of this Directive where there is the transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity'.

If the scope of the Directive remains limited and subject to strict conditions in the definition of what constitutes a relevant transfer, it is therefore even less legitimate to narrow down its scope as the Court did in *Henke*. Article 1(1) should be amended and the reference to the *Henke* case law suppressed. This would not be difficult to achieve, as shown by the example set by the British Government. It has undertaken to apply the Transfer Regulations[56] throughout the public sector, thus going beyond what the case law of the Court currently imposes on Member States. The Regulations would apply even in cases where there would be no change of employer, such as transfers of functions within the civil service.

> The process of modernisation through organisational change in the public sector will best be achieved by clarity and certainty about the treatment of staff involved. The Government is committed to ensuring that staff involved in all such transfers are treated fairly and consistently and their rights respected (. . .) The Government is committed to ensuring that the public sector is a good employer.[57]

[55] Case C–172/99 *Oy Liikenne* [2001] ECR I–745. See Davies, above n 6.

[56] Transfers of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794).

[57] *Staff Transfers in the Public Sector Statement of Practice*, Cabinet Office, January 2000. See Sargeant, M. 'New Transfer Regulations' (2002) 31 *ILJ* 35, 39.

9

JUDICIAL REVIEW IN EC AND EU LAW—SOME ARCHITECTURAL MALFUNCTIONS AND DESIGN IMPROVEMENTS?

*Laurence W. Gormley**

Introduction—Dual Level Review Mechanisms

From the point of view of an individual, rights conferred by a legal system are only effective and substantive if there are effective remedies available if those rights are infringed. In some instances, those remedies may be pre-emptive;[1] but in most instances, they seek to deal with infringements of rights, or damage to interests, which have taken place.

European Community law and European Union law have a most interesting approach to remedies, on the one hand developing them on the bare basis of the Treaties at the level of the centralised Community judiciary—the Court of Justice and the Court of First Instance—and, on the other hand, through the intervention of those bodies, insisting that remedies be developed at the level of the decentralised Community judiciary—the national courts. In that latter aspect the autonomy of the national legal systems has been respected, accepting diversity of approaches, but that autonomy is, celebratedly, far from unfettered.[2]

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[1] Such as *quia timet* injunctions in English law.

[2] See e.g. Case C–312/93 *Peterbroeck, Van Campenhout & Cie. SCS* v. *Belgian* State [1995] ECR 4599; Cases C–430 & 431/93 *Van Schijndel et al.* v. *Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I–4705 (both reciting earlier case–law); Cases C–10–22/97 *Ministero delle Finanze* v. *IN. CO. GE.'90 Srl et al.* [1998] ECR I–6307, and Case C–126/97 *Eco Swiss China Time Ltd.* v. *Bennetton International NV* [1999] ECR I–3055.

References for Preliminary Rulings

Central to the success of the Community system of remedies is the mechanism of references for a preliminary ruling established by Article 234 EC (ex 177 EC).[3] In many ways, this mechanism is the jewel in the Crown of the Community system. That great Community lawyer Gerhard Bebr put it thus:

> The inconspicuous provision of Article [234], under which the Court rendered some of its most spectacular rulings, is of great, dynamic nature, offering unexpected possibilities for the development of Community law. With great imagination and determination, the Court has boldly seized and exploited them. Without Article [234] and its imaginative use by the Court, the Community legal order would have most likely assumed an entirely different character. Very likely it would have gradually degenerated into a mere traditional international legal order.[4]

This system relies for its effectiveness on mutual trust and cooperation between the centralised and decentralised Community judiciary.[5] There have, however, been some proverbial hiccups in giving full effect to preliminary rulings;[6] and it is possible to argue that on occasions the Court was at least in danger of overstepping the boundaries of its function.[7] It is also the case that national courts have not always shown themselves willing to take Community law arguments on board, so that there may be a considerable threshold for litigants. Docket control at the level of the decentralised judges of Community law has its risks. Nevertheless, the mechanism of references for preliminary rulings has, in the

[3] See *inter alia* Andenas, M. (ed.), *Article 177: References to the European Court: Practice and Procedure* (London, Butterworths, 1994); Anderson, D., *References to the European Court* 2nd. ed., (London, Sweet & Maxwell, 2002); Kapteyn, P.J.G. & VerLoren van Themaat, P. (ed. Gormley, L.W.), *Introduction to the Law of the European Communities* 3rd. ed., (London, Kluwer Law International, 1998) 498–573, and Arnull, A.M., *The European Union and its Court of Justice* (Oxford, OUP, 1999) 49–74. See further the series of papers relating to national practice in (2002) 66 Rabel's Z. 203–631.

[4] Bebr, G., *Development of Judicial Control of the European Communities* (The Hague, Nighoff, 1982) 362.

[5] Art. 234 EC sets up 'a special field of judicial cooperation, which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.' (Case 16/65 *Firma C. Schwarze* v. *Einfuhr– und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877 at 886. See also Case 244/80 *Foglia* v. *Novello* [1981] ECR 3045 at 3062–3063 on the importance of each court having regard to the other's responsiblities.

[6] See Kapteyn & VerLoren van Themaat, above, n 3, 525.

[7] Particularly where the Court has so completely dealt with an issue before it that the national judge is simply left with nothing more to do than act as if he or she were a mere functionary of the Court of Justice. See e.g. Case C–362/88 *GB–INNO–BM* v. *Confédération du Commerce Luxembourgeois* [1990] ECR I–667; Case C–312/89 *Union départementale des syndicats CGT de l'Aisne* v. *SIDEF Conforama et al.* [1991] ECR I–997; Case C–332/89 *Marchandise et al.* [1991] ECR I–1027, and Case C–126/91 *Schutzverein gegen Unwesen in der Wirtschaft e.V.* v. *Yves Rocher GmbH* [1993] ECR I–2361

words of Lord Slynn of Hadley, created 'a remarkable relationship of comity between national courts and the Court of Justice.'[8] The Court of Justice has always taken steps to emphasise that it and the national courts have a joint role in ensuring that Community law is upheld: the Court of Justice is there more as a concerned godfather than as a sergeant-major.[9]

The reference for a preliminary ruling is designed to ensure the uniform interpretation and application of Community law throughout the whole Community.[10] From the point of view of individuals, the mechanism facilitates the one-man lobby seeking to enforce his rights,[11] although it will obviously not facilitate a challenge to Community legislation out of time by a person who had standing to mount a challenge but failed to do so: otherwise individuals would have endless opportunities for pure mischief-making.[12] However, a core feature of the mechanism is that it is available throughout the Community, under the same conditions.[13] As long as a litigant can persuade a national court to refer, the conditions for access to the Court of Justice apply equally throughout the Community.

From Pillar to Post?

There are two competing sets of interests here from the viewpoint of a proper and effective system of administration of justice and its development. On the one hand the essential objective of the mechanism and the successful relationship between the Court of Justice and national courts, as well as the principle of equal treatment of citizens of the Union and other (economic) actors, would suggest that in further European fields of integration and cooperation the preliminary ruling mechanism of the Community Treaties should be used, in order to ensure consistency and equality. On the other hand, national (and even Community) administrations tend to find too easy recourse to a judicial forum decidedly inconvenient, particularly when the judicial forum may well analyse a situation in the light of the dynamics of the framework concerned. They not infrequently perceive the record of the Court of Justice as being pro-Community, the institution as having perhaps a certain idea about

[8] Slynn, G., *Introducing a European Legal Order* (43rd. Hamlyn Lecture Series) (London, Stevens, 1992) 9.

[9] Kapteyn & VerLoren van Themaat, above, note 3, 525.

[10] See e.g. Case 166/73 *Rheinmühlen Düsseldorf* v. *Einfuhr– und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33 at 48.

[11] E.g. Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.

[12] Case C–188/92 *TWD Textilwerke Deggendorf GmbH* v. *Germany* [1994] ECR I–833 at 852–53.

[13] Thus it reflects the desire to ensure equal access to judicial protection, in particular (but not only) against acts of the Community Institutions and against action by national administrations implementing those acts.

Europe,[14] going far beyond what legislators and governments think their own intention was. Administrations start to speak about not trusting the Court; about wanting to keep its nose out of intergovernmental activities outside the Community pillar. In relation to various conventions, the Community model of references has not been adopted without adaptations.[15] Perhaps, then, it is not wholly surprising that, in relation to the architecture of the European Union, the Treaty of Amsterdam, true to its colander configuration,[16] has produced an immaculate misconception. It betrays the very foundation of the pearl of the Union itself: the concept of citizenship. This is the first architectural malfunction which this paper addresses.

It is true that before Amsterdam the Court's nose was kept very firmly out of the third pillar of the Union save where specific conventions conferred jurisdiction upon it. The Court was and is still kept at arm's length in relation to the second pillar. In policy terms, that is probably unsurprising. However, the lack of general jurisdiction in relation to the third pillar did not, of course, prevent the Court from examining the legal basis of a Joint Action under the Third Pillar on airport transit visas to see whether it encroached upon the powers conferred by the EC Treaty on the Community.[17]

In the Third Pillar, the Court now has a limited but potentially extremely interesting role. A number of matters are excluded: the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State, and the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security.[18] The Court of Justice can however review the legality of framework decisions and decisions at the instance of a Member State or the Commission, but not at the instance of the European Parliament,[19] nor at the instance of private parties. The latter exclusion is logical given that both framework decisions and decisions are normative acts, which are expressly stated not to be directly effective.[20] However, the exclusion of review by the

[14] Pescatore, P., 'The doctrine of Direct Effect: An Infant Disease of Community Law' (1983) 8 *ELRev*. 155 at 157. See also Mancini, G.F., *Democracy and Constitutionalism in the European Union* (Oxford, Hart, 2000) 183–86.

[15] See e.g. the Protocol to the Judgments Convention (consolidated in O.J. 1998 C 27/28); see also O.J. 1998 C 221/19.

[16] See Gormley, L.W., in O'Keeffe, D. & Twomey, P. (eds.), *Legal issues of the Amsterdam Treaty* (Oxford, Hart, 1999) 57 at 70.

[17] Case C–170/96 *Commission* v. *Council* [1998] ECR I–2763 at 2788.

[18] Art. 35(3) EU. But, by virtue of Art. 47 EU, this provision clearly cannot operate so as to prevent the Court reviewing the effectiveness of measures allegedly justified on public policy or public security grounds (Arts. 30, 39(3), 46(1), 296(1) and 297 EC).

[19] Although on an argument that the measure should have been adopted under the Community pillar, there is no reason why the Parliament could not seek relief (arguing an infringement of its prerogatives), by analogy with Case C–170/96 *Commission* v. *Council* [1998] ECR I–2763 at 2788.

[20] Arts. 34(2)(b) and (c) EU.

Parliament is less logical, given that it has to be consulted on those acts.[21] It may be that a measure as adopted is so radically different from the proposal on which the Parliament was consulted, that a failure to reconsult amounts to an infringement of Parliament's prerogatives. In relation to the obligation to consult under the EC Treaty, the Court has indeed found that a radical change obliges reconsultation.[22] The Court might perhaps be minded in the future to act in the way in which it finally acted when there was no EC Treaty-based protection of the Parliament's prerogatives, and permit the Parliament to launch a challenge in such circumstances.[23] The Court also has a special dispute resolution role under Article 35(7) TEU.[24] It may also, finally, give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation (but not the validity) of conventions adopted under the third pillar, and on the validity and interpretation of measures implementing them.[25]

The key malfunction, apart from the lack of a possibility of judicial review of the conventions themselves, and the standing issues already mentioned, is the *à la carte* operation of jurisdiction in relation to references for a preliminary ruling. Not only do the Member States have the option of preventing their courts from making references under Article 35(1) EU, they also have the choice of whether to permit any court or tribunal to make a reference, or only a court or tribunal against whose decisions there is no judicial remedy. On ratification of the Treaty of Amsterdam, Spain adopted the more restrictive course of action; Belgium, Germany, Greece, Italy, Luxembourg, The Netherlands, Austria, Portugal, Finland, and Sweden took the wider option.[26] This means that the courts of the United Kingdom, Ireland, Denmark, and France cannot yet make third pillar references.

[21] In relation to framework decisions, decisions, and conventions, see Art. 39(1) EU.

[22] See e.g. Case C–65/90 *European Parliament* v. *Council* [1992] ECR I–4593 at 4621; Case C–417/93 *European Parliament* v. *Council* [1995] ECR I–1185 at 1215, and Case C–21/94 *European Parliament* v. *Council* [1995] ECR I–1827 at 1852 & 1854. See further, the Code of Conduct agreed between the Commission and the Parliament (OJ 1995 C 89/69) point 3.6.

[23] Case C–70/88 *European Parliament* v. *Council* [1990] ECR I–2041, [1992] 1 CMLR 91 (Chernobyl).

[24] In relation to acts adopted under Art. 34(2) EU, whenever a dispute between Member states on the interpretation or application of any such act cannot be settled by the Council within six months of its being referred to the Council by one of its members (not necessarily, therefore by one of the disputants). Further, also by virtue of Art. 35(7) EU, the Court has jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Art. 34(2)(d) EU.

[25] Thus third pillar conventions no longer need to confer specific jurisdiction; it now follows directly from Art. 35(1) TEU itself, assuming the necessary declaration has been made under Art. 35(2) TEU.

[26] O.J. 1999 L 114/5. Of those taking the wider option, all except Greece, Portugal, Finland and Sweden reserved the right to oblige their courts or tribunals against whose decisions there is no judicial remedy to make a reference, *ibid*.

The choice of whether or not to accept the jurisdiction of the Court is appalling enough; the double choice simply compounds the felony. The result is very likely to lead to forum shopping in two respects. Firstly there will be attempts to situate a case in a Member State which has accepted jurisdiction, and, secondly, litigants will endeavour to look for a Member State which permits a preliminary ruling to be requested at an early stage in a dispute (avoiding the expense of fighting a case up to a level at which there is no further judicial remedy). National measures implementing framework decisions may well give rise to disputes before national courts, even though the framework decisions are not directly effective. The validity and interpretation of framework decisions and decisions on interpretation of conventions will be issues on which the national courts will certainly need the guidance of the Court of Justice. It is wholly incompatible with the necessary uniform interpretation, application, and implementation of such acts to permit a situation to arise in which, say, the United Kingdom courts interpret those acts differently from other courts. The likelihood that the courts in the United Kingdom might adopt an interpretation at variance with that of the Court of Justice, assuming that the latter had already given a ruling, is somewhat attenuated by the provisions of section 3(1) of the European Communities Act 1972. Nevertheless, the scope for judicial disarray is manifest.

More serious than the danger of forum-shopping and as serious as the threat of disarray is, however, the objection that access to justice varies for citizens of the Union and others, depending on the attitude of the Member State in which they find themselves. From the point of view of a uniform concept of Union citizenship, this is simply disastrous, and in fact constitutes a fraud on the citizenry. Nearly 120 million citizens of the Union enjoy second-class access to justice in third pillar matters. So much for equality of citizenship!

Can the present state of affairs be justified simply as a reflection of the Court's approach in the Community pillar of permitting the Member States procedural autonomy, subject to equal treatment of Community and domestic matters and the requirement that actions must not be made impossible or unduly difficult? Alternatively, is it simply a reflection of an essentially different approach to intergovernmental cooperation? It may well be thought that neither of these possibilities is a sufficient or even remotely acceptable justification for an appalling level of access to justice in an increasingly important area of Union activity. Certain Member States deny Union citizens and others access even to the most rudimentary level of protection afforded by Article 35(1) EU.

If the Union more correctly resembles a great cathedral than a Greek temple in its construction,[27] the congregation assembled in this, the common European home, should consider a claim against the architects, or dumping them and redesigning the cathedral. The suggested design improvement is less radical, but

[27] Gormley, L.W., in O'Keeffe, D., & Twomey, P., above, n 16, 57.

immediate: remedy the defect without more ado, by expanding the jurisdiction of the Court. Governments must have confidence in the judicial fora that they have created, both at the centralised and decentralised levels. They should not seek to protect their work from scrutiny.

Judicial Review in Community Law

The shortcomings of the Community system in relation to judicial review form perhaps a rather more traditional ground for identifying structural malfunctions, but there are clearly areas in which judicial review in the more formal sense could do with some redesign and adaptation in order more satisfactorily to safeguard the interests of private individuals, who, rightly or wrongly perceive themselves as the Cinderella of the system. Judicial review in Community law is characterised by a number of features, which make it particularly prone to criticism on the ground of architectural malfunctions. Two of these features form the next courses in this feast. First, it is effectively impossible to challenge steps in proceedings leading up to Community acts during their course:[28] litigants are left to challenge the act as such, *inter alia* on the basis of the procedural defects. Secondly, the criteria for admissibility of actions as interpreted by the Court are extremely narrow, and it can be argued that the Court has interpreted the Treaty text unduly narrowly

The first of these defects is relatively self-explanatory. The absence of a possibility of obtaining immediate relief via a speedy procedure (within days) is a major weakness in the system of judicial review. While interim measures are available, there must first be a substantive action pending before the centralised Community judiciary before an application for interim measures can be launched. It would be more advantageous, from the viewpoint of judicial protection, particularly in competition, state aid, anti-dumping cases, and even in agricultural matters, if litigants were able to mount a challenge on procedural issues immediately, rather than having to await the final decision. Such an action could be dealt with expeditiously, under a special procedure, within a couple of working days by the President of the Court of First Instance or another single judge, so as to avoid the mechanism becoming merely a filibustering technique in the hands of litigation lawyers. The objection will be that this could hold up proceedings (such as hearings in competition matters) in

[28] Case 60/81 *International Business Machines Corporation* v. *Commission* [1981] ECR 2639 at 2652. The Court added, *ibid*., that it 'would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above [binding effects, capable of affecting an applicant's interests by bringing about a distinct change in his or her legal position] but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.' See also Case T–64/89 *Automec* v. *Commission* [1990] ECR II–367 and Case T–36/92 *SFI* v. *Commission* [1992] ECR II–2479.

mid-flight. However, manifestly ill-founded, frivolous or vexatious applications could be penalised in costs. This approach may mean that the judge will look more over the administration's shoulder, but it should result in more careful lawmaking and administration by the Community institutions. If there is a real possibility that a particular action (a procedural decision leading up to the adoption of a Community act) may be annulled, and speedily, that risk will impinge upon the actions of decision-makers more immediately. The existing possibility of annulment only after a court action lasting some two years creates, on the one hand, considerable uncertainty over a long period and, on the other hand, is seen as a prospect which is less likely to have (political or legal) consequences for the decision-makers.[29] If a decision is immediately open to challenge and the response is likely to be very speedy, more care is likely to be taken, as the effects are immediately felt. It is significant that in competition law, for instance, there have been very few instances in which the Commission has revisited anti-competitive conduct in cases in which a decision has been annulled for procedural rather than substantive reasons.[30]

It is in fact the second malfunction that is perhaps the most fruitful candidate for reform: admissibility criteria in relation to actions for annulment. That admissibility criteria are not written in stone is already evident[31] and has been confirmed by the Treaty of Nice.[32] While it is not unnatural that the Community legal system should discourage mere busybodies, it seems inappropriate that individuals should have so little room for manoeuvre against legislation emanating from the Community level. In particular, public interest litigation should be subject to more generous considerations. In previous writing, the present author has discussed the state of the law on public interest litigation in the Community context and has advanced a suggestion as to how the situation might be improved.[33] At the time of finalising this manuscript for this *Yearbook*,

[29] Neither the final annulment of the notorious PVC decisions in Case C–137/92 P *Commission* v. *BASF AG et al*. [1994] ECR I–2629 nor the initial finding of non–existence by the Court of First Instance in Cases T–79/89 etc. *BASF et al*. v. *Commission* [1992] ECR II–315 seems to have produced any consequences for the officials involved.

[30] See the revisiting of PVC in Dec. 94/599 (O.J. 1994 L 239/14), as to which, see Case T–305/94 *Limburgse Vinyl Maatschappij NV et al*. [1999] ECR II–931.

[31] E.g. the Court's conferment on the European Parliament of standing for the defence of its prerogatives, see Case 70/88 *European Parliament* v. *Council* [1990] ECR I–2041 (*Chernobyl*) prior to the amendment of the EC Treaty to that effect. See also the extension of semi–privileged applicant status to the European Central Bank and to the Court of Auditors.

[32] This will make the European Parliament a privileged applicant under Art. 230 EC, meaning that its standing will no longer be restricted to the defence of its prerogatives. It may be expected that the principal effect of this change will be seen in challenges to delegated legislation enacted by the Commission in accordance with one of the comitology procedures.

[33] See Gormley, L.W. in O'Keeffe, D., & Bavasso, A., (eds.), *Judicial Review in European Union Law* (*Liber Amicorum* Lord Slynn of Hadley, Vol. I) (London, Kluwer Law International, 2000) 191, and in (2001) *European Public Law* 51. This book contains numerous important contributions on judicial review in European Union law in general.

the question of the appropriateness of the Court of Justice's traditional approach has been dramatically called into question by, once more, Advocate General Jacobs[34] and, for the first time, by the Court of First Instance.[35] These developments offer a good reason for discussing the present defects in a wider context than simply that of public interest litigation. After that discussion, it is appropriate to discuss, albeit briefly, a proposal advanced by Norbert Reich in relation to challenges on fundamental rights grounds to Community acts.

In addition to the development of administrative law practice at Community level in the fields of competition, anti-dumping, and staff cases, it is often forgotten that much of Community administrative law has been developed in the agricultural sector. This is scarcely surprising, since this is by far the most highly developed of the Community's common policies. It is thus perhaps understandable, given the far-reaching policy and political implications of the economic assessments made by the Council and by the Commission, that the Court of Justice has shown particular caution in its approach to *locus standi* in general.[36] Gerhard Bebr well explained the purpose of the annulment actions brought by private parties: it serves not only to ensure a legal exercise of Community powers but also to protect interests of private parties against the illegal use of those powers. The difference between the conditions affecting privileged (and even semi-privileged) litigants under objective control on the one hand, and the conditions under which private parties may bring an action for annulment and the acts against which they may bring such actions is, he argued, due to two basic considerations. First, the drafters of the EC Treaty sought to limit, if not to exclude, annulment actions brought by private parties against normative acts of the Community institutions; secondly they sought to exclude a possible *actio popularis*.[37] Clearly, neither the framers of the Treaty, nor the Court of Justice was going to contemplate the torpedoing of normative acts of the Community administration at the instance of any economic actor in the Community. The expression 'individual concern' in Article 234 EC (ex 173) has usually been interpreted in such a narrow manner as to exclude most economic operators or other actors affected by a Community act. Outside particular specialised areas, such as competition, state aids, and anti-dumping, the success rate has been very low indeed, leaving litigants with the not wholly inexplicable feeling that the Court of Justice is something of a misnomer. There

[34] Case C–50/00 P *Unión de Pequeños Agricultores* v. *Council* (Opinion delivered on March 21, 2002). The opinion cites various judicial Opinions, extra–judicial writing, and academic literature criticising the Court of Justice's traditional approach (see notes 5& 6 of his Opinion). A brief discussion of the Court's judgment of 25 July 2002 has been added at proof stage.

[35] Case T–177/01 *Jégo–Quéré et Cie SA* v. *Commission* [2002] ECR I–nyr (judgment of 3 May 2002).

[36] See, generally, Barents, R., *The Agricultural Law of the EC* (European Monographs 9) (Deventer, Kluwer Law International, 1994).

[37] Bebr, above, n 4, 21.

have, though, been celebrated occasions[38] on which the injustice has been so manifest that the Court has had to have recourse to pulling an equitable rabbit out of the proverbial hat in order to escape from the judicial straight-jacket which its interpretation of the words 'direct and individual concern' in *Plaumann*[39] has become.

Until the earthquakes of challenges to this straight-jacket shook the Plateau de Kirchberg on 21 March and 3 May 2002, it looked as if the dust had settled on any hopes that the meaning of the terms 'direct and individual concern' in Article 230 EC might be revisited. The earlier escapes in *Extramet* and *Codorníu* involved, as Advocate General Lenz noted in the latter case, the largest producer of the type of product involved; its economic activity was largely dependent on business transactions adversely affected by the contested regulation, and that this activity was severely affected by that regulation.[40] Arnull has correctly described the reasoning in the judgment in *Codorniu* as `terse, in places even incoherent.'[41] In *Greenpeace,* both the Court of First Instance[42] and the Court of Justice[43] made it clear that the traditional hostile stance to standing for persons other than the addressees of an act would be maintained. Thus where

> the specific situation of the applicant was not taken into consideration in the adoption of an act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act. The same applies to associations which claim to have *locus standi* on the basis of the fact that persons whom they represent are individually concerned.[44]

This prospect, essentially confirming the point about managerial concerns which Arnull[45] postulated originally in relation to the Court of First Instance's judgment in *Greenpeace*, combined with the fact that Article 230 EC is clearly narrower than Article 33 ECSC, made it inevitable that the Court should resist invitations to engage in judicial creativity in this instance.

Arnull has rightly opined that `it seems wrong in principle that a litigant's right to invoke the jurisdiction of a court of law should depend on factors which

[38] E.g. Case C–358/89 *Extramet Industrie SA* v. *Council* [1991] ECR 2501 at 2532 (cf. Jacobs, Adv. Gen. at 2514) and Case C–309/89 *Codorniu SA* v. *Council* [1994] ECR I–1853 at 1886. As to the latter judgment, see Kapteyn & VerLoren van Themaat, above, note 3, 486.

[39] Case 25/62 *Plaumann & Co*. v. *Commission* [1963] ECR 95 at 107.

[40] [1994] ECR I–1853 at 1870–1871.

[41] In Micklitz, H.–W., and Reich, N. (eds.), *Public Interest Litigation before European Courts* (Baden–Baden, Nomos, 1996), 39 at 46. See See further, Arnull, A.M., *Private applicants and the action for annulment since Codornín* (2001) *CMLRev*. 7

[42] Case T–585/93 *Stichting Greenpeace Council (Greenpeace International) et al*. v. *Commission* [1995] ECR II–2205 at 2230–2232.

[43] Case C–321/95 P *Stichting Greenpeace Council (Greenpeace International) et al*. v. *Commission* [1998] ECR I–1651 at 1715–1716.

[44] *Ibid*. at 1715.

[45] Arnull, A.M. in Micklitz & Reich (eds.), above, nn 41, 39 at 51.

are unrelated to the circumstances of his claim and which may vary with the passage of time.' It might be thought that Community law is now sufficiently robust to permit more generous standing for private litigants than is presently possible because of the Court's narrow interpretation of the word 'individual concern'. Arnull's proposed test of `an act adversely affecting an applicant's interests'[46] is indeed a possible reformulation of the meaning of the term 'individual concern' which could be adopted by the Court without a revision of the Treaty or even without stretching its existing language, although it might be more transparent to substitute that as a criterion instead of 'individual concern' in a Treaty amendment.[47] Before considering this further, examination of the alleged justification for the narrow approach seems appropriate.

The arguments, which can be raised against a wider interpretation of general standing for non-addressees without an amendment of the EC Treaty, are seldom clearly articulated.[48] First, the wording of Article 230 EC is clearly less extensive than the wording of the now defunct Article 33 ECSC. Such a difference can only reflect a conscious decision by the contracting parties to those two treaties that access to the Court for private individuals should be less extensive in the EC system than in the ECSC system. Secondly, the judicial architecture of the EC system is much less centralised than it is in the ECSC system: as has been noted above, the EC system involves an allocation of tasks between the Community judiciary and national courts. In that context, the case-law of the Court of Justice has sought to promote the use of national courts, with the possibility of a reference under Article 234 EC, as the appropriate forum in which private parties affected by normative Community legislation should challenge that legislation by, in effect, challenging national acts which are based on that Community legislation. This can be seen as promoting judicial decisions being taken as close as possible to citizens. Such an approach would be consistent with the wording of the second paragraph of Article 1 EU. Finally, it may be argued that a formula such as 'an act adversely affecting an applicant's interests' risks undermining that decentralised judicial architecture by having a centralising effect through opening the flood-gates for unrestrained appeals for annulment of decisions addressed to Member States, as well as of regulations and even directives, particularly given that the interests of a great many persons may be adversely affected by myriad acts of the Community Institutions. This argument boils down to a managerial consideration, expressing similar concerns to those of Advocate General Cosmas in *Greenpeace*,[49] albeit a consideration dressed up more in architectural clothing.

[46] *Ibid*.

[47] As advocated by Arnull, A.M., *ibid*.

[48] They also have been put, by way of balance, in Kapteyn & VerLoren van Themaat, above, n 3, 488, although an alert reader may well detect that the editor of that work had little sympathy for them.

[49] Case C–321/95P *Stichting Greenpeace Council (Greenpeace International)* v. *Commission* [1998] ECR I–1651 at 1699–1700.

Sometimes the argument is raised, in the light of the above, that if there is to be a liberalisation of standing requirements, it is up to the Member States to take the necessary action, as they have done in relation to the European Parliament and, to a lesser extent, with the Court of Auditors and the European Central Bank. In the current political climate such a view is understandable. However, the view that the EC Treaty itself prevents an adaptation of the *Plauman* test by the Court in fact cuts little ice. There is no good reason why the Court should stick to the straightjacket of *Plaumann*: the Court has always been willing to be creative with the Treaty provisions when it suited its purpose,[50] while suddenly being strict when it found it convenient to be so.[51] Being confined by the wording of the Treaty is, with the utmost possible respect, a disingenuous argument: it is the Court itself which has restricted the meaning of 'individual concern', and has then been faced with the need to remove its self-imposed limitation by unconvincing arguments. If the Court is perfectly capable of constructing the EC Treaty so as to permit it to do something other than that which is expressly provided for,[52] it is certainly capable of curing architectural malfunctions. In any event, politicians have not been slow to incorporate case-law into Treaty amendments in the past, so a nudge from the Court need not be something to be viewed with horror. There remain two points: that national courts offer an adequate venue, and the floodgates argument.

In his celebrated opinion in the first shock of the earthquake,[53] Advocate General Jacobs dismissed the adequacy of leaving the challenge of normative acts largely to the national courts. Put briefly, his argument that proceedings before national courts may not provide effective judicial protection of individual applicants is, unlike Ancient Gaul, firmly based on four legs. First, national courts may not themselves declare Community measures invalid. Their limited competence in such matters is in stark contrast to their important role in relation to the application, enforcement and interpretation of Community law. Secondly, there is no *right* of access to the Court of Justice for a remedy under Article 234 EC. National courts have a discretion whether or not to refer,

[50] E.g. Art. 231 EC confers power on the Court to decide which effects of an annulled regulation shall be considered definitive, but the Court has interpreted it by analogy to give itself the same power in relation to directives: e.g. Case C–295/90 *European Parliament* v. *Council* [1992] ECR I–4193 at 4236–4237.

[51] A comparison of the development of the concept of direct effect for decisions and directives with the refusal to accept horizontal direct effect of directives makes this very plain: see e.g. Case 9/70 *Grad* v. *Finanzamt Traunstein* [1970] ECR 825 at 838 and Case C–91/92 *Faccini Dori* v. *Recreb Srl* [1994] ECR I–3325 at 33.

[52] The Court's conclusion that it had the power by analogy to determine which of the effects of an annulled directive or decision should be declared definitive, while undoubtedly eminently sensible in the circumstances, clearly flies in the face of the restrictive wording of Art. 231 (ex 174) EC, see above, n 50, and e.g. Case C–34/86 *Council* v. *European Parliament* [1986] ECR 2155 at 2212, and Case C–271/94 *European Parliament* v. *Council* [1996] ECR I–1689 at 1719.

[53] See above, n 34.

and, even in those cases where there is an obligation, they may err in their assessment of the necessity of a reference or in the questions posed.[54] Thirdly, where Community measures do not require implementing acts, or where national authorities do not base their own acts on a Community framework, there may be no possibility at all of challenging Community measures. Moreover, to say that a person must ostensibly breach directly applicable Community law and then face civil or even criminal proceedings in order to try to get a reference does not encourage respect for the rule of law. The final consideration relates to procedural disadvantages: substantial extra delays and costs. Furthermore the willingness of national courts to order the interim suspension of Community measures pending a ruling from the Court of Justice may vary from Member State to Member State, which could prejudice the uniform application of Community law or even totally subvert it.

The learned Advocate General then pointed out that an action for annulment before the Court of First Instance was a more appropriate vehicle for deciding validity issues than Article 234 EC. A full exchange of pleadings was possible in a direct action, but under Article 234 EC only one round took place before the hearing. In a Direct action intervention by interested third parties was possible, but this was impossible on a reference unless the third party had intervened in the litigation before the national court. Finally, challenges to Community acts should be brought quickly, and the application of strict standing criteria at the Community level meant that those who fell outside those criteria were left to take their chances in the national forum. That had the disadvantage of reducing legal certainty by in effect extending the possibility of challenge without any limit as to time. Although mixed issues of validity and interpretation might appropriately be left to the national court filtration mechanism of Article 234 EC, Advocate General Jacobs concluded that where only the validity was at issue the more appropriate route would be the direct action for annulment. In any event, appeal against a ruling of the Court of First Instance on points of law was then open to the Court of Justice itself.

Nevertheless, the learned Advocate General concluded that those who were not individually concerned should not automatically be given standing if they could show that no other effective judicial protection was available to the applicant. The absence of national remedies was not a matter for Community law, nor was it for the centralized Community judiciary to examine the details of national procedural law. Making standing depend on national law would also risk divergence and inequality developing in access to the Court of Justice for litigants from different Member States.

Two comments may be made on these points. That such a state of affairs is unacceptable has been already noted in relation to Article 35 EU, above. Moreover, the Court of First Instance has found that the admissibility of

[54] This last point can be met by the possibility of the Court of Justice reformulating the questions, but it cannot wholly reinvent a reference.

annulment actions at Community level cannot depend on whether national law in an individual member State would grant an organisation standing.[55]

In view of all these considerations, and rightly rejecting the arguments of the Council and the Commission that it was national legal rules which needed to be changed, Advocate General Jacobs proposed that the notion of individual concern should be reinterpreted. A person would be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is likely to have, a substantial adverse effect on his interests.

This test is in fact stricter than that advocated by Arnull,[56] because of the addition of the word 'substantial.' Clearly even this test would still leave considerable room for the Court to take a view on the individual merits of each case as to admissibility, but it would be a higher threshold for cowboy claimants, while being more liberal than the traditional approach of the Court of Justice. Advocate General Jacobs advanced a number of arguments in favour of his test. First, in view of his rejection of the option of granting automatic standing in the absence of other effective judicial protection, this was the only way of avoiding a denial of justice. Secondly, it would ensure that individual applicants who are directly and adversely affected by a Community act would never be without a remedy, having the additional advantage of allowing validity issues relating to normative acts to be addressed in the best forum (which could also grant effective interim relief). Thirdly, it would provide clarity to a body of law that many commentators viewed as at best conceptually uncertain. Fourthly, it would encourage validity issues to be resolved in direct actions rather than through the precarious route of national courts and Article 234 EC.[57] The fifth argument was that this interpretation would transfer the emphasis of judicial review from admissibility issues to issues of substance. Finally, the learned Advocate General identified a number of anomalies in the case-law on judicial review arising from the different approaches to the notion of 'individual concern' and to the other parts of Article 230 EC,[58] and from the fact that there were no standing restrictions on applicants seeking damages for loss caused by Community measures.[59] He then proceeded to make short shrift of the objections to widening standing. He noted that his suggestion did not depart from the wording of the EC Treaty; that comparison with the ECSC Treaty was of limited relevance today in an increasingly active Community legal order in which there was a correspondingly greater need for effective judicial protection against unlawful action; that the

[55] Case T–122/96 *Federazione Nazionale del Commercio Oleario (Federolio)* v. *Commission* [1997] ECR II–1559 at 1581–1582.

[56] See above, n 46.

[57] He noted that the *TWD Deggendorff* case–law would not normally extend to general measures, see above, n 12.

[58] These parallel in part the observations above about creative interpretation of the Treaty, see above, nn 23, 50, and 52.

[59] Under Arts. 235 and 288 EC.

Community legal order had outgrown mere intergovernmental cooperation and that the Court of Justice was far more than an international tribunal; that the deluge argument was overstated, and, finally, that procedural and jurisdictional reforms, some of which have been introduced already, others being envisaged in the Treaty of Nice,[60] could increase the efficiency of the Court's case-handling.

Earthquakes often have after-shocks, or, like London buses used to do, come in groups at unpredictable intervals. A few weeks later, a particularly strong First Chamber of the Court of First Instance, sitting in extended composition, delivered its judgment on the admissibility issue in Case T–177/01 *Jégo-Quéré et Cie SA* v. *Commission*.[61] Without in any way seeking to revise the wording of Article 230 EC itself, the Court of First Instance made mincemeat of any integrity left in the *Plaumann* criterion for individual concern. What is particularly important about this case, which is now under appeal,[62] is that it concerned a situation in which no act had been adopted at national level in pursuance of the regulation concerned, against which proceedings could be brought. The Court of First Instance noted that although the regulation was of general application, the applicant was directly concerned, as it was bound by the regulation, which required the adoption of no further measures, either at Community or national level. However, under the existing case-law it was impossible to find that the applicant was individually concerned.[63] The Court of First Instance gave clear answers to the Commission's argument that the applicant was not left without a remedy, as it could seek damages under the second paragraph of Article 235 EC in conjunction with Article 288 EC. First, access to the courts was one of the essential elements of a Community based on the rule of law, and was enshrined in the Community legal order.[64] Moreover, the right to an effective remedy before a court of competent jurisdiction was based on the constitutional traditions common to the laws of the Member States and on Articles 6 and 13 of the ECHR.[65] Finally, the right to an

[60] As to the judicial architecture of the EU after Nice, see Gormley, L.W., in Arnull, A.M. & Wincott, D. (eds.), *Accountability and Legitimacy in the European Union* (Oxford UP, Oxford, 2001) Ch. 7.

[61] [2002] ECR II–nyr (3 May 2002).

[62] Case C–263/02 P *Commission* v. *Jégo–Quéré et Cie SA* (pending).

[63] The applicant could not be individually differentiated, even though it was in practice the only operator fishing for whiting in the waters south of Ireland with vessels over 30m in length; while the applicant had had meetings with the Commission, there were no procedural rights conferred upon it under a specific scheme of Community legislation, and, finally, it had not adduced evidence of peculiar circumstances such as those in *Extramet or Codorniu* (see above, nn 38 and 40).

[64] Because of the complete system of remedies to permit review of the legality of the acts of the Community Institutions. See Case 294/83 *Les Verts* v. *European Parliament* [1986] ECR 1339 at 1365, in which the Court of Justice also noted that 'Neither [the Community's] Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in accordance with the basic constitutional charter, the Treaty.'

[65] See, *inter alia*, Case 222/84 *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 at 1682, in which the Court noted that the European Parliament, the Council and

effective remedy for everyone whose rights and freedoms guaranteed by the law of the European Union had been violated was reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000.[66] This last argument is essentially a political one, as the Charter does not itself have legal force. However, soft law can at the very least be an extremely effective aid to interpretation; it can be relied upon to bolster a conclusion, and can certainly be taken into account by the Court of Justice.[67]

The Court of First Instance then proceeded to examine whether in this case the applicant would be deprived of its right to an effective remedy if the application were to be held inadmissible. It noted that no action before a national court was possible, and adopted Advocate General Jacobs's argument set out above about it not being possible to require individuals to break the law in order to gain access to justice. Moreover, falling back on an action for damages would not result in the removal from the Community legal order of a measure that is held to be illegal. In any event, the admissibility and substantive requirements relating to actions for damages differed from those for actions for annulment, and the judicial review carried out in the former actions was limited to censuring sufficiently serious infringements of rules of law intended to confer rights on individuals,[68] whereas in the latter case judicial review was more comprehensive. This led, as surely as night follows day, to the conclusion that neither the possibility of using Article 234 EC nor of an action in damages could be regarded as guaranteeing persons the right to an effective remedy enabling them to contest the legality of measures of general application which directly affected their legal situation. While very much aware of the need to respect the procedures established by the EC Treaty,[69] the Court of First Instance agreed with Advocate General Jacobs that there was no compelling reason to read into the notion of individual concern in the fourth paragraph of Article 230 EC a requirement that an applicant seeking to challenge a general measure had to be differentiated from all others affected by it in the same way as the addressee. Reconsideration of the previous strict interpretation was thus appropriate. Accordingly, the Court of First Instance adopted the following criterion:

the Commission (OJ 1977 C 103/1) and the Court itself in myriad decisions had recognized that the principles on which that Convention was based had to be taken into consideration in Community law.

[66] OJ 2000 C 364/1.

[67] See e.g. Case22/84 *Johnston*, above, n 65, and Case C–106/96 *United Kingdom* v. *Commission* [1998] ECR I–2728.

[68] The Court of First Instance referred *inter alia* to Case C–352/98 P *Bergaderm & Goupil* v. *Commission* [2000] ECR I–5291 at 5324–5325 and Case T–155/99 *Dieckmann & Hansen* v. *Commission* [2001] ECR II–3143 at 3162.

[69] Thus the Court of First Instance looked over its shoulder to remind the Court of Justice that it was not redrafting the Treaty (even though, as demonstrated above, note 50, the Court of Justice in effect does that on occasions).

> a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.[70]

In casu the conclusion was that the applicant, who was clearly affected by the scope and provisions of the regulation, was individually concerned, and, as direct concern had also been established, its action was admissible.

This criterion is more worked out than that proposed by the learned Advocate General, but shows very clearly the enormous influence of his Opinion. It has very considerable merits. It is sufficiently demanding 'in a manner which is both definite and immediate' and sufficiently targeted 'by restricting his rights or by imposing obligations on him.' It does not throw open the door to cowboy applicants, but it does clearly complete—at Community level—the system of remedies which Community law seeks to afford litigants. It has the enormous advantage of removing litigants from the often arbitrary and sometimes wholly uninformed venue of national law as a threshold that must be crossed for a remedy in relation to a Community act. Politically at Nice the need for credibility in the eyes of citizens of the Union and other parties as to the transparent nature of Community legislative action and judicial protection was acknowledged. Thus it is no longer acceptable that normative Community acts (outside special systems) have for so long been subject to scrutiny at the instance of a private party who is clearly affected by those acts only if it can either convince a national judge to make a reference, or satisfy the centralised Community judiciary that there has been a sufficiently serious infringement of a superior rule of law intended to confer rights on individuals. The time is, as Advocate General Jacobs has amply demonstrated, undoubtedly ripe for an evolution in the interpretation of the notion of individual concern.[71]

It may be argued that changing the restrictive approach would centralise appeals, removing them from being close to the citizen, whereas the Court of

[70] Para. 51 of the judgment.

[71] Paras. 82–99 of his Opinion in Case 50/00 P *Uniòn de Pequenos Agricultores* v. *Council* [2002] ECR I–nyr (21 March 2002). He based his view that the time was ripe on four points: the Court's case–law was hardly entirely consistent and settled, as there had been some movement over the years, so that decisions on admissibility had become increasingly complex and unpredictable; the Court's case–law on standing was increasingly out of line with the administrative laws of the Member States; the establishment of the Court of First Instance and the progressive transfer to it of all actions brought by individuals made it increasingly appropriate to enlarge the standing of individuals to challenge general measures (and this could be achieved without stretching the wording of Article 230 EC), and, finally, the case–law of the Court on the principle that the national courts must offer effective judicial protection of rights granted under Community law made it increasingly difficult to justify narrow restrictions on standing before Community courts.

Justice's approach of leaving challenges to normative acts to be routed via the national courts is more citizen-friendly. However that criticism is unfounded for a number of reasons. First, the existing approach leaves people without a remedy where there is no national act to attack that is rooted in the Community act. Secondly, it makes more sense for issues of validity to be decided as far as possible in the context of proceedings that permit speedy and effective remedies, including interim measures. Thirdly, the approach of the Court of First Instance in fact promotes more use of a one-stop shop instead of a possibly multi-layered national approach preceding a reference. Finally, it avoids litigants being at the mercy of the, on occasion, whimsical approaches of national judiciaries that may refuse to make references in cases in which the need for a reference is glaringly apparent.

There remains, in this design solution offered by the Court of First Instance to a manifest malfunction in the judicial architecture of the European Communities, simply the question whether the Court of First instance should have taken this step, without waiting for the Court of Justice to give judgment in the light of Advocate General Jacobs's Opinion. A number of reasons plead for the conclusion that the Court of First Instance was correct to act now. First of all, although it is attached to the Court of Justice, it has its own jurisdiction, subject to appeal on a point of law to the Court of Justice.[72] It does not have to wait for the Court of Justice to act: it can form its own view. In its original jurisdiction the Court of First Instance is perfectly entitled to depart from an earlier line taken by the Court of Justice.[73] Secondly, judicial development often takes place in a dialogue. A lower court—or a dissenting judge—may often in the long term have its or his or her view adopted by higher courts. English lawyers only have to think of Lord Denning's views on the citation of Hansard in court and by judges eventually triumphing in the Judicial Committee of the House of Lords[74] to illustrate that point. Thirdly, if the Court of First Instance had followed blindly the *Plaumann* approach, this would very clearly have left

[72] Clearly, if a case is remitted to the Court of First Instance by the Court of Justice for re–determination in accordance with a point of law decided on appeal by the Court of Justice, the Court of First Instance is then bound by that decision on the point of law.

[73] See Cases T–177 and 377/94 *Altmann et al.* v. *Commission* [1996] ECR–SC IA–533; II–1471 departing, because of changes in the nature of the JET project from a short–term into a more permanent project, from Cases C–271/83 *Ainsworth et al.* v. *Council et al.* [1987] ECR 167. The identity of the litigants and their arguments were different. The Court of First Instance thus followed the line advocated by Mischo and VerLoren van Themaat, Adv. Gen. in the earlier case.

[74] See *Pepper (Inspector of Taxes)* v. *Hart* [1993] AC 593, [1993] 1 All ER 42, HL, overruling on this point, *Davis* v. *Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL; as to Lord Denning's approach, see [1978] 1 All ER 841 at 850–852 (although, as to the substantive result, the House of Lords affirmed the Court of Appeal). But Lord Denning MR demonstrated that there was a perfect way round the views of the House of Lords on quoting Hansard in *Davis* v. *Johnson*, by quoting someone else citing Hansard! See *R.* v. *Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council* [1979] 2 All ER 881 at 898 (on the meaning of maladministration).

the applicant helpless. Given that the Court of Justice had already decided to hear *Unión de Pequeños Agricultores* in plenary session with a view to reconsidering its case-law on individual concern, a speedy decision by the Court of First Instance would offer the possibility that its views could be taken into account by the Court of Justice in its deliberations as part of the existing corpus of law. It may be argued in some circles that the Court of First Instance was acting like an upstart, but that sounds like the patient with a terminal case of wounded pride. With the utmost possible respect, it would be wholly inappropriate if the Court of First Instance were unable to contribute to the judicial, academic, and even policy dialogue about judicial protection simply for fear of treading on somewhat long toes. Even the Court of Justice itself is not infallible, nor does it always arrive at results that are clearly supported by the premises on which they are based. Even a long-standing line of authority which is widely perceived to be perverse or no longer appropriate, must be open to challenge in judicial as well as academic or even political[75] fora.

Of course if the floodgates were to be opened to every busybody in sight, the centralised Community judiciary would risk being overwhelmed, but the Court of First Instance has sought to ensure that no-hopers will not be encouraged. The floodgates argument has always been trotted out, but it is in reality little more than a smokescreen. Careful application of the Court of First Instance's approach will soon settle the dust and scatter the undeserving.

Unfortunately it now seems that the Court of Justice is determined to resist calls to reconsider its case-law on admissibility. Shortly after the second shock, it delivered judgment in *Unión de Pequños Agricultores*.[76] As regards the admissibility of the appeal, it noted that the appellant would procure a definite advantage through its appeal, as the application could be examined on its merits. The Court of Justice added, though, that the question whether the alleged right to effective judicial protection might or might not in certain circumstances, render admissible an action for annulment of a regulation brought by a natural or legal person related to the substance of the appeal and could not, in any event, prejudge the question whether the appellant had an interest in bringing appeal proceedings. The Court noted that the particular findings of the Court of First Instance that the regulation involved was of general application, that the appellant's specific interests were not affected, and that the appellant did not satisfy the *Plaumann* criteria, were not being challenged. The sole point was thus whether the appellant, as representative of its members, could nevertheless have standing on the sole ground that, in the absence of any legal remedy before the national courts, the right to effective judicial protection required it. The Court of Justice then summarised its existing case-law and also reaffirmed the entitlement, as a matter of Community law, of individuals to

[75] By way of amendment of the Treaty through an intergovernmental conference under Art. 48 EU.

[76] Case C–50/00 P *Unión de Pequños Agricultores* v. *Council* [2002] ECR 1–nyr (25 July 2002).

effective judicial protection of rights they derived from the Community legal order. It also reaffirmed its often-stated view that the EC Treaty had established a complete system of legal remedies and procedures for judicial review of Community acts, through direct and indirect means. The Court then stated that it was for the Member States to establish a system of legal remedies and procedures which ensured respect for the right to effective judicial protection. In that context, on the basis of the old Article 5 EC (now Article 10), national courts were 'required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.' Like Advocate General Jacobs, it rejected the argument that the non-availability of action at national level should allow a direct action against the Community measure concerned. This would require the centralised Community judiciary to examine and interpret national procedural law in each individual case. That was beyond their jurisdiction. The Court of Justice noted that there had been exceptional cases in which a litigant had demonstrated that it was directly and individually concerned by a regulation, but stated that such instances could not have the effect of setting aside the condition of direct and individual concern which was laid down in the EC Treaty itself. Any changes would have to be by way of revision of the EC Treaty under Article 48 EU.

This clearly rejects Advocate General Jacob's proposal for a revision of the interpretation, and seemingly also the view of the Court of First Instance, although that will formally have to wait for the ruling on the appeal.[77] The Court of Justice apparently really does think that it has done all it can to make a complete system, and has in fact bounced the ball in the direction of the Member States. Thus national courts are required to be as accommodating as possible, and it is (rightly) left to the Member States to decide whether to revise the Treaty. Both of those points are fair enough, and the jurisdiction point is indeed understandable, but the Court's very bland statements sidestep the criticisms of Advocate General Jacobs and the Court of First Instance. Their formulations would not require Community level investigation of national remedies. The point that it is not the Treaty which needs amending to permit standing to be more generous,[78] but the interpretation which the Court of Justice itself placed on the concept of individual concern, was wholly ignored. The Court of Justice sought to escape, with the utmost possible respect, too glibly and unconvincingly from the compelling criticisms which have been made of its case-law and from the very sensible route offered in particular by Court of First Instance. It is as if the Court of Justice has shrugged its proverbial shoulders to

[77] See above, n 62.

[78] Unless provision is to be make for a special scheme of public interest litigation, as to which, see above, n 33.

deny responsibility and to pass the proverbial buck. Thus the judgment in *Unión de Pequños Agricultores* looks like an abdication of responsibility.

It is time that the Court of Justice stopped pretending that everything in the judicial review field is satisfactory. It is in reality as unsatisfactory as the failure of the Court of Justice to seize the opportunity offered it. It is time that the court of Justice ceased to be struck down by the sickness of *Plaumann*; rather, it should take up its bed and walk.[79] Like Caliban in *The Tempest*, it still has the capacity for grace and even the opportunity for redemption in the appeal against *Jégo-Quéré*.[80] But it simply will not do for the Court of Justice to look at the criticisms, reject the proposed solutions and, like the Gods in Brecht's *Der Gute Mensch von Sezuan*, disappear on a pink cloud. It is distinctly disingenous to pretend that everything is perfect, and, if not, it is for others to remedy the situation. It is high time that the Court took its judicial responsibility to offer effective judicial protection at Community level by revisiting its wholly restrictive and untenable interpretaiton of the concept of individual concern in *Plaumann*.

A European Fundamental Right Action?

This discussion of design solutions to the architectural malfunction in judicial protection is an appropriate place to draw the attention of those who do not read German to the suggestion advanced by Reich for a European Fundamental Right action.[81] In this contribution to the discussion about a European Charter of Fundamental Rights, he set out four conditions for such an action.

First, it would lie only against actions of the Institutions in relation to infringement of Article 6(2) EU or infringement of rights guaranteed subjectively to individuals under other provisions of the Treaties. It would include collective rights, where they arise from primary Community law, such as collaboration by management and labour in Article 136 EC et seq., or the rights of organization of consumers under Article 153 EC.

Secondly, it would lie exclusively before the Court of Justice. This would, though be a deviation from the current allocation of jurisdiction between that Court and the Court of First Instance in relation to action brought by private parties.

Thirdly, the applicant would have to show that he was directly concerned, but not that he was individually concerned. This, Reich points out, would bring directives within the ambit of measures open to challenge, albeit of course provided that the challenge was properly based. The challenge could be launched

[79] John 5. 8.

[80] See above, n 62.

[81] Reich, N., '*Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde*' (2000) *Zeitschrift für Rechtspolitik* 375.

by those on whom obligations were imposed by virtue of the directive as well by as those whom it benefited, in so far as they could demonstrate a proper legal interest to be protected. Associations would, he felt, be directly concerned if Community fundamental rights are conferred upon them, as Reich claimed to be the case in Articles 136 et seq. and 154 EC. The requirement of direct concern would, he argued, act as a brake on attempts to launch an *actio popularis*. He saw direct concern as being absent when, for example, a failure to undertake an environmental impact assessment of a proposal was to be laid at the door of a Member State rather than at that of the Commission.

Finally, Reich envisaged this action as being a subsidiary cause of action, only available when other avenues are not available or are no longer available. Reich saw this as being possible where a highest national court has refused to make a reference for a preliminary ruling.

Accordingly he suggested that an additional paragraph be added to Article 230 EC in the following terms:

> If a natural or legal person claims that through the action of Institutions of the Community a Community legal act infringes Article 6 EU or other rights guaranteed in the Treaties benefiting him, he may bring a European Fundamental Right action before the Court of Justice, provided that he is directly affected thereby and other means of recourse are not or are no longer available to him.[82]

A few observations on this suggestion may be made by way of reaction. This would be a wholly separate type of action from that previously envisaged, so much so that it probably would need to be put into a separate article rather than being grafted on to Article 230. The question arises, though, whether such a new form of action is necessary. It would offer a means of attacking acts not currently open to attack by individuals—such as regulations properly so-called and directives. But, as the Court of First Instance's solution demonstrates, this could be achieved more simply by changing the interpretation of the notion of 'individual concern.' It may also be more effective simply to develop a special framework for public interest litigation. There is also the point that Community case-law as it stands takes sufficient account of fundamental rights through the protection of rules of law relating to the application of the Treaty. It may also be open to discussion whether the rights cited by Reich as being conferred really are fundamental rights or actually rights of a more subjective or economic nature.

Concluding Observations

This paper has attempted to discuss some of the shortcomings of the present state of Union and Community law in the field of judicial review, and to dis-

[82] The present author's own translation of Reich's proposal.

cuss some of the possible solutions, including those now advanced by members of the centralised Community judiciary, leaving the changes to be made by the Treaty of Nice aside.[83] If the Community's judicial architecture and indeed the Union's judicial architecture is to deserve the confidence of those affected by it, improvements to the shortcomings which have been identified in this paper must be made without more ado. It is to be hoped that not all of the suggestions made or discussed above will fall on deaf ears. In particular the willingness or otherwise of the Court of Justice to change its long-standing interpretation of the notion of 'individual concern' in Article 230 EC will form a benchmark by which lawyers and prospective litigants will be able to judge whether the system of judicial protection in the European Communities and European Union really will afford adequate guarantees that the rule of law, one of the foundations of the European Union, is observed. It is now up to the Court of Justice to meet the challenge facing it. It will indeed be a major test of its credibility.

[83] See above, note 60.

10

THE QUEST FOR A MASTER KEY TO CONTROL PARALLEL IMPORTS

*Inge Govaere**

I. The Key to the Master Key

A lot of attention has been devoted in the past few years to attempts made by intellectual property owners to oppose parallel imports.[1] This refers in particular to imports without their consent of goods placed by themselves, or with their consent, on the export market. The question is crucial as it is inherently linked to the quest for the key to control international trade flows and to restrict intra-brand competition in the country of importation.

At first sight the two crucial players are, on the one hand, the proprietor of the tangible product who wants to import the product and, on the other hand, the owner of intellectual property rights embodied in the product. In the absence of exclusive rights conferred by intellectual property rights the proprietor of the tangible product is, in principle,[2] free to trade in the product on any market he deems fit. This given is fundamentally altered in the presence of intellectual property rights as they are considered to be indispensable non-tariff barriers to trade. Intellectual property rights allow, but do not oblige, the proprietor of the intellectual property to bar the parallel importation of the tangible product. As such the intellectual property owner may determine not only whether, and when, to import directly products himself or with his consent but also whether, and when, to allow parallel importations by third parties. The key to protecting a market against not only potential inter-brand

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[1] See, among others, Hays, T. 'Anti-competitive agreements and extra-market parallel importation' 26 (2001) *ELRev* 468; Jones, J. 'Does an opportunity still exist for the development of a doctrine of international exhaustion at a Community level under Articles 28 and 30 ?' (2000) *EIPR* 171; Zarpellon, S. 'The scope of the exhaustion regime for trade marks rights' 21 (2001) *ECLR* 382; Murphy, G. 'Who's wearing the sunglasses now ?' *ECLR* (2000) 1; Wong, T. 'Exceptions to the free movement of parallel imports' (2000) *EIPR* 585; Hays, T. 'The burden of proof in parallel-importation cases' (2000) *EIPR* 353.

[2] Of course the marketing of the products will need to be in compliance with the commercial legislation in force in the country of marketing/importation. In the EC this is subject to the principle of mutual recognition.

competition with counterfeit and pirated goods, which is not at all at issue here,[3] but also against intra-brand competition with own products marketed abroad, thus essentially lies in the hands of private parties.

Most products embody one or more intellectual property rights. Suffice it to think of trademarks, which are attached to virtually all industrial products, often in combination with copyright or related rights, design rights or patents. Whereas the latter are temporary in nature trademarks may, in theory, last forever. Accepting the unrestricted right of intellectual property owners to control parallel imports clearly has the potential to undermine any free trade or trade liberalizing objective set forth by states in the public interest. The EC Treaty, the Agreement on the European Economic Area (hereafter: 'EEA') and the Agreement on the World Trade Organization (hereafter: 'WTO') are prime examples of agreements meant to stimulate regional and international trade respectively. The question is therefore whether, and to what extent, states should retain a master key to control international trade flows. The possibility to do so is expressly acknowledged in the Agreement on Trade Related Aspects of Intellectual Property Right (hereafter: 'TRIPS') annexed to, and forming integral part of, the WTO. Article 8(2) TRIPS provides that

> (a)ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

This could be done by inserting corrective mechanisms to unwarranted effects of intellectual property rights in the form of the principle of exhaustion[4] and/or through the application of the competition rules.[5] Contrary to the EC major trading partners, such as the USA and Japan, have already made use of this possibility through introducing *inter alia* a principle of international exhaustion of rights, be it subject to certain conditions.[6]

Control over a master key becomes all the more important in view of the important contextual changes introduced by TRIPS. The latter eliminates

[3] Counterfeit and pirated goods are goods which infringe intellectual property rights in the country of importation and were put on the market of exportation *without* the consent of the intellectual property owner. As such, they do not qualify as parallel imports. See also Art. 1(4) of Council Regulation No 3295/94 on counterfeit and piracy, OJ 1994 L 341/8, as modified by Council Regulation 241/99, OJ 1999 L 27/1.

[4] Art. 6 TRIPS.

[5] Art. 40 TRIPS.

[6] On the situation in the USA subsequent to the decision of the US Supreme Court in 1998 in the *Quality Kings Distributors* v. *L'anza Research Internationa, Inc*. Case, see Zadra-Symes, L. and Basista, J. 'Using US Intellectual Property rights to prevent parallel imports' (1998) *EIPR* 219. On the situation in Japan susbequent to the decision of the Japanese Supreme Court in 1997 in the *BBS Kraftfahrzeugtechnik AG* v. *Racimex Japan Corp. and Jap Auto Products Co*. Case, see Tessensohn, J. and Yamamoto, S. 'The big Aluminium wheel dust up—international exhaustion of rights in Japan' (1998) *EIPR* 228.

certain legal constraints with respect to the place of production of protected products, such as the local manufacturing clause for patents. At the same time it provides for a minimum harmonisation of intellectual property rights worldwide, thus allowing for a multiplication of exclusive rights on the basis of which parallel imports may potentially be restricted (section II). This is bound to challenge, sooner or later, the approach towards intellectual property rights not only in worldwide trade but also in the EC and the EEA. Under the current approach adopted by the European Court of Justice (hereafter : 'the Court') the focus lies on the conditions for application of the principle of Community, or regional EEA, exhaustion. This is true with respect to both internal parallel importation and external parallel importation (section III). The very fundament of this reasoning may well be challenged, in the future, through the backdoor of the application of the competition rules to safeguard intra-brand competition. The *Micro Leader* case,[7] as dealt with by the European Court of First Instance, is a first important warning in this respect (section IV).

II. Contextual Changes and Future Challenges

The important contextual changes brought about by TRIPS to the issue of parallel imports help to explain why the latter occupies such a prominent place in case-law and legal doctrine today, and will continue to do so in the foreseeable future. Parallel imports are likely to occur whenever there are important price differences between markets. The initial choice to bring the product on the lower priced market belongs to the intellectual property owner. Parallel imports become a problem when an intellectual property owner wants to shield a higher priced market from intra-brand competition with an imported product. The importation of lower priced products into a higher priced market may be lucrative in spite of additional costs, such as customs duties and transportation costs. To the extent that the WTO seeks to reduce trade barriers parallel importation is bound to become more and more attractive. At the same time, the TRIPS Agreement fundamentally alters the setting for crucial decisions to be taken by the intellectual property owner. On what market should he introduce his products? When may and should he oppose to parallel imports? The answer to those questions is determined by legal constraints and the prospect of economic gains, both of which were modified by the coming into force of TRIPS.

[7] Case T–198/98 *Micro Leader* [1999] ECR II–3989.

A. Legal Constraints

The owner of intellectual property rights, in particular of patents and trade marks, may not necessarily be free to decide where to produce or to market the protected products. This may in turn influence the arguments about the need, or not, to oppose parallel imports by others as is shown by the evolution in approach towards patents.[8]

1. A New Understanding of 'Working' Intellectual Property Rights

In order to reconcile the public and private interests inherent in patent protection most countries initially used to impose compulsory working of the patent. It was considered that if a patent holder could exclude local production by others on the basis of his patent right, then he should at least be under the obligation to produce locally himself. This excluded the possibility to work the patent through direct importation. So it was logical that the patent holder could also exclude parallel importation by others. [9] The sanction for not working the patent locally was initially the revocation of patent protection. In practice this requirement made it impossible for most inventors to obtain and, in particular, to retain patent protection in several countries at once. This obstacle to international protection of patents was remedied by the negotiation of international treaties, such as the Paris Convention on the Protection of Industrial Property. It was still considered important that a patent should be worked locally, albeit no longer necessarily by the patent holder himself. Compulsory licensing was therefore introduced as a sanction for infringement of the local manufacturing clause, instead of compulsory working with possible revocation of the right.[10] The rationale was that the objective of patent legislation should be to establish a trade-off between the private interest of the patent holder in

[8] The following statement, which is still highly pertinent today, is taken from Machlup, F. and Penrose, E. 'The Patent Controversy in the Nineteenth Century' (1950) *The Journal of Economic History* 1, 1–2: 'The patent controversy, as most seesaw battles, attracted at the time the widest public interest; frequent reports appeared in the daily press and in weekly magazines. That the whole story was later forgotten and now seems to be unknown even to experts in the field is probably due to the absence of any modern historical accounts of the debates that were carried on in the nineteenth century.'

[9] See the early economic reasoning as developed in Demaret, P. *Patents, Territorial Restrictions and EEC Law*, IIC Studies, Vol. 2 (1978).

[10] Penrose, E. *The Economics of the International Patent System*, (New Jersey The John Hopkins Press, 1951). At 231 she writes that, besides compulsory working :'(t)he second method of reducing the cost of the patent monopoly is that of compulsory licensing. This is by far the most effective and flexible method and enables the state to prevent most of the more serious restrictions on industry. It could be used very effectively to undermine the monopoly power of several of the more powerful international cartels whose position is largely based on their control of the patent rights to industrial processes in the larger industrial countries; and it could be used to ensure that patented new techniques developed abroad are available to domestic industries wishing to use them.'

obtaining a patent and the public interest in having the patent worked locally, rather than to induce the inefficient allocation of production by a patent holder. Failure to work the patent locally by the patent holder therefore no longer led to the revocation of the patent, but third parties could obtain a compulsory licence to produce the protected product locally instead. As direct importation could still be held not to constitute working the patent so, logically, also parallel importation could be prohibited by the patent holder.

The existence of a local manufacturing clause in national patent legislation was never as such challenged in EC law. The modalities thereof were, nonetheless, subject to scrutiny by the Court.[11] In the cases brought by the Commission against the United Kingdom and Italy, the Court held that

> (a)lthough the penalty for lack of insufficiency of exploitation of a patent may be regarded as the necessary counterpart to the territorial exclusivity conferred by the patent, there is no reason relating to the specific subject-matter of the patent to justify the discrimination inherent in the contested provisions between exploiting the patent in the form of production on the national territory and exploiting it by importation from the territory of other Member States.[12]

The Court further clarified in the *Generics* v. *Kline* Case that Member States could no longer maintain measures, such as relating to licences of right, which would discourage a patentee from directly importing his product from other Member States rather than manufacturing domestically.[13] The local market was thus to be equated with the internal market. Local manufacturing could no longer refer solely to domestic production in a Member State but, instead, was to be interpreted as relating to production in the internal market. Importations from outside the Community could still be considered as not fulfilling the obligation to work the patent locally.

Article 27(1) TRIPS apparently goes a step further. It stipulates that patent rights shall be enjoyable without discrimination as to whether products are imported or locally produced. This seems to imply that local working may no longer be equated with local manufacturing only. The patent holder should be considered to be working the patent locally even though he is merely importing the patented products so that compulsory licences, allowing for local

[11] For more details, see Govaere, I. *The Use and Abuse of Intellectual Property Rights in EC Law* (London, Sweet & Maxwell, 1996)169 ff.

[12] Case C–30/90 *Commission* v. *United Kingdom* [1992] ECR I–829 at para 28. Case C–235/89 *Commission* v. *Italy* [1992] ECR I–777 at para 24.

[13] Case C–191/90 *Generics* v. *Kline* ECR [1992] I–5335. The issue raised in this case was the compatibility, with the EC rules on the free movement of goods, of a national provision that required the competent national authority 'to refuse a licence (of right) to import from another country when the patentee works the patent by manufacture in the United Kingdom but to grant a licence (of right) to import from a third country where the patentee works the patent by importation of products manufactured in other Member States of the EEC'.

production, may no longer be granted in this respect.[14] It seems that the rationale is to come to the most efficient allocation of production worldwide which, in turn, should allow for important economies of scale. The fact that importation now qualifies as working the patent raises the question of whether also parallel imports should be allowed and, if so, under what conditions the principle of exhaustion or the competition rules should apply.

Besides local working of patents, also the maintenance of a trade mark registration may be made dependent on use. This is expressly acknowledged by Articles 15(3) and 19 TRIPS. The latter provides that an uninterrupted period of at least three years of non-use may, under certain conditions, lead to a revocation of a trade mark registration. Compulsory licensing of trade marks as a sanction for non-use is not allowed.[15] According to Article 19(2) TRIPS,

> (w)hen subject to the control of its owner, use of a trademark by another person shall be recognised as use of the trade mark for the purpose of maintaining the registration.

Similar to the current interpretation to be given to a local working condition for patents, an obligation to use the trade mark locally does not imply that the product to which the trade mark is attached should be locally produced also. The condition is merely to use the trade mark on the local market be it through local production and marketing or through importation of the branded product.

2. *Potential Consequences of Abolishing the Local Manufacturing Clause*

It is not easy to predict what the potential consequences of the elimination of a local manufacturing clause with respect to patents will be in practice. The patent holder is now free to choose the place where to locate worldwide production, according to his best commercial interests, whilst being able to exercise exclusive patents rights also on all other markets of WTO countries.[16] His interests may not necessarily converge with that of states, and in particular not of all states party to the WTO and TRIPS. This may be illustrated by reference to two plausible medium- to long-term scenarios.

[14] Einhorn, T. 'The impact of the WTO Agreement on TRIPS (Trade related aspects of intellectual property rights) on EC law: a challenge to regionalism' 35 (1998) *CMLRev* 1069, 1090–91. Another interpretation might be that 'the requirement of that provision is met if the compulsory licensing rules do not treat differently imported and locally produced products', see Correa, C. 'The GATT Agreement on trade-related aspects of intellectual property rights: new standards for patent protection' (1994) *EIPR* 327, 331. Compulsory licences are, anyhow, subject to strict conditions according to Art. 30 and 31 TRIPS. See Ullrich, H. 'TRIPS: adequate protection, inadequate trade, adequate competition policy' (1995) *Pacific Rim Law & Policy Journal* 153, esp. 176.

[15] Art. 21 TRIPS.

[16] Including on markets where prior to TRIPS no patent protection could be obtained. See also below at point B, on the effects of compulsory harmonisation achieved by TRIPS.

A first and static approach would adopt the premise that abolishing the local manufacturing clause will not entail an important transfer of production. In this view the traditional home countries of technology-based industries, mainly industrialised countries such as the USA and the EC, would remain the main countries of production of patent-based products from which the global market would be served. The main merit of TRIPS would then essentially be to secure exclusivity on those export markets where before no patent protection could be obtained. It is apparent that in particular developing countries would suffer economically from having to grant patent protection whilst no longer being able to require local manufacturing. Local production would come to a hold whilst the transfer of technology, and especially of know how, would be largely substituted for plain transfer of technology-based products.

Another and more dynamic approach could well turn out to be to the detriment of the industrialised countries. TRIPS may harmonise intellectual property laws but it should not be forgotten that the WTO has, so far, not led to a global harmonisation of social and competition laws. Competitive conditions for production may still vary greatly from one WTO country to another. A possible, though most likely unintended, result of abolishing local manufacturing requirements world-wide could be the gradual transfer of technology-based production, and maybe also of investment in research and development although this is not necessarily linked, to low wage countries.[17] It would then be for the industrialised countries to face a double burden. They would no longer have a major technology based industry whereas they would most likely continue to pay the highest price for technology-based products in the market.

Eliminating the local manufacturing requirements with respect to patents thus has the potential of being either a win/loose or a loose/win situation when considered from the point of view of industrialised and developing countries respectively. Or a mixture of both depending on how industry is going to exploit the new possibilities created by the TRIPS Agreement. It is unlikely that it will turn out to be a win/win situation in spite of the fact that this would have been the only acceptable conclusion in view of trying to justify such a far-reaching measure at the WTO level of governance. For individual countries, a means to try to counter a potential transfer of technology-based production could be to engage in a 'race-to-the-top' of national intellectual property legislation, or else in a 'race-to-the-bottom' of national social and competition laws. Neither of which seems to be desirable. [18] An alternative and urgent solution in the face of such a transfer of technology-based production would consist in ensuring, at least, a master key to control parallel imports. TRIPS essentially

[17] There are of course many other factors that will influence this outcome, such as subsidies, access to skilled labour, etc.

[18] Govaere, I. and Demaret, P. 'The TRIPS Agreement: a response to global regulatory competition or an exercise in global regulatory coercion?' in Esty D. et. al. (eds.) *Regulatory competition and economic integration: comparative perspectives* (Oxford OUP, 2000) 368.

favours international trade flows in technology-based products. It allows the patent holder to work the patent locally through direct importation instead of through local production. It would be far-reaching to allow him, at the same time and in all circumstances, to restrict international trade flows through opposing to parallel importations by third parties. The question thus becomes to determine under what conditions the master key could, and should, be used to open doors that are otherwise shut tight through the enforcement of intellectual property rights.

B. Improving Prospects for Economic Gains

Besides legal constraints the question of whether, or not, to introduce a product on a given market is largely inspired by the prospect of economic gains. The better the prospect of obtaining a good profit the bigger, of course, will be the incentive to bring the product on the market. Various factors are thereby taken into account, such as the price-demand ratio and the competitive pressure present on any given market. The existence of intellectual property protection may play an important role in this respect. The latter are exclusive rights which are essentially meant to shield the owner from undue inter-brand, and intra-brand, competition. The objective of most intellectual property rights, other than trade marks,[19] is precisely to put the owner in the possibility to obtain a return for his creative effort as an incentive to stimulate investment of time and money in research and development. According to the Court, it is meant to put the owner in the possibility to obtain a return for his creative effort without, however, guaranteeing that a return will also be obtained in all circumstances.[20] The possibility to obtain a monopoly reward will largely depend on the type of intellectual property right concerned, as well as on the existence of products on the market that do not infringe the intellectual property right whilst being considered by the consumers as substitutable alternatives.

The TRIPS agreement is bound to increase the incentive to bring a technology-based product on different markets at once. The aim of TRIPS is to come to a worldwide minimum level of harmonisation of intellectual property laws, without substantive derogations for the developing countries.[21] It thus multiplies the markets on which exclusive rights may be secured, and potential counterfeit importation eliminated, at the source. The gradual substitution of

[19] The objective of trade marks is to guarantee the (commercial) origin of the product or, as Art. 16 TRIPS mentions, to avoid a likelihood of confusion.

[20] Case 187/80 *Merck I* [1981] ECR 2063 at para 10. However, it was argued elsewhere that the Court drew the wrong conclusion in this case by allowing the exhaustion of rights in the absence of parallel protection, see Govaere, above n 11 at 158–68.

[21] Developing countries only benefit from a longer transitional period. See the article by Ullrich, above n 14. There are, however, important problems of implementation. See for instance Levy, C. 'Implementing TRIPS—a test of political willingness' (2000) *Law and Policy in International Business* 789.

counterfeit products for those of the intellectual property owner, in particular in developing countries, is bound to entail an important increase in parallel imports from lower priced to the higher priced markets.

Concurrently, a lot of strain is put on the traditional main argument against parallel importations. The lack of equivalent parallel intellectual property protection in the country of exportation could, before, act as a fundamental reason to allow for parallel imports to be restricted. The argument went that through intra-brand price competition with parallel imports in the country of importation, indirectly also the inter-brand price competition in the country of exportation would be imported. Take the example of product ABC which, under intellectual property protection, could be marketed at 100 Euro in the country of importation. In the absence of parallel protection in the country of exportation the price of product ABC will most likely be much lower, for instance 20 Euro, as it may be subject to inter-brand competition with product XYZ sold at 18 Euro. The parallel importation of product ABC would lead to fierce intra-brand price competition, as it would oppose product ABC sold at 100 Euro to product ABC sold at 20 Euro plus costs. The intra-brand price competition with products that had been exposed to inter-brand competition in the country of exportation would most likely lead to a significant decrease in price in the country of importation, perhaps at a level of 30 Euro.[22] This would then imply that the intellectual property owner is in the possibility to obtain a reward for his creative effort neither in the country of exportation nor in the country of importation.[23] It could therefore be considered necessary to allow the intellectual property owner to protect his exclusive rights in the country of importation through barring parallel imports.

The absence of, and deficiencies in, intellectual property protection worldwide is precisely what TRIPS is trying to remedy. It was pointed out that the accumulation of parallel protection, due to TRIPS:

> amounts to multiplying the use, sale and importation monopoly by the number of jurisdictions in which intellectual property protection is separately granted, thus extending the right-holders prerogatives.[24]

In principle it becomes possible for an intellectual property owner to secure 'islands' of exclusive rights, and thus also the possibility to obtain a reward for the creative effort, in each WTO country including in each Member State of the

[22] Another unwarranted result might be that the intellectual property owner refrains to bring his product on the market where he enjoys intellectual property protection altogether. However, see above at point A. about possible IPR-related legal constraints to produce and/or market a product in a given market.

[23] This is the most controversial result of the previously cited *Merck* ruling of the Court, as confirmed later on in the *Merck II* ruling; see Joined Cases C–267/97 and C–268/95 *Merck II* [1996] ECR I–6285.

[24] Yusuf, A. and Moncayo Von Hase, A. 'Intellectual property protection and international trade: exhaustion of rights revisited' (1992) *World Competition* 115, 124.

EC. TRIPS has indeed led to 'external' EC harmonisation in an area where the adoption of internal EC harmonisation measures often proved to be difficult and cumbersome.[25] In the face of the emergence and multiplication of parallel protection also the question as to whom may, ultimately, control parallel imports in a worldwide, EC or EEA context is given a new meaning and importance. It is important to underline in this respect that TRIPS does not oblige but nonetheless expressly allows WTO countries to secure master keys to parallel trade in the form of exhaustion of rights and/or the application of competition rules to counter abuse of the exclusive rights.

III. Master Key n° 1: The Principle of Exhaustion

The main trade-liberalising principle with respect to intellectual property rights is the principle of exhaustion of rights. The objective of the latter in essence is to keep the intellectual property owner, under certain conditions, from invoking his exclusive rights to prevent parallel importations. It offers no guarantee that parallel imports will also and effectively take place. The EEA Agreement expressly lays down the principle of regional exhaustion. This is different for the EC Treaty, which does not mention the principle of exhaustion at all. Likewise, the TRIPS Agreement contains no express obligation in this respect, other than the reference in Article 6 TRIPS to the need to comply with the principles of most-favoured-nation treatment and national treatment in case the principle of exhaustion is adopted by a WTO member.[26]

In the absence of an express reference to the principle of exhaustion of rights it is up to the courts to settle the delicate issue of who may control parallel imports in any given case. The battle for the key will usually be fought before the courts at the level of the market players, opposing the owners of the intellectual and the tangible property in the same product. This should not conceal the more crucial, and underlying, quest for the master key. It is apparent that the position of parallel importers will carry much more weight whenever their interests are incidental to higher state interests in forging trade liberalisation and intra-brand competition.

There is now an abundant case-law of the European Court of Justice seeking a balance between the exclusive rights of intellectual property owners, in

[25] On the reason for this, see Govaere, I. 'Convergence, divergence and interaction of regional trade agreements and the agreement on trade related aspects of intellectual property rights (TRIPs)' in Demaret P. *et. al.* (eds.) *Regionalism and Multilateralism after the Uruguay Round: Convergence, Divergence and Interaction* (Brussels, European Interuniversity Press, 1997), 703.

[26] Art. 6 TRIPS reads as follows: 'For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights'. Exceptions are, however, made to the principle of most-favoured-nation treatment for agreements prior to TRIPS and duly notified, such as is the case for the EC and the EEA. See Govaere, above n 25.

particular of trade mark proprietors, and the internal market objective of securing free movement of goods.[27] The Court's rulings relate not only to 'internal' parallel importation concerning trade within the internal market, including Norway, Iceland and Liechtenstein by virtue of the EEA. Some recent cases deal with so-called 'external parallel importation' whereby products are (re-) imported from third countries into the EC. The Court has hitherto consistently adopted the premise that an intellectual property owner has the right to the first marketing of the protected product in the Community or the EEA. Subsequently he may no longer, in principle, oppose the further commercialisation and internal parallel importation within the EEA.

A. Community and Regional Exhaustion

Ever since the very first case in which the principle of exhaustion was introduced, the *Deutsche Grammophon Gesellschaft* Case,[28] the Court has consistently held that the specific subject matter of intellectual property rights under Article 30 EC is limited to the right for the owner of the exclusive right, or with his consent, to put the product on the internal market for the first time. No more, no less. The principle of Community exhaustion so construed was later on expressly written into EC harmonisation measures, such as Article 7 of the first TradeMark Directive.[29] The Court has clarified that this provision needs to be interpreted in the light of the Court's case law on the application of Articles 28–30 EC to trademarks.[30]

1. Current Issues

With respect to internal parallel importation, the crucial question over the past few years was to what extent, and under what conditions, a trademark proprietor may oppose to the repackaging and re-labelling of the protected product for the sake of parallel importation. This was to be expected. From the start there necessarily has been a constant fine-tuning of the principle of Community or Regional (EEA) exhaustion in the case-law of the Court. Not surprisingly there have been cases questioning the meaning of 'consent' needed to trigger the principle of exhaustion, such as relating to compulsory patent

[27] Some cases also deal with the relationship to services, see for instance Case 62/79 *Coditel* [1980] ECR 881.

[28] Case 78/70 *DGG* [1971] ECR 487.

[29] Dir. No 89/104/EEC, OJ 1988 L 40/1.

[30] See, for instance, Joined Cases C–427/93, C–429/93 and C–436/93 *Bristol Myer Squibb* [1998] ECR I–3457; Joined Cases C–71/94 and C–73/94 *Eurim-Pharm* [1996] ECR I–3630; Case C–232/94 *MPA Pharma* [1996] ECR I–3671.

licensing[31] or to rental of copyright and related works.[32] More important in number were the cases calling for a refining of the specific subject matter of trade marks. The Court thereby gradually took the essential function of avoiding a risk of confusion for the consumer[33] and guaranteeing the commercial origin of the product[34] more and more into consideration. This led the Court to acknowledge that the trade mark proprietor not only has the right to first put the branded product on the market but also, in principle, the exclusive right to affix his mark to the product.[35] The prima facie conclusion in the early *American Home Products* and *Hoffman-La Roche* Cases was, therefore, that a trademark proprietor may prevent parallel importers from repacking and reaffixing the trade mark. The Court did, however, add an important qualification. It held that the use of trade marks, to prevent the parallel importation of repackaged and relabelled products, could nonetheless constitute an arbitrary discrimination or a disguised restriction on trade under the second sentence of Article 30 EC. This would be so if, having regard to the marketing system adopted by the trade mark proprietor, it would contribute to the artificial partitioning of the markets between Member States.

The exception was bound to give rise to conflicting interpretation by trademark proprietors and parallel importers. In the *Hoffman-La Roche* Case the Court indicated that parallel importers might be entitled to repackage and reaffix the trade mark as long as the original condition of the product was not adversely affected, the trade mark proprietor received prior notice, and the consumer was informed about whom was responsible for the repackaging.[36] This created the presumption that parallel importers would be entitled not only to import the unaltered branded product but, also, to alter the original packaging and to reaffix trade marks as long as the goodwill function was respected. In addition, the Court extended the principle of exhaustion to the prohibition to use the trade mark for publicity purposes, on the condition that the reputation of the mark would not be undermined.[37] The Court reasoned that there would

[31] Case 19/84 *Pharmon* [1985] ECR 2281, where the Court held that the patent holder is not considered to have consented to putting products on the market under a compulsory licence, regardless of whether or not he also received a reward. This was different in Case 434/85 *Allen & Hanburys* [1988] ECR 1245 because the licence of right concerned only allowed for a reward to be received.

[32] Case 158/86 *Warner Brothers* [1988] ECR 2605. The Court ruled that consent to sell a video tape leads to exhaustion with respect to further sales, but does not necessarily constitute the consent also to rent out the video tape.

[33] See in particular Case 119/75 *Terrapin* v. *Terranova* [1976] ECR 1039; Case C–317/91 *Deutsche Renault* v. *Audi* [1993] ECR I–6227.

[34] On the guarantee of origin function, see Case 102/77 *Hoffman-La-Roche* v. *Centrafarm* [1978] ECR 1139. For the clarification that it concerns the commercial origin of a product and not the historical origin of the mark, see Case C–10/89 *HAG II* [1990] ECR I–3752.

[35] Case 3/78 *Centrafarm* v. *American Home Products* [1978] ECR 1823

[36] Para 10. See also Case 1/81 *Pfizer* [1981] ECR 2913, where these criteria were applied in respect of a transparent wrapping.

[37] Case C–337/95 *Parfums Christian Dior* [1997] ECR I–6013.

be little point in engaging in parallel importation if the sale of products thus imported could not be made known to the public. Needless to say that the exception seemingly became more important than the rule. The impression was created that trade mark proprietors would only be able to oppose to tampering with their packaging and trade mark if they could prove that goodwill would be undermined or the reputation of the mark unduly affected. This led to a wave of new cases before the Court, such as the widely discussed *Bristol Myers Squibb* Case,[38] to try to rectify the balance in favour of the trade mark proprietors. Though still walking on a thin rope, cases such as *Pharmacia & Upjohn* now clarify that a parallel importer may only exchange original trade marks attached by the proprietor where this is objectively necessary to allow for parallel imports to take place.[39] The focus of future debate thus naturally shifts towards the meaning to be given to the 'necessity' criterion.

2. *Fundamental Issues*

The trade mark saga works around the issue of exhaustion but, as such, does not fundamentally challenge the premise adopted by the Court. The fact remains that the Court consistently applies the principle of exhaustion with reference to the first marketing of protected products in the internal market, rather than to a first and effective use of the exclusive right. It was made perfectly clear in the controversial *Merck* Cases that neither the lack of parallel protection nor the absence of a possible reward would alter this basic approach.[40] In the *Merck II* Case the Court nonetheless pointed to the new legislative context, whereby it should become possible to obtain patents for pharmaceutical products in all Member States, as a justification for sticking to its approach.[41] Internal EC harmonisation is still lacking in this respect. However, all Member States are now obliged, by virtue of Article 27(1) TRIPS, to provide for patent protection for inventions in all fields of technology, thus including for drugs.[42] In spite of the Court's contention, the fact that it becomes possible to obtain parallel patent protection in all Member States does not guarantee that

[38] Joined Cases C–427/93, C–429/93 and C–436/93, above n 30. See for instance also Case C–349/95 *Loendersloot* [1997] ECR I–6227.

[39] Case C–379/97 *Pharmacia & Upjohn* [1999] ECR I–6927.

[40] Merck I & II, above nn 20 and 23, respectively. The prior reward theory elaborated after the earlier *Centrafarm* v. *Sterling Drug* Case (Case 15/74 [1974] ECR 1147) was thereby substituted for the so-called consent theory.

[41] Para 39.

[42] Drugs were long excluded from patent protection in many countries, including in certain Member States such as Italy, on the basis of public health considerations. Under TRIPS no such option was left, as was illustrated by the case India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of the Panel, 5 September 1997, WT/DS50/R; Appellate Body Report, 19 December 1997, WT/DS50/AB. The tension between patents and public health policies of developing countries, such as South-Africa, have led to accepting the primacy of the latter without, however, relaxing the obligations under Art. 27(1) TRIPS.

parallel protection with respect to a given invention will also and effectively exist. As long as patents, as other intellectual property rights,[43] are granted by Member States on the basis of the principle of territoriality it will be up to each patent holder to apply for, and to maintain, patent registration in those Member States where he considers at the time of first registration that he may want to bring his products on the market. [44] The cost of patent registration, as well as local working conditions,[45] may be important practical considerations in this respect especially for small and medium-sized undertakings. The effective existence of parallel intellectual property protection with respect to a given product may thus not be taken for granted, even if the conditions for obtaining exclusive rights are harmonised. The need to clarify the conditions under which the principle of exhaustion may apply thus continues to exist also, if not even more so, after the *Merck II* ruling.

In the *Merck I* Case the Court held that the patent holder has to bear the consequences of his choice to market his products on a market where he does not benefit from patent protection. In *Merck II*, the Court clarified that the principle of exhaustion would not play only if the patent holder did not have a choice, but was under a legal obligation, to put the products on an export market where he did not enjoy parallel protection.[46] The Court might of course simply take its controversial reasoning a step further in the future. The Court might well hold that the patent holder has to bear the consequences of his choice not to register for patent protection in all (EEA) Member States at once. This would come very close to a *de facto* obligation to take out a patent registration in all (EEA) Member States. It should be pointed out that even with respect to the unitary Community Trade Mark and Community Design Right the EC legislator has rejected a similar option and has taken care to allow for the concurrent existence of national exclusive rights.

In *Merck II* the consent to market the products which triggers exhaustion of rights is seemingly reduced to the voluntary act of marketing the products. If so, then the question will undoubtedly arise whether a legal obligation to market a product could not be invoked to bar the application of the principle of exhaustion also in the presence of parallel protection. In the *Pharmon* Case the Court already held that the marketing of products by third parties under a

[43] Exceptions are the Community trade mark and Community design which apply to the whole internal market. However, national trade marks and national designs continue to co-exist so that it remains up to the proprietor to determine for what markets to register for exclusive rights.

[44] Inventions are subject to the principle of absolute novelty. In the EC, as in most countries, the first-to-register criterion is adopted. The USA traditionally adopts the first-to-invent criterion to establish novelty. The right of priority as written into the Paris Convention offers the possibility to register in different countries mostly within one year of initial registration without loosing novelty status. The European Patent Convention offers a centralised procedure to register in different European countries at once.

[45] Be it through importation, see above at Sect. II.

[46] Para 54.

compulsory licence did not constitute consent.[47] It seems only a small step to hold that also the compulsory working by the patent holder himself does not constitute consent. In practice, however, the latter comes down to holding that the principle of exhaustion can never apply if the Member State of exportation requires local working of patents or, presumably, makes trade mark registration subject to use. Although this line of reasoning seems to be far-reaching, the merit would consist in reopening the debate as to the conditions for application of the principle of exhaustion where parallel protection can, and is, effectively obtained but public authority interferes with the free choice of intellectual property owners. If free choice is essential to establish consent, why should this relate only to the decision as to when and where to market the products and not to other crucial aspects, such as setting the price of the product? It should be underlined that in spite of external harmonisation by virtue of TRIPS there are, for instance, still important differences in the Member States with respect to public health policies. Certain Member States control the price of drugs, and thus hold the price artificially low, whereas others let the market, and the patent monopoly, play to the fullest. This entails important differences in price for drugs, and thus also in the reward for the inventive effort, which induces parallel imports in intra-Community trade. This aspect is currently totally neglected by the Court.[48] Consent to market the products automatically triggers exhaustion of rights. Neither disparities in public health policies nor public interference with free choice may successfully be invoked. As their intellectual property rights are unconditionally held to be exhausted, undertakings under those conditions have little choice but to turn to other, and sometimes complex, strategies to block parallel imports. A prime example is the *Bayer* Case which is currently pending before the Court in appeal to a judgment of the Court of First Instance.[49] The only solution which was thought by Bayer not to fall foul of the EC competition rules, namely unilaterally restricting the offer of drugs on government controlled markets so as to reduce the risk of parallel imports into so-called free markets, is challenged by the Commission as a concurrence of wills contrary to Article 81 EC.

There is another reason why there is an urgent need for the Court to come to terms with intellectual property rights and to reflect carefully under what conditions the principle of exhaustion may apply in intra-EEA context. The application of the principle of exhaustion in the absence of equivalent parallel protection is pinpointed as a major obstacle for the EC to extend this principle also to its international trade relations.[50] It would indeed be totally inconceivable and utterly indefendable to come to a principle of international exhaustion

[47] Case 19/84, above n 31.

[48] For instance, Case 15/74, above n 40. See the criticism by Demaret, above n 9.

[49] See Case T–41/96 *Bayer*, Judgment of the Court of First Instance of 26 October 2000, currently in appeal before the Court of Justice.

[50] See Govaere, above n 25.

modelled on the principle of Community (or regional) exhaustion as currently understood. The latter purposively creates an imbalance in favour of the internal market objective which is foreign to international trade relations with third countries, other than in the framework of the EEA. At the same time, it would not be easy to defend a differentiated approach to conditions for exhaustion according to whether intra-EEA or international exhaustion is at issue. Article 6 TRIPS implies that where the principle of international exhaustion is adopted, it should comply with most-favoured nation treatment as well as with national treatment.

B. International Exhaustion in the EC and the EEA

The fact that the principle of Community exhaustion is modelled on needs specific to the internal market helps to explain why the Court has always been reluctant to extend this principle to external parallel imports by virtue of case-law. Both in the early *EMI Records* and *Polydor* Cases the Court refrained from introducing a principle of international exhaustion.[51] Even though the latter case concerned an agreement which contained duplicate provisions to Articles 28–30 EC, the Court clarified that in view of the different objectives and context similar provisions should not necessarily be interpreted in the same way as the corresponding EC Treaty provisions. The question as to whether, in the absence of international exhaustion in EC law, Member States could still apply this principle with respect to third countries was for long left unanswered. As was pointed out by the EFTA Court in the *Mag* Case, it was clear that the Court had 'ruled out national exhaustion and established Community-wide exhaustion as a minimum standard' without, however, clearly indicating whether this was also the maximum standard which Member States were allowed to adopt. [52]

1. Current Issues

It was not until 1998, in the landmark *Silhouette* Case,[53] that the Court rejected off-hand the principle of international exhaustion of trademarks for application in either the EC or the Member States. Surprisingly enough, the reasoning was essentially based on the wording and legislative history of Article 7 of the trademark Directive.[54] The latter provision basically codifies the court's case-law with respect to Community exhaustion. As there was no consensus among

[51] Case 51/75 *EMI Records* [1976] ECR 811; Case 270/80 *Polydor* [1982] ECR 329.

[52] Case E-2/97 *Mag Instruments* v. *California Trading Company Norway*, Advisory Opinion of the EFTA Court of 3 December 1997 at paras 16 and 22.

[53] Case C–355/96 *Silhouette* [1998] ECR I–4799.

[54] A lot of criticism of *Silhouette* is due to the fact that the Court does not usually adopt a textual method of interpretation of EC law and even less considers legislative history as crucial in this

Member States about the issue of international exhaustion of trade marks, an initial reference thereto was taken out of the final version of the Directive. Advocate General Jacobs considered that this made it difficult for the Court to read international exhaustion into the directive. The only way to interpret the silence of the EC legislator allegedly became either to allow each Member States to adopt, or not, the principle of international exhaustion or to allow none of the Member States to do so. In the absence of an express reference to international exhaustion the latter was considered the better solution in order to safeguard the unity of the internal market. It is submitted that having regard to the legislative history it seems, nonetheless, equally difficult to justify this outcome vis-à-vis those Member States who initially proposed to include an express reference to international exhaustion.

With respect to external parallel importation the crux of the issue thus seemingly became to establish what will constitute 'consent to import' protected products in the Community or the EEA. Although this is commonly discussed under the heading 'international exhaustion' in reality it merely serves to establish whether, or not, the further movement and marketing of those products in the internal market may be subject to the principle of Community or EEA exhaustion. Consent given by the trade mark proprietor to put the product on a third market, or even to import a certain amount of branded products into the EEA, is so far not withheld as a possible criterion by the Court. In *Sebago* the Court held that what is needed is consent to import each batch of the protected products concerned into the Community.[55] The *Davidoff* Case further clarified that the consent to external parallel importation may be either express or 'unequivocally' implied. The latter may not be inferred from the mere silence of the trade mark proprietor. The Court held that it is irrelevant that the importer is not (made) aware of the opposition to external parallel imports by the trade mark proprietor or that the authorised retailers and wholesalers have not imposed contractual reservations in this respect. It underlined that the fact that under contract law the absence of such an express reservation entails an unlimited right of resale and of marketing the products in the EEA does not imply consent which could trigger the exhaustion of the rights. [56] Consent may only be implied:

> where it is to be inferred from facts and circumstances prior to, simultaneously with or subsequent to the placing of the goods on the market outside the European Economic Area which, in view of the national court, unequivocally demonstrate that

respect. The more teleological method of interpretation as usually employed by the Court is known as the 'purposive' approach. See Lord MacKenzie Stuart, *The European Communities and the Rule of Law* (London, Stevens & Sons, 1977) 77.

[55] Case C–173/98 *Sebago* [1999] ECR I–4103.

[56] Joined Cases C–414/99 and C–416/99 *Zino Davidoff* [2001] ECR I–8691 at para 60.

> the proprietor has renounced his right to oppose placing of the goods on the market within the European Economic Area.[57]

Importation with the consent of the intellectual property owner, be it express or unequivocally implied, qualifies as direct importation. As a matter of principle parallel external importation, this is without consent, may thus continue to be opposed. Subsequent to *Davidoff* the main problem will be to establish when, in any given case, a national court will hold implied consent to be unequivocally established so that it could be maintained that direct importation, rather than parallel importation, is at issue. In this context future arguments may well focus more on the notion of putting the products on the EC market 'for the first time'. This is bound to arise in relation to the re-importation of products which were first put on the EC market with the consent of the intellectual property owner but later on exported and re-imported without express consent.

2. *Fundamental Issues*

The approach adopted to external parallel importations by the Court in *Silhouette* is different from the position taken about half a year earlier by the EFTA Court in the *Mag* Case.[58] This may seem surprising in view of the objective of homogeneity which is crucial to the well-functioning of the EEA.[59] Article 2(1) of Protocol 28 EEA expressly states that:

> (t)o the extent that exhaustion is dealt with in Community measures or jurisprudence, the Contracting Parties shall provide for such exhaustion of intellectual property rights as laid down in Community law. Without prejudice to future developments in case law, this provision shall be interpreted in accordance with the meaning established in the relevant rulings of the Court of Justice of the European Communities given prior to the signature of the Agreement.

As seen before, the principle of international exhaustion was expressly rejected with respect to trade marks in the *Silhouette* Case and has not been seriously reconsidered by the Court since then. Prior to this ruling, the EFTA Court already gave a totally different interpretation of Article 7 of the trade mark Directive which, so far, it has not reconsidered either.

On the basis of the case-law of the Court prior to the EEA, and considering the lack of an express reference in the final version of the Directive, the EFTA Court ruled in the *Mag* case that the EFTA countries under the EEA Agreement are free to adopt, or not, the principle of international exhaustion of intellectual property rights. To come to this conclusion it took into account both the

[57] Para 47.

[58] Case E-2/97, above n 52.

[59] The objective of homogeneity essentially implies that the same rules are applied, implemented and interpreted in the same manner all through the EEA.

public interest in forging free trade and competition and the function of the trade mark. In the words of the EFTA Court:

> The EFTA Court notes that the principle of international exhaustion is in the interest of free trade and competition and thus in the interest of consumers. Parallel imports from countries outside the European Economic Area lead to a greater supply of goods bearing a trade mark on the market. As a result of this situation, price levels of products will be lower than in a market where only importers authorized by the trade mark holder distribute their products.
>
> Furthermore, the principle of international exhaustion is in line with the main function of a trade mark, which is to allow the consumer to identify with certainty the origin of the products. The ECJ has defined the specific subject-matter of a trade mark to be to guarantee the identity of the origin of the trade-marked product to the consumer or ultimate user, by enabling him or her to distinguish without any possibility of confusion that product from products which have another origin (see Case 102/77 Hoffman-La Roche (. . .) para 7). This main goal does not come into question in the present case since the products imported are original goods bearing the original trade mark and stemming from the proprietor of the mark. . . . the protection of goodwill cannot be regarded as a main function of a trade mark right that would require a ban on parallel imports. The principle of international exhaustion is therefore fully consistent with the function of the mark as indicator of origin'.[60]

It is difficult to counter the argument that trade marks fulfil the same function regardless of where the products were first put on the market, be it in the EC, the EEA or abroad. In the *Hag II* Case, the Court clarified that the function of trade marks is to guarantee the commercial origin of the products rather than their historical origin.[61] No more than guaranteeing a historical origin are trade marks meant to guarantee a geographical origin of a product. In case geographical origin were to be important for reasons other than strictly related to the trade mark function, such as a practice of differentiating in quality according to the targeted market, then this should be settled by other means, such as adequate labelling. The Court has in the past acknowledged that there are other and specific rules which are aimed at guaranteeing the quality and the security of products or for safeguarding public health.[62] The EFTA Court clearly shares the view that the function of trade marks is to avoid a risk of confusion for the consumer through guaranteeing the commercial origin of the product and not to call a right into being which would allow the proprietor to control all further trade, be it intra-EEA or international trade, in the branded product.

The EFTA Court not only establishes that there is no need, in terms of the trade mark function, to allow trade mark proprietors to control external

[60] Para 19–20.

[61] Above n 34.

[62] See, for instance, Case 15/74, above n 40. Anyhow another option would still be to use different trade marks for different markets. In that way the trade mark proprietor could avoid undermining the goodwill associated with his trade mark used in the country of importation.

parallel imports. It argues that the latter would be contrary to the public and consumer interest. Public interest is equated with free trade and competition, leading to greater supply of goods and lower prices in the EFTA countries.[63] It is immediately apparent that the public interest withheld by the EFTA Court in *Mag* is not synonymous to the internal market interest as put forth by the Court in *Silhouette*. Interestingly enough, also in *Mag* the need to safeguard the unity of the internal market was presented as a major counter argument to international exhaustion.[64] The EFTA Court correctly pointed to the fact that the issue of external parallel importation is alien to the internal market objective of free movement of goods but rather needs to be situated in the context of international trade relations with third countries.[65] As the EEA establishes a free trade area and not a customs union, nor a common commercial policy, it can not impose restraints on EFTA countries in their (trade) relations with third countries. According to the EFTA Court the fact that the EFTA countries may apply, or not, the principle of exhaustion does not create a problem as, anyhow, it concerns products manufactured outside the EEA. Only products originating in the EEA are in free circulation in the internal market.

It is apparent that both courts take a radically opposed approach to the issue of external parallel importation. The EFTA Court in *Mag* refutes the internal market argument as irrelevant because it concerns above all an international (trade) issue and other public interests, such as free trade and competition, are at stake. The Court in *Silhouette* to the contrary adopts an introspective rather than a global vision. It totally disregards the international context as well as other public interests, such as free trade and competition. The only argument that is seriously considered is the need to safeguard the unity of the internal market. It is thereby seemingly irrelevant that this may result in an isolation of the internal market by trade mark proprietors in order to be able to charge higher prices to the EU consumer.

It is in order to protect the unity of the internal market, and not to uphold the function of trade marks, that the principle of international exhaustion was finally rejected by the Court in *Silhouette*. Seen from this perspective it is to be expected that, in the absence of an express reference to the contrary, the Court would equally reject offhand the principle of international exhaustion with respect to other intellectual property rights, such as patents and copyright. The specific function of the latter will probably not be taken into account either, in spite of the important differences between them. It would nonetheless be easier

[63] The results of the Nera study were not conclusive in this respect.

[64] Argument invoked by France, Germany, the UK and the EC Commission.

[65] Paras 25–28. Long before *Mag* and *Silhouette* it was submitted that the issue of international exhaustion is most likely to be situated under the common commercial policy, see Govaere, I. 'Intellectual property protection and commercial policy' in Maresceau M. (ed.) *The European Community's commercial policy after 1992: the legal dimension* (Dordrecht, Martinus Nijhoff, 1993) 197.

to argue why patents and copyright might be invoked to prevent external parallel imports, or at least to call for stringent conditions for the principle of international exhaustion to apply, than it is for trade marks. In EC as in international context the function of trade marks is to guarantee the commercial origin of a product irrespective of its geographical origin. Similarly, in intra-Community as in international trade it is crucial that the patent or copyright owner is put in the possibility to obtain a reward for his creative effort. As mentioned before, this entails safeguarding that such exclusive rights in the EC will not systematically be undermined by intra-brand competition with products that were subject to inter-brand competition or government interference, for instance with respect to price-setting, in the country of exportation.[66] The easy solution of allowing intellectual property owners to bar all parallel imports is no longer an acceptable option in view of the important contextual changes introduced by TRIPS and their potential consequences for the internal market.[67] Hence the need to reflect seriously upon a mid-way solution and to consider applying the principle of exhaustion in a situation of adequate parallel protection. It is for the Community legislator, if not the Court, to establish the conditions under which the principle of exhaustion could and should apply to both internal and external parallel imports alike.

IV. Master Key Number Two: Competition Rules

The case-law on exhaustion is important, but not necessarily decisive, with respect to parallel imports. The use of competition rules may equally be important to safeguard intra-brand competition in the consumers interest. The fact that also the application of competition rules may constitute a corrective instrument to anti-competitive behaviour of intellectual property owners is expressly acknowledged by Article 40 TRIPS. Article 40(2) TRIPS stipulates that

> (n)othing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. (. . .).[68]

Articles 81–82 EC and Articles 53–54 EEA could thus, in principle, be applied to unwarranted restrictions on intra-brand competition due to the blocking of parallel imports. Though not necessarily mutually exclusive, this option of

[66] See above at point III.B.

[67] See above at Section II.

[68] Art. 40(1) TRIPS reads as follows: '1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.' Art. 40(2) TRIPS further gives examples of abusive behaviour whereas Art. 40(3) and (4) TRIPS stipulate when and how a WTO Member may request consultations with another WTO member concerned.

course becomes all the more important when the principle of exhaustion is not withheld. This explains the current differentiation to be made in competition law approach between internal parallel importation and external parallel importation.

A. Internal Parallel Importation

The EC competition rules are complementary to the internal market rules and have as a major objective to make sure that undertakings do not resurrect barriers to intra-Community trade. The enforcement of intellectual property rights to bar parallel imports may have the same result. Being a unilateral act this will, however, only fall foul of Article 82 EC when the exclusive rights are exercised by an undertaking occupying a dominant position in the EC market or a substantial part thereof. There also needs to be an abuse of that dominant position as opposed to a normal use of the exclusive right to oppose imports.[69] This is difficult to establish in practice. According to the Court in the *Magill* Case, the differentiating factor between a normal use and an abuse of the exclusive rights under Article 82 EC is constituted by the presence of so-called 'exceptional circumstances'.[70] Or, as in the *Hilti* Case, by the tie-in of unprotected products.[71]

It is important to underline that in the *Deutsche Grammophon Gesellschaft* Case, the Court came to the conclusion that the mere exercise of copyright to bar internal parallel importation did not constitute a breach of the competition rules. It is precisely upon this finding that it went on to state that, if the exercise of the exclusive right was not contrary to the competition rules, one still had to consider whether this exercise was not contrary to other Treaty provisions.[72] As such, the principle of Community exhaustion was introduced under the rules on the free movement of goods because the competition rules proved to be of no avail against the unilateral use of intellectual property rights to block intra-Community trade. From then on the principle of exhaustion became the first and main instrument to guarantee intra-brand competition in the presence of intellectual property protection. As such it was no longer necessary, in practice, to establish under what 'exceptional circumstances' the use of intellectual property rights to bar internal parallel imports might also constitute a breach of Article 82 EC.[73]

The fact that there are only few cases whereby Article 82 EC has been applied effectively to the unilateral exercise of the exclusive rights does not mean that intellectual property rights may always and readily be invoked as an

[69] See Case 24/67 *Parke Davis* [1968] ECR 55.

[70] See Joined Cases C–241–242/91 P *RTE and ITP (Magill)* [1995] ECR) I–743.

[71] Case C–53/92 P *Hilti* [1994] ECR I–667

[72] Case 78/70, above n 28 at para 7.

[73] Although the Commission might, for instance, impose a fine or a penalty payment in case a breach of Art. 82 EC.

alternative to writing territoriality clauses in agreements.[74] It was for instance made clear in the early *Consten Grundig* and *Sirena* Cases, of 1966 and 1971 respectively, that Article 81 EC could apply to trade mark assignments which have as an effect to prevent internal parallel importation.[75] In *Ideal Standards*, the Court did qualify its approach and held that before concluding that a trade mark assignment gives effect to an agreement prohibited under Article 81 EC it is necessary to analyse their context, the commitments underlying the assignment, the intention of the parties and the considerations for the assignment.[76] Similarly, the Court in *BAT* held that trade mark delimitation contracts may be lawful, provided they serve to delimit the spheres within which the respective trade marks may be used. They should, however, be intended to avoid confusion and conflict between the trade marks and not to divide the internal market or to restrict competition otherwise.[77]

B. External Parallel Importation

If the mere use of intellectual property rights to prohibit internal parallel imports is not considered to fall foul of the competition rules, according to the *Deutsche Grammophon Gesellschaft* ruling, then it would seem difficult to hold differently with respect to external parallel importation. Otherwise it would come down to allowing an intellectual property holder to restrict internal trade more than trade with third countries. The major difference, of course, is that up till now the principle of international exhaustion is not applied in EC law whereas internal parallel imports are already guaranteed by virtue of the principle of Community or EEA exhaustion. The crucial issue thus becomes to know under what exceptional circumstances intellectual property rights may nonetheless be held to be abused when blocking external parallel imports.

The *EMI Records* Case concerned an agreement on trade marks between traders established inside and outside the EC, whereby the EC market as a whole was isolated. The Court held that this might be contrary to Article 81 EC, in particular if the trader outside the EC had subsidiaries in the EC that otherwise could have use the trade mark.[78] The question is to what extent the isolation of the EC market due to the enforcement of intellectual property rights may also play a role in the absence of an agreement. In the recent *Micro Leader* Case,[79] the Court of First Instance held that the Commission needed to consider whether the use of copyrights by Microsoft to bar the external parallel

[74] The technology transfer block exemption gives some guidance with respect to know how and patent licensing, see Commission Reg. 240/96, OJ 1996 L 31/2.

[75] Case 40/70 *Sirena* [1971] ECR 69.

[76] Case C–9/93 *Ideal Standards* [1994] ECR I–2789.

[77] Case 35/83 *BAT* v. *Commission* [1985] ECR 363.

[78] Case 51/75, above n 51.

[79] Case T–198/98, above n 7. On this case, see Muñoz, R. 'Propriété intellectuelle: vers une exception à l'épuisement communautaire?' (2000) *JTE* 215.

importation of computer programs, put with its consent on the Canadian market, did not amount to an infringement of Article 82 EC. In particular it pointed to the argument that higher, if not excessive, prices were charged on the French market. In the view of the Court of First Instance important price differences might apparently constitute such an 'exceptional circumstance' as needed to trigger Article 82 EC.

If the competition rules may thus be important to control abusive behaviour by intellectual property holders they, nonetheless, do not have the same potential as the introduction of the principle of international exhaustion. The premise is and remains that external parallel imports may be prohibited. The isolation of the EC market will therefore only exceptionally be sanctioned. First of all it needs to be proven that the intellectual property owner has a dominant position on the market. In case he holds no such position then he may, in any event, unilaterally restrict external parallel imports, regardless of the effects on the internal market or the level of prices charged. Furthermore it needs to be proven that the dominant position has been abused. According to *Magill* it has to be established that there is an 'exceptional circumstance' which may be distinguished from the 'normal' unilateral exercise of exclusive rights. In the latter case this consisted in preventing the occurrence of a new product in a related market for which there was a strong consumer demand. In *Volvo* the Court already indicated that fixing prices for spare parts at an unfair level might constitute abusive conduct by the holder of design rights in a dominant position. Case 238/87 *Nelvo* [1988] ECR 6211. The question is, of course, how to determine when prices are unfairly high in the face of intellectual property rights. In particular where exclusivity is granted so as to provide a possibility to obtain return for the creative effort it seems extremely difficult, for the Commission or any court, to establish what should be a 'just' reward. In *Micro Leader*, the price difference with a third market is considered to be a potentially crucial factor in this respect. This seems to be somewhat paradoxical. The need for technology-based industry to maintain different price levels worldwide is one of the most important arguments invoked against the introduction of the principle of international exhaustion. Should undertakings now be sanctioned for taking this argument to the letter?

V. Conclusion

The TRIPS Agreement does not oblige the Contracting Parties to adopt a master key to control parallel imports. It leaves it up to each country to decide whether, or not, to adopt the principle of international exhaustion and/or to apply competition rules in order to counter abusive behaviour by intellectual property holders. Article 8(2) TRIPS nonetheless states that appropriate measures may be needed where the latter unreasonably restrain trade or adversely affect the international transfer of technology. In particular when read in

conjunction with the important contextual changes introduced by TRIPS it seems that this provision, in reality, begs the question of introducing a master key to control parallel imports by each of the individual Contracting Parties. Important trading partners of the EC, such as the USA and Japan, have apparently understood this message. They have gradually formulated master keys to control international trade flows in technology-based products in the form of conditional international exhaustion as well as competition rules. Also the EFTA Court has allowed for the principle of international exhaustion to be applied in the interest of free trade and competition. It seems that, in particular when considered in a global perspective, the EC is far lagging behind.

There currently is no straightforward answer as to whom may control the master key to parallel imports under EC law. Similarly, so far little attention has been paid to the formulation of acceptable conditions under which such a master key could be used. Instead, a differentiation is made according to internal and external parallel imports, going from one extreme to another in so far as the principle of exhaustion is concerned. This in turn has implications for the application of competition rules. In the absence of the principle of exhaustion the latter carry the full and almost impossible burden of shielding the internal market from attempts to unduly isolate the market in order to charge higher prices to the consumer.

In intra-Community trade the internal market objective weighs heavily in favour of internal parallel importation, sometimes unduly so to the detriment of the intellectual property owner. The overriding view is that it would be incompatible with the internal market objective of eliminating barriers to trade to allow intellectual property owners to resurrect barriers between the Member States with respect to products which were put on the internal market by themselves or with their consent. According to the Court it is thereby irrelevant to know whether there was also parallel protection or whether there was government interference with price setting in the Member State of exportation.[80] The only way to escape the principle of Community, or EEA, exhaustion is to prove that there was no consent given by the intellectual property holder to put the products on the EEA market.

The approach to external parallel importation is very different. The view currently held by the Court is that whether, or not, goods may be imported from abroad has no direct bearing on the functioning of the internal market as long as the uniformity of the internal market is preserved. The internal market objective would thus merely require that either all intellectual property owners are entitled to bar parallel imports or that all external parallel imports are, in principle, allowed. The interests of external parallel importers, contrary to those of internal parallel importers, therefore do not necessarily and automatically coincide with the internal market objective. This explains why, up until

[80] See the *Merck* case, above n 20.

now, a fundamentally different approach prevails with respect to internal or external parallel imports.

The principle of international exhaustion of trade marks was rejected offhand by the Court in *Silhouette*. The international trade issue was thus reduced to establishing when the intellectual property holder would be held to have consented to the importation of the protected products in the EEA, so that the principle of EEA exhaustion could subsequently apply. The crucial question, of course, is whether in the context of WTO and TRIPS globalisation it still makes sense to equate the EC public interest, introspectively, with merely safeguarding the unity of the internal market. The *Micro Leader* Case rendered by the Court of First Instance clearly puts some strain on this approach. It pinpoints the potential isolation of the whole EC internal market and the ensuing differential, not to say discriminatory, pricing policies which may be prejudicial to EU consumers. These are, however, normal consequences of, if they are not intended by, the rejection of the principle of international exhaustion. Competition rules may serve to take off the sharp edges, but no more. Article 82 EC permits the striking down of such anti-competitive behaviour only by undertakings in a dominant position and only in the presence of exceptional circumstances.

It would seem to be a better and more consistent solution to reconsider the conditions under which the principle of exhaustion could apply to both internal and external parallel imports alike. It is important to bear in mind that Article 6 TRIPS makes the principle of international exhaustion subject to the most-favoured nation and national treatment principle. This implies that, in theory, the EC has the choice between not introducing international exhaustion at all or applying the same approach to international exhaustion as prevails in an intra-EC context. It would of course be inconceivable that the current concept of Community or EEA exhaustion would simply be extended to international trade relations. At the same time it is apparent that the EC will need to evolve towards some form of international exhaustion. There is bound to come a time, sooner rather than later, when the extremes will be left and a mid-way solution found. An option might be to apply the principle of exhaustion only when 'effective' and 'appropriate' parallel protection exists in the country of exportation. It remains a task for the EC legislator, if not the Court, to model the master key to its most 'appropriate' form in order to control parallel imports in the future without unduly impinging upon exclusive rights intellectual property holders.

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THE FIRST TWO YEARS OF THE COMPETITION COMMISSION APPEAL TRIBUNALS

*Mark Jephcott**

I. Introduction

On 1 March 2002, the Competition Commission Appeal Tribunals ('the Appeal Tribunals') celebrate the second year of their existence, this being also the second anniversary of the coming into force of the Competition Act 1998 ('the Act') which founds their jurisdiction. In fact the Act had existed in dormant form for some time before this date (it was enacted on 9 November 1998), giving competition practitioners and officials alike ample warning of the main provisions of the new regime. However, as the Appeal Tribunals are an appellate body, their opportunity to play their part in the brave new world of competition law had to await the actions of the administrative bodies, and hence the Appeal Tribunals were not called upon to act until fifteen months into their tenure. Nevertheless, once appraised of appeals they have proceeded to produce a number of final and interlocutory judgments which have established the framework and ground rules for an effective judicial forum.

In particular, the Appeal Tribunals have confirmed that their jurisdiction extends to the United Kingdom as a whole (and not just to England and Wales), and have put beyond all doubt that they are much more than a mere judicial review body: they will hear appeals on facts and law and will judge on the merits. Moreover, the Appeal Tribunals have already clarified a number of procedural issues, and also have given guidance in some complicated areas of competition and human rights law.

This paper aims to give an overview of the Appeal Tribunals, their procedure, and their role within the United Kingdom competition regime, and to highlight the areas of interest raised in the cases to date, particularly as regards

*Competition Commission, Appeal Tribunals. This article is based on a seminar presented to the Centre for European Legal Studies at Cambridge University in February 2002. The views expressed in this paper are those of the author entirely and should not be taken as representing those of the Appeal Tribunals.

the functioning and procedure of the Appeal Tribunals as a body. Firstly, however, it is appropriate briefly to outline the relevant provisions of the Act which founds the jurisdiction of the Appeal Tribunals.

II. The Competition Act 1998

The Act replaces or amends legislation including the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the majority of the Competition Act 1980. The old legislation was thought to be unduly technical, and not to contain sufficient sanctions against genuinely harmful anti-competitive conduct. Moreover many innocuous agreements were unnecessarily caught. It was felt that it was time to remodel on the basis of Community competition law, as laid out in Articles 81 and 82 (formerly 85 and 86) EC.

A. The Prohibitions

The Act introduces two prohibitions based on Articles 81 and 82 EC: one of agreements (whether written or not) which prevent, restrict or distort competition and which may affect trade within the United Kingdom ('the Chapter I prohibition')[1]; the other of conduct by undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the United Kingdom ('the Chapter II prohibition').[2] Pursuant to section 4 of the Act, the Director General of Fair Trading ('the Director') may grant an individual exemption from the chapter I prohibition, if the agreement meets certain criteria set out at section 9. Articles 81 and 82 EC continue to apply to agreements or conduct which may affect trade between Member States.

The Act provides for certain exclusions from the prohibitions.[3] These are set out in Schedules 1 to 4 of the Act. The most significant relate to mergers, professional rules designated by the Secretary of State and (in very limited circumstances) public policy.

B. Investigation, Enforcement and Penalties

The Act gives the competition authorities wide powers to investigate undertakings believed to be breaching either prohibition.[4] These are similar (but not identical) to those enjoyed by the European Commission pursuant to Regulation 17/62. In addition, financial penalties of up to a maximum of 10 per cent of the

[1] Section 2 of the Act.
[2] Section 18 of the Act.
[3] Sections 3 and 19 of the Act.
[4] Sections 25 to 44 of the Act.

turnover of any undertaking in the United Kingdom for up to three years[5] may be imposed for an infringement. Any agreement which infringes the Chapter I prohibition is void and unenforceable.[6] It is widely believed that third parties who have suffered loss as a result of any unlawful agreement or conduct have a claim for damages in the courts.

C. Community Law and the Act

Section 60 of the Act sets out certain principles to ensure that United Kingdom authorities and courts handle cases in such a way as to be consistent with Community law. The Act therefore places a dual obligation on them in considering and dealing with the application of the Prohibitions. First of all, they must ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court of Justice and Court of First Instance or with any decision of those courts.[7] Secondly, they must have regard to any relevant decision or statement of the European Commission.[8]

This obligation to ensure consistency applies only to the extent that this is possible, having regard to any relevant differences between the provisions concerned.[9] This means that there will be certain areas where the Community principles will not be relevant. For example, the Community single market objectives designed to establish a European common market would not be relevant to the domestic prohibition system.

D. The Regulators

The Office of Fair Trading ('the Office'), headed by the Director,[10] has responsibility for the day-to-day operation of the regime under the Act. This includes conducting investigations, giving guidance on the application of the Act and deciding whether the prohibitions have been infringed, granting exemptions from the prohibitions, and taking enforcement measures including the imposition of fines. Where agreements or conduct being considered under the Act concern the regulated utilities, the Director shares jurisdiction concurrently with the relevant sectoral utilities regulators in telecoms, gas, electricity, water, and railways.

[5] Section 36 of the Act and Statutory Instrument No. 309/2000 *The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000*.

[6] Section 2(4) of the Act.

[7] Section 60(2) of the Act.

[8] Section 60(3) of the Act.

[9] Section 60(1) of the Act.

[10] The position of the Director was created by section 1 of the Fair Trading Act 1973. Significant powers are entrusted to him as an individual, and all decisions are those of the Director, not the Office.

E. Appeals from the Regulators

Sections 45 to 49 of the Act set up the mechanism for appeal from decisions of the Director and the Regulators. Such appeals lie to the Appeal Tribunals which constitute the judicial arm of the Competition Commission.

III. The Competition Commission and the Appeal Tribunals

A. Background to the Competition Commission

The Competition Commission is a new institution established by section 45(1) of the Act. Section 45(3) provided for the dissolution of the Monopolies and Mergers Commission ('MMC') and the transfer of its functions to the Competition Commission.

The Competition Commission has two 'sides': a reporting side and an appeals side. The old MMC functions have been taken over by the reporting side. The Competition Commission is headed by a Chairman (Dr Derek Morris) and two Deputy Chairmen (Denise Kingsmill and Professor Paul Geroski). The appeals side consists of appeal tribunals, headed by the President (Sir Christopher Bellamy QC). Both sides are made up of part-time members, drawn from all walks of life, many having specific relevant expertises. The Competition Commission has a management board, known as the Competition Commission Council. It comprises the Chairman, the President of the Appeal Tribunals, the Secretary and the two Deputy Chairmen. The Competition Commission members are supported by a permanent staff of approximately eighty.

B. The Reporting side of the Competition Commission

Although the Competition Commission's existence stems from the Act, the principal functions of the reporting side are set out in section 5 of the Fair Trading Act 1973. It is the duty of the reporting side to investigate and report on any question which may be referred to it. Such references may relate to mergers, monopolies and anti-competitive practices, modifications of licences of regulated utility companies and the performance of public sector bodies. References relate to an evaluation of the impact of the factual situation on the public interest. Following such a reference it is the duty of the reporting side to carry out an investigation and make a report setting out its reasoned conclusions on the questions comprised in the reference.

Further, the reporting side is required to consider what actions might be taken to remedy the situation if it finds that the public interest is being harmed and may impose penalties accordingly. In most instances the reports of the reporting side are not finally determinative.[11]

[11] There are exceptions—for example water charging references under the Water Industry Act 1991, and by virtue of the Utilities Act 2000 the reporting side may veto modifications to licences

C. The Appeal Tribunals

The Appeal Tribunals were introduced by the Act in light of the fact that power has been conferred on the Director and the regulators to impose penalties on undertakings. The previous judicial review process was not considered to constitute an adequate remedy. As such, it is now possible for undertakings to appeal against the substance and not just the legality or reasonableness of a United Kingdom competition authority's ruling.

Any party to an agreement and any person in respect of whose conduct the Director has made a decision within the meaning of section 46(3) of the Act, may appeal to the Appeal Tribunals against that decision.[12] In addition, a person who is not the subject of a decision who demonstrates that they have 'sufficient interest' in the decision, may apply to the Director asking him to withdraw or vary it. If the Director rejects the application, the third party may appeal to the Appeal Tribunals against that decision.[13]

Appeals are heard before tribunals consisting of three members (one legally qualified Chairman and two lay members) appointed by the President. There are currently twenty appeal panel members from various legal, economic and other disciplines. The Appeal Tribunals must determine the appeal on the merits,[14] may reconsider the economic and legal analysis applied by the authority and take any decision that the Director could have taken.[15] The Appeal Tribunals thus have full judicial functions. Where further investigation is required, the cases may be referred back to the Director.[16]

The procedure governing appeals to the Appeal Tribunals is set out in the Competition Commission Appeal Tribunal Rules 2000, S.I. 2000 No. 261.[17]

The Appeal Tribunals signalled to the legal community at a very early stage (see the *Guide to Appeals under the Competition Act 1998*, produced by the Registry in June 2000 ('the Guide')) that they are much more than a mere judicial review body and that the procedures are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under rule 1.1 of the Civil Procedure Rules 1998. Part 2 of the Guide confirms that

> [t]he Rules are based on the same general philosophy as the CPR and pursue the same overriding objective of enabling the appeal tribunals to deal with cases justly (. . .) To achieve this objective in the particular context of the Act, the Rules are modelled

of gas and electricity undertakers. There are similar proposals under consideration in respect of water undertakers. Further the Government is consulting on proposals on the merger control regime under which the reporting side would finally determine remedies to address anti-competitive effects of mergers.

[12] Sections 46(1) and (2) and 48(1) of the Act.

[13] Sections 47(6) and 48(1) of the Act.

[14] Schedule 8, para 3(1) of the Act.

[15] Schedule 8, para 3(2)(e) of the Act.

[16] Schedule 8, para 3(2)(a) of the Act.

[17] All references to 'Rules' hereafter relate to the Tribunal rules, unless otherwise stated.

> partly on the CPR and partly on the Rules of Procedure of the Court of First Instance. A central feature of both the CPR and the rules of the CFI is case management by the court.

The Guide sets out the five main principles of the Rules, namely, (i) early disclosure in writing; (ii) active case management; (iii) strict timetables; (iv) effective fact-finding procedures; and (v) short and structured oral hearings. The Guide states, at paragraph 2.6, that in general the Appeal Tribunals aim to complete straightforward cases in less than six months.

Further appeal on a ruling of a tribunal may be made to the appropriate court, with leave,[18] on a point of law arising from a decision of a tribunal, or from any decision of a tribunal as to the amount of a penalty.[19] In relation to proceedings in England and Wales, the appropriate court is the Court of Appeal; in relation to Scotland, it is the Court of Session; and, in relation to Northern Ireland, it is the Court of Appeal in Northern Ireland.[20]

IV. The Cases to Date

At the time of writing, four cases have come before the Appeal Tribunals. Two of these have been disposed of by final judgment, another final judgment is expected shortly and a preliminary jurisdictional point in the fourth case was recently heard in Northern Ireland.

The first appeal to come before the Appeal Tribunals was submitted in May 2001. That case resulted in three interlocutory judgments and one final judgment. The first full judgment was handed down in September 2001, barely three months after the initial application was lodged. A brief analysis of each of the judgments follows in which the points of interest are highlighted.

A. Cases No. 1000/1/1/01 and 1000/1/1/01(IR) *Napp Pharmaceutical Holdings Limited and Subsidiaries* v. *The Director*

In this case Napp Pharmaceutical Holdings Limited and Subsidiaries ('Napp') appealed against the first penalty decision to be issued by the Director ('the Decision'). In that decision, dated 30 March 2001, the Director fined Napp £3.21 million for breaching the Chapter II prohibition.

[18] Section 49(2) of the Act.
[19] Section 49(1) of the Act.
[20] Section 49(4) of the Act.

1. The Decision

In broad terms, the Director found that Napp had abused its dominant position in the supply of sustained release morphine[21] tablets and capsules in the United Kingdom, by heavily discounting the supply of its product MST Continus ('MST')[22] to hospitals[23] and thereby excluding competitors from that segment of the market while at the same time maintaining excessively high prices for the same product in the larger community sector.[24]

In the community sector Napp's NHS list price for MST remained the same since its launch, subject to periodic reductions imposed by the Pharmaceutical Price Regulation Scheme ('PPRS').[25] According to the Decision, GPs in the community segment are not price sensitive in relation to morphine products because the proportion of their total indicative budget which is spent on morphine is small. The hospital sector is more price sensitive: they are willing to try competitors' drugs. Moreover, whilst hospital pharmacists will routinely substitute a generic equivalent[26] for a branded drug, if a GP prescribes a particular brand of drug, the community pharmacists must dispense that drug.

In relation to Napp's dominance on the relevant market, the Director relied both on Napp's high market shares[27] and the fact that there were significant barriers to entry.[28] The Director did not consider that the buying power of the NHS or the particular features of the PPRS restricted Napp's ability to behave independently of its competitors.

As regards sales to hospitals, the Director considered that Napp abused its dominant position by seeking to eliminate competition by selling MST to hospitals at below cost and targeting competitors by offering higher discounts where it faced competition.[29] In coming to this conclusion, the Director relied

[21] Sustained release morphine is a strong opioid analgesic used to treat constant pain, particularly in cancer patients.

[22] Napp launched MST, the first sustained release morphine product to appear on the market, in 1980 and had the United Kingdom patent on its formulation until 1992.

[23] The hospital sector relates to the prescriptions by hospital doctors to patients and comprises 10–14% of the relevant market.

[24] The community sector relates to the prescriptions by GPs once the patients have left the hospital. This sector comprises 86–90% of the relevant market.

[25] The PPRS is a voluntary scheme between the Secretary of State for Health and the Association of British Pharmaceutical Industry which regulates the profit companies make for sales of branded prescription drugs to the NHS—it sets a limit on the rate of return for a company across all branded prescription medicines and is not applied to each product individually.

[26] A generic drug is one with the same compound preparation as the original branded drug, but usually given a non-proprietary name based on the compound preparation itself e.g. morphine sulphate.

[27] These were estimated to be in excess of 90% in both sectors.

[28] The Director considered that there existed both regulatory and strategic barriers to entry—for instance Napp's 'first-mover' advantage and its reputation as an aggressive competitor; see paras 101–118 of the Decision.

[29] See para 236(a) of the Decision. The Director referred, in particular, to Napp's (i) selectively supplying MST to customers in the hospital segment at lower prices than to customers in the

first on the test set by the European Court of Justice in *AKZO*,[30] that pricing below average variable cost is abusive. The Director considered that direct costs, consisting of materials and direct labour, constituted a reasonable proxy for variable costs (paragraph 190). The Director rejected Napp's defence that it was not pricing below cost since its overall sales—i.e. to the hospital and community segments combined—were incrementally profitable because of a mechanistic 'follow-on effect', which Napp estimated on the basis of an internet survey of GPs to be around 15 per cent, whereby losses incurred in discounted sales to hospitals are more than compensated by the 'follow-on' sales in the community segment where the GP repeats the hospital prescription (paragraphs 148 et seq). However, the Director did accept that there was a 'follow-on effect' between hospital and community sales and that Napp's figure of 15 per cent 'may serve as a crude estimate of this effect at a national level over time' (paragraph 150). In relation to foreclosure of the total market, the Director noted that the hospital segment is a key point of entry for new competitors to the whole market, since hospitals serve to establish the reputation of a brand because prescribing decisions of hospital specialists establish the credibility of a product and GPs acquire first hand knowledge of a product (see paragraphs 162–67).[31]

In the community segment, the Director considered that Napp's prices were excessive on the basis that they were above that which would exist in a competitive market, and it was clear that those high profits had not stimulated successful new entry within a reasonable period (paragraph 203). According to the

community segment; (ii) targeting competitors in (a) supplying at higher discounts (in excess of 90%) to hospitals where it faced or anticipated competition, or (b) supplying at higher discounts on those strengths of MST where it faced competition; and (iii) supplying MST to hospitals at excessively low prices, in some cases below total delivered cost, and in other cases below direct costs (see paras 188 to 196). Moreover, Napp's pricing policy also foreclosed a large part of the total market (see paras 160 to 180).

[30] Case C–62/86 *AKZO Chemie BV* v. *Commission* [1991] ECR I–3359.

[31] In its final judgment (see below) the Tribunal noted that there existed considerable confusion on the part of both parties in relation to the term 'follow-on' effect. According to the Tribunal, the parties used the term interchangeably when referring to two, separate, concepts. The Tribunal suggested that the reason for this confusion was probably because it was a phrase 'coined by Napp's advisers for the purposes of this case' (para 235). The first was a 'narrow follow-on effect' whereby in about 15% of cases the brand of oral sustained release morphine prescribed by the GP in the community sector is determined by the hospital's choice of brand. The second concept, termed 'hospital influence' describes the whole range of ways in which the fact that a drug is used in hospitals may affect the prescribing habits of GPs; this would include direct referrals, but also enhancement of the brand's reputation simply because hospitals stock the drug. Regardless of the correctness or otherwise of the 'follow-on' effect in the broad or the narrow sense and regardless of the Director's apparent acceptance of it (at para 150 of the Decision), the Tribunal concluded that it did not assist Napp's Case (para 247) since there was no evidence emanating from any of the documents produced by Napp that it 'ever took into account any follow-on effect when setting or carrying out its pricing policy (. . .) what Napp was well aware of was not any follow-on effect in the narrow sense, but the strategic importance of hospital business, and the hospital influence thereby acquired, as the gateway to the community segment' (paras 248 and 255).

Director, there are two ways of determining whether Napp's prices are 'above the competitive level'. First, by assessing 'whether the difference between costs actually incurred and the price actually charged is excessive' in accordance with the *United Brands* Case,[32] and secondly to establish what the competitive price for MST is and then compare this with the actual price. The Director concluded that the prices that Napp was able to charge were on average well over ten times higher than its price in the hospital segment, its gross profit margin was in excess of 80 per cent and more than 40 per cent higher than for its next rival (paragraphs 204–34).

Five weeks after the Decision was published, the Director imposed directions on Napp to bring the infringements to an end under section 33 of the Act.[33]

2. *The Interim Relief Judgment—Case No 1000/1/1/01(IR)*

Within less than a week, Napp made an application under Rule 32 to suspend the directions. In the event, the application was disposed of by consent, on the basis of a likely four month delay to final appeal and the voluntary measures proposed by Napp—to grant an indemnity to the NHS and a reduction in termination period for existing contracts. The President,[34] however, made use of the opportunity to give guidance on future applications for interim relief.

The first point clarified by the President was that a request for interim relief could be made before the main appeal was lodged; this was implicit in Rules 32(7)(e) and 32(10). However, the Tribunal will normally require a firm indication as to the date at which the appeal will be lodged, as well as an undertaking to pursue the appeal with all due expedition (paragraph 32).[35]

The President then considered the threshold test as regards the merits of the main appeal which an applicant for interim relief should overcome. In coming to a decision, the President noted that 'the principles normally applied in applications for interim relief in the civil courts, such as *American Cyanamid* v. *Ethicon* [1975] AC 396, are not in themselves necessarily determinative of the issues likely to arise under Rule 32(4)' (paragraph 39), on the basis both that the

[32] Case C–27/76 *United Brands* v. *Commission* [1978] ECR 207.

[33] The directions required Napp (i) to reduce the list price for MST by at least 15% within 15 working days, and thereafter to supply MST at a price no higher than the reduced NHS list price less the normal wholesaler's discount of 12.5%; and (ii) to supply MST to hospitals at a price of not less than 20% of the (reduced) list price. Napp was given a four month period of grace to renegotiate its existing hospital contracts.

[34] The President sat alone in accordance with his powers under Rule 33(1).

[35] The President also drew to the attention of the Director that it would be desirable in the future for directions to be made at the same time or in the same document as the decision, due to the potential complications of different appeal dates as a result of separate decisions by the Director. Section 46(4) of the Act provides that an appeal does not automatically suspend the effect of a decision, except in relation to an appeal against a penalty, but Rule 32(4) allows the Appeal Tribunals to do so by taking into account all relevant circumstances.

Director is not obliged to offer a cross-undertaking in damages and that different principles are applied throughout the United Kingdom (for instance, in Scotland).

The President considered that 'the nearest analogous situation to hand is that of an application to the Court of First Instance' and concluded that the appropriate threshold test was therefore that set in *Atlantic Container*,[36] viz. that the merits of the main appeal were prima facie 'relevant and not entirely ungrounded'. However, even where this was satisfied, as here, the court should look at other factors, and the Tribunal noted that Napp's undertaking was an important factor. As for the mechanics of the Consent Order, the President noted that the Act and the Rules clearly provide for variation of directions by the Tribunal[37] and for these to be enforceable by the Director.[38]

3. *Request for an Extension of Time for Serving Defence—Interlocutory Judgment 10 July 2001*

After the interim measures hearing, the case proceeded along its normal course and a case management conference was held, in accordance with the Rules and the Guide (see Part 7), on 25 June 2001, where the date for service of the defence and the oral hearing were set .

Two days before the deadline for lodging the defence was due to expire, the Director's legal advisers applied for a two and a half day extension. The President considered that, since the application raised a question of principle about the Appeal Tribunals' attitude to requests for extensions of time, this was a useful opportunity to give some guidance.

The President noted that the third of the Appeal Tribunals' five main principles, as set out in the Guide refers to 'Strict Timetables', and that the first case management conference is a major means for ensuring that the timetable is adhered to. Although the extension requested was only short, the President emphasised that

> [u]nlike most kinds of litigation, proceedings before this tribunal run so far as possible to a timetable which is fixed and known in advance. . . . The tribunal must start as it means to go on by insisting that case management deadlines are strictly met. The time for raising problems regarding the timing of the defence is at the first case management conference and not two days before the defence is due. . . . The tribunal expresses the hope that it will not need to be troubled by such further applications in the future.

[36] Case–149/95P (R) *Commission* v. *Atlantic Container Line AB and Others* [1995] ECR I–2165.

[37] Paras 3(2), 3(3) and 10 of Schedule 8 of the Act have this combined effect as applied by Rule 32(11).

[38] Section 34 and Schedule 8, paras 3(2)(d) and (e) of the Act.

Hence the President seemed eager to establish, at an early stage in the development of the Appeal Tribunals, that deadlines are just that, and that difficulties in meeting them should be identified early, and at the appropriate forum, namely the case conference.

4. *Judgment on Certain Matters Arising from a Case Management Conference—8 August 2001*

Following the second case conference, the Tribunal was called upon by Napp to rule, by means of a formal judgment, firstly on whether parts of the Director's defence should be disallowed on the basis that the Director had abandoned designating excess pricing in the community sector as a stand alone abuse simply because of the absolute level, and now contended that it was excessive *as a result of* the exclusionary hospital pricing and yet the penalty and directions had been based on the existence of two separate abuses. Secondly, whether a number of witness statements submitted in the Director's defence were inadmissible as new evidence.[39]

Although the Tribunal noted that the Director's definition of excessive pricing as set out at paragraph 203 of the Decision did not require that the absence of 'effective competitive pressure' on Napp's prices in the community sector should be due to Napp's exclusionary conduct, but that it could result from other factors such as regulatory barriers or the lack of price sensitivity of GPs, the Tribunal held that it could not be said that the Director had 'abandoned the totality of his allegation regarding excessive pricing (. . .) The most that can be said at this stage is that the Director's case on excess pricing *may* have shifted, perhaps to an important extent' (paragraphs 44–45). However, it was not considered that such a shift amounted to a matter for striking out the defence, pursuant to Rule 8(1), on the basis that this is a reserve power to deal with wholly exceptional cases. The Tribunal concluded that the better course was to give Napp the opportunity to submit a reply to the Defence. In the event, Napp did not do so.

In relation to the alleged new evidence, the Tribunal held[40] that '[i]t is impossible to deduce from the Act and the Tribunal Rules that there is an absolute bar on the admission of new evidence before the Tribunal', and accordingly that what evidence is acceptable is a matter for the discretion of the Tribunal. The

[39] The Tribunal was also asked to rule on the Director's request to withdraw his acceptance of Napp's 'follow-on effect' figure of 15% (see above n 31) on the basis of doubts surrounding the internet survey, such doubts being supported by a witness statement. In the event, the Tribunal did not need to rule since, during the course of the case management conference, he abandoned the request. For the record, the Tribunal noted that it would have been difficult to permit such a withdrawal in view of the significance of the figure of 15% for the Decision as a whole.

[40] Referring to the Tribunal's powers to provide for the giving of evidence, e.g. hearing of witnesses, appointment of experts (see Schedule 8, para 9(1) of the Act and Rules 17, 20–21).

Tribunal reserved its position as to the extent of this discretion at this interlocutory stage, and decided only to resolve the immediate questions at issue, namely whether to exclude the Director's witness statements.

The Tribunal analysed the cases put forward by Napp in support of its suggested blanket ban on new evidence and ruled on a number of pervasive human rights issues. Firstly, and perhaps of most significance for future cases, the Tribunal noted at paragraph 69:

> The Director concedes, in our view rightly (see Case C–235/92P *Montecatini* v. *Commission* [1999] ECR I–4575, points 175 and 176), that these proceedings are 'criminal' for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms' [hereinafter 'the Convention'].

However, referring to the Court of Appeal in *Han & Yau* v. *Commissioners of Customs and Excise* (3 July 2001), the Tribunal noted that, whilst the fact that proceedings are classified as 'criminal' for the purposes of the Convention gives the defendant the protections set out in the Convention,[41] it does not follow that civil penalty proceedings are to be regarded as criminal and therefore subject to the procedures that apply to the investigation of crime and the conduct of criminal proceedings as defined by English law.[42]

Furthermore, the Tribunal noted at paragraph 74 that:

> the fact that the administrative procedure before the Director may not itself comply with the requirements of Article 6(1) of the ECHR, does not constitute a breach of the Convention, provided that the Director is subject to subsequent control by a judicial body that has full jurisdiction and does comply with Article 6(1): *Albert and Le Compte* v. *Belgium* 5 EHRR 533, and *Alconbury Developments Ltd* [2001] UKHL 23. As we see it, *the Act looks to the judicial stage of the process before this Tribunal to satisfy the requirements of Article 6 ECHR*' [emphasis added].

The Tribunal similarly considered that, in accordance with *Lloyd* v. *McMahon* [1987] 2 WLR 821, it can legitimately correct unfairness which may have occurred in the administrative procedure before the Director, without necessarily quashing his decision.[43]

The Tribunal concluded that there should be a presumption against permitting the Director to submit new evidence that could properly have been made available during the administrative procedure.[44] However, in certain circumstances, for instance where a party makes a new allegation or produces a new expert's report, this presumption may not apply. In other words, rebuttal evidence submitted by

[41] For instance, the right to a fair and public hearing (Art. 6(1)), the presumption of innocence (Art. 6(2)) and the right to 'examine or have examined witnesses against him' (Art. 6(3)(d)).

[42] See Potter LJ at para 84 and Mance LJ at para 88 of that judgment.

[43] See Lord Bridge at p 884F and Lord Templeman at p 891 E–G. This approach was confirmed by the Tribunal in its final judgment (para 137), which referred to a House of Lords case which post-dated this interlocutory judgment, *Magill* v. *Porter* [2001] UKHL 67 per Lord Hope at 87–94.

[44] Para 79 of the judgment.

the Director will normally be allowed. In the event the Tribunal admitted the majority of the witness statements adduced by the Director.

Given the clear authority at the Community level that European Commission investigations are similarly 'criminal' for the purposes of Article 6 of the Convention and the Tribunal's duty under section 60 of the Act, it is perhaps unsurprising that the Tribunal agreed that the Director's investigations under the Act which may lead to the imposition of a penalty under section 36, are to be regarded as 'criminal' for Convention purposes. Similarly, the Tribunal was in effect bound to follow the authority in the *Alconbury* and *McMahon* cases. Nevertheless, this early clarification by the Tribunal of important human rights issues is useful.

5. *Final Judgment of 15 January 2002*

The long-awaited final judgment turned out to be something of a magnum opus. This was necessitated in part by the very complicated background facts and the fact that, being the second substantive case to come before the Tribunal, a number of threshold issues needed to be resolved. Nevertheless, the Tribunal noted that 'the procedure in this case did not go entirely to the plan envisaged in the *Guide*' probably because Napp's pleadings were not sufficiently focussed and the Director sought to introduce new evidence (paragraph 88). The Tribunal mentioned that 'we hope that the principles of the *Guide* can be closely followed in future cases'. It is interesting to note that the Tribunal referred to the 'voluminous' nature of both parties' pleadings *seven* times in this and the interlocutory judgments. Another point of interest is the Tribunal's clear proactive approach to managing its cases whereby, of its own motion, it requested Napp, pursuant to Rule 17(2)(k), to produce any documents at Board or senior management level which referred to the objectives, strategy or policy considerations taken into account by Napp in setting its prices. A number of important issues were raised and dealt with by the judgment.

—*Burden and Standard of Proof*

The Tribunal confirmed the 'criminal' nature of these proceedings (paragraph 98) and ruled that it 'follows from Article 6(2) that the burden of proof rests throughout on the Director to prove the infringements alleged' (paragraph 100), as confirmed by Community case law (*Montecatini*, paragraph 179).

The *standard* of proof was less clear cut: there was no guidance in Convention case law. Working from first principles, and noting that the Prohibitions are not criminal offences (in contrast to, for instance, sections 42 to 44 of the Act), that penalties are recoverable under section 38(8) as a civil debt, and that the matters at issue are likely to involve assessment of complex economic data, the Tribunal ruled that the appropriate standard of proof was the domestic civil standard. Within that civil standard, however, according to English, Scottish and Northern Irish law, there is a requirement that the more

serious the allegation, the more cogent should be the evidence before the court concludes that the allegation is established on the preponderance of probability.[45]

Accordingly, in cases that come before the Tribunal 'strong and convincing evidence' will be required, and any Decision will need to be soundly based. Indeed, the Tribunal questioned whether there was in practice any real difference between applying a civil standard on the basis of strong and convincing evidence, and a criminal standard of beyond reasonable doubt.

—Disclosure of Documents and Access to the File

Disposing of the procedural matters raised by Napp, the Tribunal confirmed that the Tribunal's discretion to permit the Director to adduce new evidence will be exercised sparingly, but that rebuttal evidence will normally be admitted.[46] The Tribunal further took the opportunity to confirm that the now firmly established Community law regarding 'access to the file' will apply in proceedings before the Tribunal. Accordingly, the Tribunal will uphold the principle set out in Rule 14 of the Director's Rules,[47] which provides, in effect, for the 'right to be heard' and for 'access to the file' whereby the Director must put to the defendant the essential facts and matters on which he relies. In this respect, the Director may not rely, in establishing his case, on anything that has not been disclosed to the defendant, and, subject to the protection of internal documents (Director's Rule 30(1)(f)) and confidential information as defined by Director's Rule 30(1)(c)—essentially business secrets and information relating to the private affairs of an individual—the whole of the Director's file must be available for inspection by the defendant enabling it to seek exculpatory material, in accordance with *Solvay* v. *Commission*.[48]

—Abuse: Predatory and Excessive Pricing

The parties' arguments in relation to the predatory pricing abuse have been set out above. Broadly, Napp submitted that it had not committed an abuse because any below cost sales were, owing to the mechanistic 'follow-on' effect, incrementally profitable on a 'net revenue' basis, that the Decision relies on pre-1 March 2000 events and that it had no intention to eliminate competition from the relevant market.[49] The Director submitted that although there may exist some 'follow-on' effect for Napp, the real commercial value in the heavily discounted hospital sales lay in excluding competitors from the essential gateway

[45] See Lord Nicholls' speech in *In re H* [1996] AC 563, citing notably *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455 and *Hornal* v. *Neuberger Products Ltd* [1957] 1 QB 247, 266.

[46] See para 114 of the judgment.

[47] The Director's Rules are contained in the Competition Act 1998 (Director's Rules) Order 2000, SI No. 293.

[48] Case T–30/91 *Solvay* v. *Commission* [1995] ECR II–1775.

[49] See paras 171 to 198 of the judgment.

to the profitable community segment. Moreover, Napp was clearly aware of the exclusionary effect of its strategy, as evidenced by the papers disclosed pursuant to the Tribunal's Rule 17 request.[50]

After setting out a synopsis of the relevant Community law,[51] the Tribunal found after a preliminary analysis that Napp had committed an abuse. Firstly, the Director's reliance on pre-1 March facts was not inadmissable, on the basis that in this case 'it is relevant to take facts arising before 1 March 2000 into account for the purposes, but only for the purposes, of throwing light on facts and matters in issue on and after that date'.[52] Secondly Napp had a 'particularly onerous special responsibility' not to allow its conduct to impair competition since it was a quasi-monopolist enjoying superdominance,[53] in accordance with Advocate General Fennelly's Opinion in *Compagnie Maritime Belge*.[54] The Tribunal concluded[55] that Napp had abused its superdominant position by selling at prices well below direct cost, and doing so selectively on those tablet strengths where it has faced competition, in accordance with Community case law, namely paragraph 71 of *AKZO* and paragraphs 41 and 42 of *Tetra Pak*.[56]

For completeness, the Tribunal also considered Napp's arguments that the test for abusive pricing set out in *AKZO* and *Tetra Pak*—namely that below average variable cost selling 'must always be considered abusive'—was not determinative in itself but that it merely created a presumption of abuse, which could be rebutted, according to Advocate General Fennelly's Opinion at paragraph 127, 'by showing that such pricing was not part of a plan to eliminate a competitor'. In other words, according to Napp, Advocate General Fennelly had softened the rigid *AKZO* and *Tetra Pak* test to a rebuttable presumption.

In determining Napp's intention, the Tribunal took into account the documents disclosed in answer to the Tribunal's Rule 17 request, on the basis that, while these documents pre-dated the period of the infringement, they explained the origins and motives of Napp's pricing policy. Citing Rule 20(2),[57] the Tribunal held that it was open to the Director to rely on the documents disclosed to the Tribunal, even though they were not relied upon in the Decision, (i) as evidence tending to rebut assertions made by Napp in the course of the appeal and (ii) as secondary support for the finding already made by the Director in the Decision, that Napp's intention was to eliminate competition.

[50] See paras 199 to 206 of the judgment.

[51] See paras 207 to 216 of the judgment.

[52] Para 217 of the judgment.

[53] See para 219 of the judgment.

[54] Joined Cases C–395/396 P and C–396/96 P *Compagnie Maritime Belge Transports SA and others* v. *Commission* [2000] ECR I–1365 at 132–37.

[55] At paras 226–28 of the judgment.

[56] Case T–83/91 *Tetra Pak* v. *Commission* [1994] ECR II–755, confirmed on appeal, Case 333/94 P *Tetra Pak* v. *Commission* [1996] ECR I–5951.

[57] Rule 20(2) provides: 'The tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken and notwithstanding any enactment or rule of law relating to the admissibility of evidence in proceedings before a court.'

Finally, the Tribunal noted that the Director had not alleged that supplying the hospital segment at lower prices than the community segment was, *of itself*, an abuse. Accordingly, the Tribunal set aside paragraph 236(a)(i) of the Decision if and in so far as that subparagraph was intended to identify an element of the abuse not otherwise covered by the rest of paragraph 236(a).

In relation to the abuse of excessive pricing, Napp argued in essence that the price of MST is set in accordance with the PPRS and that that price is reasonable having regard to the objects of the PPRS. According to the Director, the PPRS is irrelevant since it is not concerned with the control of anti-competitive practices.

The Tribunal confirmed that the Director's definition of excessive pricing, set out at paragraph 203 of the Decision seemed 'soundly based', and that it applied to Napp's pricing in the community sector in the present case.[58] Moreover, the PPRS is not directed to the question whether or not the price of an *individual product* sold in a market where there is dominance is above the competitive level, which was the essential question in the present case: the fact that a pharmaceutical company is subject to the PPRS does not, of itself, give that company any kind of exemption from the Chapter II prohibition in general, or from section 18(2)(a) in particular, as regards the prices of *individual products*.

In relation to the Director's alleged change of case, raised at the interlocutory stage the Tribunal concluded that (a) it was satisfied on the basis of the evidence set out in the Decision that Napp committed the abuse of excessive pricing: the *Decision* (and not the Defence) must always be the starting point of the Tribunal's analysis; and (b) in any event the way the Director pleaded the abuse in the defence did not involve a material change to the general thrust of the Decision.[59]

—*The Penalty*

In relation to the penalty imposed by the Director, Napp argued first that it did not commit any infringement intentionally or negligently and hence, pursuant to section 36(3) of the Act, the Director was not entitled to require Napp to pay him a penalty. The Tribunal considered that, following the decision of the Court of Justice in *SPO* v. *Commission*,[60] the Director must be satisfied, as a threshold matter, that the infringement was either intentional or negligent; he

[58] Para 400 of the judgment.

[59] Paras 428–41 of the judgment.

[60] Case C–137/95P *SPO and others* v. *Commission* [1996] ECR I–1611. The Tribunal did not consider that the slightly different structure under sections 36 and 38 of the Act, as compared to Article 15(2) of Regulation 17/62 (which confers power on the European Commission to impose fines) was sufficient to constitute a relevant difference between the provisions concerned for the purposes of section 60 of the Act.

does not, however, for the purposes of crossing that threshold, have to determine specifically which it is.[61]

The Tribunal considered that an infringement is committed 'intentionally' for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition.[62] In that context, it is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Prohibitions.[63] In the absence of any evidence to the contrary, the fact that certain consequences are plainly foreseeable is an element from which the requisite intention may be inferred. An infringement is committed 'negligently' if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition.[64]

In the circumstances, the Tribunal concluded that Napp had committed the abuse of low prices to hospitals intentionally, and of excessive prices 'at the least, negligently'.

In relation to the amount of the penalty, the Tribunal observed first that it did not consider that it was bound by the 'five step' approach set out in the Director's *Guidance as to the Appropriate Amount of the Penalty* (OFT 423) ('the Guidance') both as a matter of construction of the Act and in view of Article 6(1) of the Convention whereby an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, in assessing the amount of any penalty, the Tribunal proposes 'to adopt a "broad brush" approach. Each case will depend on its own circumstances'.[65] In the case at issue, the Tribunal considered that Napp's abuse amounted to a serious infringement of the Act. However, the Tribunal considered that there existed some mitigating factors, namely: that the Director's case on follow-on effect and foreclosure had not been expressed entirely consistently,[66] and that paragraphs 4.15 to 4.17 of Guideline OFT 414 *Assessment of Individual Agreements and Conduct* could be read as suggesting that certain behaviour should not be regarded as predatory where a price cut is incrementally profitable to an undertaking on the basis of a net revenue test.

In relation to excessive pricing, the Tribunal noted, inter alia, that the way the Director characterised the abuse before the Tribunal, linking it more

[61] Para 455 of the judgment.

[62] Case 100/80 *Musique Diffusion Française* v. *Commission* [1983] ECR 1825, at 112; Case T–77/92 *Parker Pen* v. *Commission* [1994] ECR II–549, at 81.

[63] Case T–65/89 *BPB Industries and British Gypsum* v. *Commission* [1993] ECR II–389 at para 165 and Case T–29/92 *SPO and Others* v. *Commission* [1995] ECR II–289 at para 356.

[64] See *United Brands*, paras 298 to 301.

[65] Para 535 of the judgment.

[66] Above n 31.

explicitly to the abuse on hospital discounting, 'muddied the waters' as to the circumstances in which he (the Director) might consider the PPRS to be a defence to a charge of abuse of excessive pricing on pharmaceutical products, and there has been no decided case at Community level upholding an abuse of excessive pricing in circumstances comparable to the present case.

Accordingly, the penalty was reduced to £2.2 million. The Directions were upheld in their entirety.

B. Cases No. 1002/2/1/01(IR), 1003/2/1/01, 1004/2/1/01 *Institute of Independent Insurance Brokers (IIB) and Association of British Travel Agents Limited (ABTA)* v. *The Director*

This case resulted in the first ever full judgment of the Appeal Tribunals. It relates to the withdrawal by the Tribunal of the Director's decision to grant negative clearance to the rules of the General Insurance Standards Council ('GISC' and the 'GISC Rules'). The Tribunal also set aside two further decisions which refused to vary or withdraw the negative clearance decision, submitted pursuant to section 47 of the Act by IIB and ABTA.

The GISC Rules, notified to the Director under section 14 of the Act in June 2000, are intended to establish a system of self-regulation governing the selling, advising or broking of general insurance carried on from a permanent place of business in the United Kingdom. Broadly, general insurance is defined as all types of insurance except life insurance and the market has an estimated value of £27 billion. The members of GISC comprise both insurers and intermediaries. Pursuant to GISC Rule F42, the members of GISC agree not to deal with intermediaries engaged in the selling, advising or broking of general insurance unless the intermediary concerned is a member of GISC or the appointed agent or sub-agent of a member of GISC.

In his decision of 24 January 2001 (the 'GISC Decision'), the Director found that GISC Rule F42 in particular did not infringe the Chapter I prohibition on the bases, inter alia, firstly that those intermediaries who do not wish to join GISC have the alternative of becoming agents or sub-agents of those that do join,[67] and secondly that he did 'not have any indication that Rule F42 will result in a significant number of intermediaries exiting from the market'.[68] The Tribunal described[69] the former as 'the agency point' and the latter as 'the exit test'.

IIB, an association representing a significant number of independent insurance broking firms in the United Kingdom, and ABTA, both objected to their members being obliged to become Members of GISC by virtue of GISC Rule

[67] Para 34 of the GISC Decision.
[68] Para 35 of the GISC Decision.
[69] Para 193 of the judgment.

F42 and accordingly applied to the Director, pursuant to section 47(1) of the Act, to withdraw or vary the GISC Decision. The Director decided, by two decisions addressed to IIB ('the IIB Decision') and to ABTA ('the ABTA Decision'), respectively, not to do so. Pursuant to section 47(6) of the Act, IIB and ABTA appealed these decisions; on the same day IIB also lodged an application for interim relief pursuant to Rule 32.[70]

Although the appeals were formally directed against the IIB and ABTA Decisions respectively, the substance of both appeals concerned the correctness or otherwise of the Director's finding, in the GISC Decision, that the GISC Rules fell outside section 2 of the Act. In the result, the Tribunal considered that the main issue in these appeals was whether the GISC Rules, and in particular GISC Rule F42, 'have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom' within the meaning of section 2(1)(b) of the Act.[71]

In a very detailed judgment.[72] the Tribunal set out the background to the general insurance sector and the creation of GISC[73] and also set out a succinct synopsis of the Community law on restrictive agreements.[74]

The Tribunal found that GISC Rule F42 amounted to 'a restriction of competition' within the meaning of section 2(1)(b) of the Act. In reaching that conclusion the Tribunal considered that, although section 60 of the Act enjoins the Tribunal to construe section 2 consistently with Community law, its primary task as a United Kingdom tribunal is to construe the Act. According to the Tribunal, as a matter of the ordinary meaning of words in the English language, a provision such as GISC Rule F42 whereby a group of suppliers, acting

[70] At the case management conference GISC (intervening) agreed to write to its members, in terms satisfactory to IIB, stating that GISC Rule F42 was not yet in force and that, until its introduction under transitional rules on 1 September 2001, members of GISC were free to deal with non-Members. On that basis, IIB did not pursue its application for interim relief.

[71] Para 166 of the judgment.

[72] The judgment consisted of some seventy five pages, compared to the GISC Decision which ran to just over seven.

[73] Paras 25–86 of the judgment.

[74] Paras 168–178 of the judgment. In very brief outline, the Tribunal considered that the most recent Community law on the subject was as set out in Advocate General Léger's opinion of 10 July 2001 in Case C–309/99 *Wouters* which held that the first step is to determine the 'object' of the agreement in accordance with Case 56/65 *Société Technique Minière* [1966] ECR 235; if the object is clearly restrictive (for instance a price-fixing agreement) the agreements 'by their nature' restrict competition and no further analysis is required. If that is not the case, it is necessary to consider the effects on competition of the agreement, by considering the competition that would occur in the absence of the agreement (*Société Technique Minère*; Cases 180 to 184/98 *Pavlov* [2000] ECR I–6451). In addition, it must be shown that the effect is appreciable (Case 5/69 *Völk* v. *Vervaecke* [1969] ECR 295; Cases T–374/94 etc *European Night Services* v. *Commission* [1998] ECR II–3141). The Tribunal also touched on the troublesome concept of 'rule of reason'; referring to Advocate General Léger in *Wouters*, the Tribunal noted that, if it exists at all, it is confined to a '*purely competitive* balance sheet of the effects of the agreement' and accordingly, any public interest issues are irrelevant and may be considered only in relation to exemption under Art. 81(3) EC.

collectively, agree not to deal with certain persons is a provision which has as its object or effect the prevention, restriction or distortion of competition.[75] The Tribunal held that the freedom to deal with whom one pleases is the essence of the competitive process and a horizontal agreement whereby numerous suppliers collectively agree to deprive themselves of that freedom is to be treated as a restriction of competition both as regards its object and its effect.[76]

The Tribunal rejected the Director's 'agency point' and 'exit test' outright,[77] noting in relation to the latter that the Director had no indication of the likely exit figures, and considered that he had simply failed to address the question of law which was whether the obligation of the vast majority of insurers only to deal with GISC members or the de facto obligation of intermediaries to join was an appreciable restraint of competition.

The Tribunal rejected arguments put by GISC and the Director that the GISC Rules fall outside the ambit of the Chapter I prohibition on the basis that any fetter on competition which they may create is in the public interest in that it creates a system of self regulation. The Tribunal was of the opinion that any such considerations go to the justification of the restriction on competition in question, and not to whether there is a restriction of competition in the first place. This view, the Tribunal believes, is consistent with the structure of the Act: having established that GISC Rule F42 brings the Chapter I prohibition into play, the benefits claimed to flow from that restriction on competition fall to be analysed by reference to the criteria set out in section 9, with a view to a possible individual exemption under section 4.

For completeness, the Tribunal looked at other issues and in particular the position of GISC as a sole regulator and whether the exclusion of alternative regulatory schemes was something which restricts competition appreciably and hence merited investigation: the Tribunal concluded that it did.[78] The Tribunal rejected the Director's argument that regulatory functions do not 'constitute an economic activity' and GISC is not an 'undertaking' and hence fall outside the scope of the Act: even considering that to be true, the Act will apply since 'the restrictions in question derive from a "decision by an association of undertakings" or, alternatively, because the Rules of GISC constitute an agreement between the members of GISC'[79] as confirmed by *Wouters*.

Accordingly, the Tribunal set aside the IIB Decision and the ABTA Decision, and withdrew the GISC Decision. In addition the Tribunal remitted to the Director for further investigation the issues of exit levels from the industry and GISC as sole regulator,[80] pursuant to its powers under paragraph 3(2)(a) of Schedule 8 of the Act.

[75] Para 215 of the judgment.
[76] Paras 179–92 of the judgment.
[77] Paras 193–205 of the judgment.
[78] Paras 219–44 of the judgment.
[79] Para 248 of the judgment.
[80] Paras 202–04 and 223–44 respectively.

It is interesting to note that in this very first judgment, the Tribunal, like the Court of First Instance in its very first judgment[81] overturned the first contested decision sent to it. In addition, the Tribunal referred to the 'somewhat cumbersome nature of the procedure under section 47 of the Act, which does not confer on an interested person, who is not a party to an agreement, the right to appeal direct to this Tribunal against an adverse decision'[82] without having first to request the Director to vary or withdraw his decision. It does indeed seem an unnecessarily circuitous and time consuming method of granting third parties their legitimate rights to challenge decisions. The Tribunal continued '[w]e hope that this issue can be addressed in future . . . from the perspective of a possible modification to the Act'. The forthcoming Enterprise Bill would appear to be an ideal opportunity to do so.

1. Judgment on Costs of 29 January 2002

At the handing down of the judgment, the Tribunal invited argument as to how it should approach the issue of costs under Rule 26. In short, all parties agreed that, pursuant to Rule 26(2) the Tribunal has a wide discretion to award costs. The Director submitted (and GISC concurred) that as a general rule costs should lie where they fall unless either party behaved unreasonably,[83] IIB submitted that costs should follow the event, and ABTA submitted that the Tribunal should not fetter its wide discretion as to future cases but that in this case they should be awarded to the clear 'winner'.[84]

The Tribunal availed itself of the opportunity make some general observations in relation to costs. It noted that Rule 26(2) indeed conferred on it a wide and unfettered discretion and did not refer to, implicitly or otherwise, the rules that apply in, for instance, civil litigation or in employment or planning appeals.[85] The Tribunal referred to the procedure followed by the Value Added Tax Tribunals whereby costs seem to follow the event, but that normally the Commissioners of Customs and Excise will not seek costs if they are successful; to a vehicle licensing appeal where Lord Bingham CJ concluded that there was no rule that costs should follow the event but neither was there a rule that costs should be awarded against the local authority only if it had behaved unreasonably; and to the procedure followed by the Court of First Instance pursuant to Article 87(2) of its rules that 'the successful undertaking is awarded its costs' but that '[i]n practice, however, the bills of costs are taxed severely downwards, by an admittedly opaque process of reasoning, a narrow view being

[81] Case T–42/89 *Yorck van Wartenburg* v. *Parliament* [1990] ECR II–31.
[82] Para 270 of the judgment.
[83] Paras 21–32 of the judgment.
[84] Paras 8–15 and 16–20 of the judgment respectively.
[85] Paras 39–41 of the judgment.

taken as to the level of expenses that may properly be described as "necessarily incurred"'.[86]

In setting out what it considered to be the factors relevant to the exercise of its discretion,[87] the Tribunal made very clear that it did 'not accept the submission, apparently advanced by the Director, that this Tribunal is in some way merely an extension of the system of administrative enforcement of the Chapter I and Chapter II prohibitions set up under the Act. This Tribunal is constituted as an independent and impartial tribunal within the meaning of Article 6 of the [Convention] and proceedings before it are judicial, not administrative'. The Tribunal concluded that there was 'force in the contention that a general or rigid rule to the effect that losing *appellants* should normally be liable for the Director's costs, as well as their own, could tend to deter appeals' and accordingly that 'that policy consideration should . . . militate against the Tribunal awarding the Director his costs against unsuccessful appellants'. In relation to cases where, as here, it is the Director who is unsuccessful, the Tribunal considered that 'it would not be proper, certainly at this early stage, to fetter our discretion under Rule 26(2) by adopting a general principle to the effect that, if the Director loses, he should be liable to pay costs to a private party only if he has been guilty of a manifest error or unreasonable behaviour', and that the Director's concerns that he will be frequently faced with large costs bills are better addressed by the Tribunal's case management and other powers designed to avoid unnecessary escalation of costs.[88]

In relation to GISC, the Tribunal considered that, in this case, it would follow the practice in the Court of First Instance that a party who intervenes in support of the losing party is ordered to pay the additional costs occasioned by the latter by reason of the intervention.

Accordingly, the Tribunal ordered that the Director and GISC bear their own costs and pay 85% and 15% respectively of IIB's and ABTA's costs as agreed between the parties or determined by the Tribunal in the absence of agreement.

C. Case No. 1005/1/1/01 *Aberdeen Journals Limited ('Aberdeen Journals')* v. *The Director*

This was the third case to come before the Appeal Tribunals; it was heard in December 2001 and, at the time of writing, the final judgment remains pending. The case relates to an appeal against a decision of the Director that Aberdeen Journals abused its dominant position on the market for the supply of advertising space in both paid-for and free local newspapers in the Aberdeen area, by engaging in a campaign of predatory pricing against a free newspaper in Aberdeen, the Aberdeen & District Independent, by pricing advertising space

[86] Paras 42–46 of the judgment.
[87] Paras 49–53 of the judgment.
[88] Paras 54–61 of the judgment.

in another free newspaper in Aberdeen, owned by Aberdeen Journals, the Herald & Post, at significantly below 'market value'.

For the purposes of this article, the main point of interest was the interlocutory judgment, issued at the first case management conference on 16 October 2001, which determined where the location of the proceedings was to be, pursuant to Rule 16. Rule 16 provides that the Tribunal must determine whether the proceedings are 'proceedings before a tribunal in England and Wales, in Scotland or in Northern Ireland'. The need for this rule arises as a result of the provisions relating to appeals[89] since the determination will determine which court has jurisdiction in relation to any appeal, and issues relating to disclosure and evidence.

The Tribunal considered that the question whether the proceedings are proceedings before a tribunal in England and Wales, Scotland or Northern Ireland is to be determined according to the criteria set out in Rules 16(1) and (2)[90] and the *separate* question of where any case conference or hearing may take place should be determined having regard to the criteria set out in Rule 16(3).[91] Accordingly, it would be possible for a case conference to be take place in London in relation to proceedings before a tribunal in Scotland, and vice versa. The Tribunal confirmed that 'this Tribunal will operate under the three legal jurisdictions of the United Kingdom as the case may be and will hold its hearings where it thinks fit, not necessarily in London'.

Given that Aberdeen Journals is habitually resident in Scotland and that the conduct concerned primarily took place in Scotland, the Tribunal concluded that the proceedings were proceedings before a tribunal in Scotland. As regards the, separate, question of where the main hearing should take place, the Tribunal noted that 'the centre of gravity of the Competition Act 1998 should not be seen to be in London in all cases' on the basis that 'this Act applies throughout the United Kingdom and . . . we think it is right to, as it were, "bring justice to the people" and to hold the hearings where appropriate in a place where the public concerned is likely to have some interest in the proceedings'. On this basis, the Tribunal determined that the oral hearing should take place in Scotland too.

D. Case No. 1006/2/1/01 *BetterCare Group Limited ('BetterCare')* v. *The Director*

The latest case to come before the Appeal Tribunals was heard in Belfast on 5 February 2002. It relates to an appeal against what BetterCare contends is the rejection of a complaint that it made to the Director under the Chapter II

[89] Section 49 of the Act.

[90] For instance, where the applicant is habitually resident or where any impugned conduct took place.

[91] For instance, the 'just, expeditious and economical conduct of the proceedings'.

prohibition. The complaint made by BetterCare was essentially that North and West Belfast Health and Social Services Trust ('North and West') was abusing its position as a dominant purchaser in the market for nursing home care services in the area for which it is responsible for providing such services, essentially in offering unfair terms in its purchase from BetterCare of nursing and residential care services. BetterCare carries on business in the supply of those services. After correspondence between BetterCare and the Director, the Director rejected BetterCare's complaint essentially on the grounds that North and West was not an undertaking. Hence, the case raises two issues: first of all whether the Director made an appealable decision within the meaning of section 46(3) of the Act and secondly whether North and West is an 'undertaking'.

At the case conference, held in London on 20 December 2001, the Tribunal ruled by means of an interlocutory judgment that the question of whether there is an appealable decision would be dealt with as a preliminary point, before the separate issue of whether North and West is an undertaking, on the basis that the Tribunal's 'entire jurisdiction depends upon that point being resolved'.[92] Moreover, pursuant to Rule 16 the proceedings were held to be before a Tribunal in Northern Ireland, and the hearing was ordered to take place in Belfast.[93]

The Tribunal also ruled on requests to intervene submitted, pursuant to Rule 14, by Registered Homes Confederation of Northern Ireland and Bedfordshire Care Group ('Bedfordshire'). The Tribunal permitted the intervention of both despite the objections raised by the Director in relation to Bedfordshire that it would not usefully add anything to the proceedings. The Tribunal noted that 'that is not the point. The only question is whether that group has a sufficient interest to intervene' and, considering that Bedfordshire represents the interests of private nursing home owners, albeit not in Northern Ireland, it was deemed to have an interest in the question whether a body such as North and West is an 'undertaking'.

Accordingly, it would appear that the jurisdictional hurdle of 'sufficient interest' that interveners must clear does not depend on whether they are likely to add anything useful to the proceedings but only on whether they appear likely to be sufficiently affected by their outcome.

V. Conclusions

It seems clear from the above, that, in their short life, the Appeal Tribunals have clarified a number of issues which will facilitate the smooth running of proceedings which come before them in the future. The Appeal Tribunals clearly consider that they constitute the 'judicial' stage of the competition process with a jurisdiction that extends throughout the whole of the United Kingdom, and

[92] Para 8 of the judgment.
[93] See paras 12–16 of the judgment.

are not merely an extension of the Director's administrative procedure. Moreover, the cases have proved beyond all doubt that the Appeal Tribunals are a full appellate body, as opposed to merely a judicial review body, with autonomous, wide-reaching powers which have already been exercised to good effect.

The tribunals which have sat to date have added this flesh to the bare bones of the Rules by taking the proactive step of seizing every opportunity to produce detailed interlocutory judgments to signal to the competition world the procedures and standards which they expect to be followed by litigants. The various *Napp* judgments have clarified both procedural and substantive questions: procedurally, the minimum requirements for the granting of interim relief; the importance of the case management conference and of meeting deadlines; submission of new evidence by the Director and his scope for relying on facts arising before March 2000; the disclosure of documents by the parties and pursuant to a tribunal's request. Substantively, *Napp* clarified: the troublesome notion of burden and relevant standard of proof; the law relating to predatory and excessive pricing; and the imposition of penalties. The *GISC* judgments have given useful guidance on: the cumbersome section 47 procedure; the award of costs; the meaning of 'restriction' of competition, and have confirmed that although they have certain obligations under section 60 of the Act, the primary task of the Appeal Tribunals is to construe the Act. The *Aberdeen Journals* interlocutory judgment established the procedure for determining the location of proceedings and the final judgment is likely to further clarify the concept of predatory pricing. *BetterCare* will define the meaning of an 'appealable decision'.

Moreover, the cases to date have demonstrated that the Appeal Tribunals can and will act promptly when seized of cases: final judgment in the *GISC* case was handed down barely three months after the initial application was lodged, and the very complicated *Napp* judgment in less than eight months. It seems likely that the Appeal Tribunals will adhere to their self-imposed target of completing straightforward cases in less than six months.

In conclusion, after a necessarily slow start, in their first two years of existence the Appeal Tribunals have set the groundwork for a productive future. The judgments to date have begun to equip the Tribunals with the tools necessary to deal with the eventualities which future appellants may raise, and indeed for any further roles which may be afforded to the Tribunals, whatever they may be. The initial steps have been successfully taken in setting up an effective and efficient appeal system.

12

THE ELUSIVE QUEST FOR UNIFORMITY IN EC EXTERNAL RELATIONS

*Panos Koutrakos**

I. Introduction

Within the context of Community law, the negotiation, conclusion and implementation of international agreements is often fraught with legal problems about competence. There are various reasons for this: the EC Treaty set out a *sui generis* legal order based on the principle of limited powers pursuant to Article 5 EC. On the other hand, international trade relations deal with a wide range of distinct, albeit interdependent, areas not necessarily falling within the Community's competence. This substantive discrepancy entails the simultaneous involvement of both Member States and Community institutions, whose often differing agenda may give rise to disputes of a procedural and practical nature. This process has been seen as a threat to the uniformity of the Community's external relations. The Commission, for instance, has often argued that, in order for the Community to maintain a unified position on the international trade scene, to preserve the coherence of its policies and protect the credibility of its negotiating stance, the exclusive nature of its competence should be interpreted broadly.

The aim of this analysis is to show that, in legal terms, to associate the need for uniformity with the positive determination of the issue of competence is an impossible task, as the Court has consistently approached the issue of the Community's exclusive competence on a pragmatic basis and past practice left scope for deviation for Member States. This explains the sensitivity of both EC and national institutions about and their concomitant focus on procedural arrangements dealing with external trade relations.[1] However, the question of whether the scope of EC external competence should be reassessed for the benefit of the effective conduct of its policies has not been abandoned. The present

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[1] These arrangements have been viewed as 'self-indulgent': Smith, M.E. 'The Quest for Coherence: Institutional Dilemmas of External Action from Maastricht to Amsterdam' in Stone Sweet, A., Sandholtz, W. and Fligstein, N. (eds.) *The Institutionalization of Europe* (Oxford, OUP, 2001) 171, 192.

analysis will argue that it should and that Community institutions and Member States should focus on whether any disputes over the management of external relations may be addressed in an effective manner within a legal framework which would not undermine the efficiency of the conduct of the EC external relations, whilst ensuring the integrity of the existing Community rules.

The analysis is structured as follows. First, the balanced approach of the Court to the exclusive nature of the EC competence and the scope of the Common Commercial Policy will be outlined. Second, the broad construction of the Court's jurisdiction to interpret mixed agreements, along with its emphasis on the duty of cooperation between EC and Member States will be analysed. Third, the reaffirmation of these interpretative trends in the recent Opinion 2/00 will be examined. Fourth, parallel developments in the area of the establishment and management of the internal market will be highlighted, with emphasis on intra-Community trade in goods.

II. Overview of the Construction of EC External Trade Relations

A. Diversity Sanctioned by the Court

To study the Common Commercial Policy of the European Community is tantamount to examining both the strength and pathology of the EC external relations. The fundamental legal feature of the CCP is the exclusive competence it has been held to confer on the European Community. When asked to determine whether the Community was competent to conclude the Local Cost Standard Agreement under the auspices of the OECD, the Court ruled on the nature and context of the CCP as follows:

> The Common Commercial Policy . . . is conceived in . . . Article [133 EC] in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other . . .The provisions of Articles [133–4 EC] . . . show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible. To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.[2]

The introduction of the exclusive nature of the Community competence over the CCP was consistent with the principle of the wide interpretation of Article 133 EC already put forward by the Court in relation to the powers conferred

[2] Opinion 1/75 *OECD Local Cost Standard* [1975] ECR 1355, para B.2.

thereunder on the Community institutions in order 'to allow them thoroughly to control external trade by measures taken both independently and by agreement. . .'.[3] That conclusion had been justified on the basis of 'the proper functioning of the customs union'.[4] In legal terms, the implications of exclusivity arising from Article 133 EC could not have been articulated more clearly by the Court:

> [a]s full responsibility in the matter of commercial policy was transferred to the Community by means of Article 133(1), measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community.[5]

The exclusive competence conferred by Article 133 EC upon the Community made the definition of the scope of CCP of utmost importance. The Court put forward a number of principles whose broad and uncompromising wording appeared to be consistent with that defining the exclusive EC competence. The ruling delivered by the Court, when asked in 1978 whether it fell within the exclusive competence of the Community to conclude an agreement establishing a buffer stock regarding trade in natural rubber, was revealing.[6] The Court addressed first the Council's argument that the subject matter of the agreement did not bring it fully within the scope of Article 133. It was argued, in particular, that the agreement in question had very distinct economic policy overtones which were part of national competencies, not least because rubber constituted a strategic product impinging upon national defence policies. In response to that line of reasoning, the Court accepted the special nature of the Agreement on Natural Rubber, namely a commodity agreement signed within the auspices of the United Nations Conference on Trade and Development (UNCTAD); its purpose was to ensure both reliable supplies for the importing States and stable prices for the exporting States through the setting up of a buffer stock of rubber. However, while it pointed out that that agreement constituted 'a more structured instrument in the form of an organisation of the market on a world scale and in this [was] distinguished from classical commercial agreements',[7] the Court focused its ruling on the need for a 'coherent'[8] and 'worthwhile common commercial policy to be carried out' by the Community.[9] That entailed that Article 133 EC should not be restricted to the traditional aspects of external trade, for, otherwise, the CCP 'would be destined to become nugatory in the

[3] Case 8/73 *Hauptzollamt Bremerhaven* v. *Massey Fergusson GmBH* [1973] ECR 897, para 4.

[4] *Ibid*.

[5] Case 41/76 Criel, *née Donckerwolke et al. v. Procureur de la République au Tribunal de Grande Instance, Lille et al*. [1976] ECR 1921, para 32.

[6] Opinion 1/78 *Natural Rubber agreement* [1979] ECR 2871.

[7] Para 41.

[8] Para 43.

[9] Para 44.

course of time'.[10] Having opined that Article 133 EC could be interpreted broadly enough to cover measures 'aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade',[11] the Court concluded that 'the question of external trade must be governed from a wide point of view', as 'a restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries'.[12]

This approach relies upon a broad construction of the CCP in so far as its aims are not confined to trade liberalization but may also encompass regulation of the world market.[13] The implications of this construction of Article 133 EC cannot be overstated, as it views the CCP as a flexible policy whose dynamic nature would enable it to adjust to the developing international trade environment. This was a theoretical stance not confined to the earlier jurisprudence. In the mid-1990s, it was held that [t]he specific subject matter of commercial policy . . . requires that a Member State should not be able to restrict its scope by freely deciding, in the light of its own foreign policy or security requirements, whether a measure is covered by Article [133]'.[14] In late 1990s, in a preliminary reference on the interpretation of sanctions against Serbia and Montenegro, it was held that 'the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the Common Commercial Policy on the ground that they have foreign and security objectives'.[15]

All in all, the approach of the Court to the CCP appeared to be as forceful in its wording as it was uncompromising in its implications for the Member States. However, the application of this approach reveals a somewhat different reality. Opinion 1/78 is quite revealing in that respect, as regards the definition of the scope of CCP: on the one hand the Court relied upon the *effet utile* of

[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid*., para 45.

[13] The same approach was adopted in relation to the Council's contention that the agreement fell beyond the scope of Art. 133 EC because of its links with general economic policy and the strategic nature of its subject matter. The Court ruled that the scope of the CCP 'cannot be restricted in the light of more general provisions relating to economic policy' and, therefore, 'where the organisation of the Community's links with non-member countries may have repercussions on certain sectors of economic policy . . ., that consideration does not constitute a reason for excluding [the regulation of international trade in commodities] from the field of application of the rules relating to the Common Commercial Policy' (para 49). The Court went on to point out that 'the fact that a product may have political importance by reason of the building up of a security stock is not a reason for excluding that product from the domain of the Common Commercial Policy'.

[14] Case C–70/94 *Fritz Werner Industrie-Ausrustungen GmbH* v. *Federal Republic of Germany* [1995] ECR I–3189, para 10.

[15] Case C–124/95 *The Queen, ex parte Centro-Com Srl* v. *HM Treasury and Bank of England* [1997] ECR I–81, para 26.

the CCP in an international environment which is not confined to trade measures pertaining to traditional aspects of external trade and accepts that, whilst 'it may be thought that at the time where the Treaty was drafted liberalisation of trade was the dominant idea, the Treaty itself does not form a barrier' for a more comprehensive and diverse trade policy; on the other hand, having described the finance mechanism of the Agreement on Natural Rubber in detail and having highlighted its position as an essential feature of the scheme set up by the Agreement, the Court reached a conclusion on the basis of practical considerations, namely that the Member States should be allowed to participate in the negotiation of the Agreement. What was deemed to be the crucial issue was who would be responsible for financing the agreement: if that burden fell upon the Community budget, the conclusion of the Agreement would fall within the exclusive competence stemming from Article 133 EC; if the burden of financing the Agreement fell upon the national budgets, the Member States should participate in the Agreement along with the Community.[16]

This conclusion was criticised, not least for 'putting the cart before the horse',[17] that is, allowing exclusivity to be determined by the financial aspect of the agreement rather than the other way round. What is interesting, for the purposes of this analysis, is that as far as the Natural Rubber Agreement was concerned, the conclusion that it fell without doubt within the scope of the CCP and that it was covered by the exclusive nature of the Community did not, in fact, amount to its negotiation exclusively by the Community.[18] A similarly pragmatic approach was taken in the area of trade measures with foreign policy implications, where national authorities were recognized as enjoying considerable discretion to determine whether their security was at risk.[19]

While the Court's jurisprudence in the 1970s set the foundation for a broad, albeit flexible, construction of the CCP, the scope of the latter remained subject to controversy.[20] It was in Opinion 1/94 that a clearer definition was put forward, when the Court addressed the issue of the Community's competence to conclude the General Agreement on Trade in Services (GATS) and the

[16] Paras 52–60.

[17] Weiler, J. 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in Schermers, H.G. and O'Keeffe, D. (eds.) *Mixed Agreements* (Deventer, Kluwer, 1981) 35, 72, reprinted in Weiler, J. *The Constitution of Europe* (Cambridge, CUP, 1999) 130, 174.

[18] As Cremona pointed out early on, whilst the foundation of the doctrine of exclusivity is the separation of powers between the EC and Member States, 'when applied to international agreements [it] seems in practice to be having the contrary effect of encouraging the joint participation of the Community and the Member States in the negotiation and conclusion of agreements'; see Cremona, M. 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community' (1982) 2 *OJLS* 393, 427.

[19] For this approach in the area of exports of dual-use goods, see Koutrakos, P. *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford, Hart Publishing, 2001), ch. 6.

[20] See the overview provided in Bourgeois, J. 'The Common Commercial Policy—Scope and Nature of the Powers' in Völker, E.L.M. (ed.) *Protectionism and the European Community* (The Hague, Kluwer, 1987) 1.

Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), annexed to the WTO Agreement.[21] The facts of this very well-known ruling[22] cut to their barest essentials are as follows. The Commission argued that the Community was exclusively competent to conclude both agreements on a number of grounds: first, because both the agreements fell within the scope of Article 133 EC; in the alternative, on the basis of the so-called 'principle of implied powers' put forward in Case 22/70 *ERTA*, according to which the Community's competence to conclude an international agreement may flow from its competence set out in the EC Treaty to act internally;[23] in the alternative, pursuant to the principle put forward in *Opinion 1/76*, according to which the Community is exclusively competent to conclude an international agreement if that is 'necessary for the attainment of one of the objectives of the Community';[24] in the alternative, pursuant to Articles 95 and 308 EC.

All the above arguments were rejected by the Court. First, whilst it accepted that trade in services is not automatically excluded from the scope of CCP, it concluded that the conclusion of GATS was. The reason for this was that from the four modes of supply of services covered by GATS, namely involving consumption abroad, commercial presence, the presence of natural persons and cross-frontier supply of services, it was only the last that fell within the scope of Article 133 EC by virtue of its similarity to trade in goods. The same rationale was applied to the conclusion of TRIPS: while a link between international property and trade in goods was acknowledged, only rules prohibiting the release for free circulation of counterfeit goods were deemed to be covered by Article 133 EC. This was because the objective of TRIPS, namely to strengthen and harmonise the protection of intellectual property rights on a world-wide scale, was alien to the development of Community law which had not provided for harmonising measures in that area.

Second, as to the Commission's argument that the competence of the Community had become exclusive pursuant to the *ERTA* principle, the Court stressed the absence of Community harmonising legislation; in relation to the protection of intellectual property rights in particular, the Court pointed out

[21] Opinion 1/94 *WTO Agreement* [1994] ECR I–5267.

[22] See, for instance, Bourgeois, J. 'The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession', (1995) 32 *CMLRev* 763, Arnull, A. 'The Scope of the Common Commercial Policy: A Code on Opinion 1/94' in Emiliou, N. and O'Keeffe, D. (eds.) *The European Union and World Trade Law after the GATT Uruguay Round* (Chichester, Wiley, 1996) 343, Emiliou, N. 'The Death of Exclusive Competence?', (1996) 21 *ELRev* 294, Tridimas, T. and Eeckhout, P. 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism' (1994) 14 *YEL* 143; Hilf, M. 'The ECJ's Opinion 1/94 on the WTO—No Surprise, but Wise? (1995)6 *EJIL* 245, Pescatore, P. 'Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is There an Escape From a Programmed Disaster?' (1999) 36 *CMLRev* 387.

[23] Case 22/70 *Commission* v. *Council (ERTA)* [1971] ECR 263.

[24] Opinion 1/76 *Draft Agreement establishing a European laying up fund for inland waterway vessels* [1977] ECR 741.

that the 'harmonisation achieved within the Community in certain areas covered by TRIPS is only partial and that, in other areas, no harmonisation has been envisaged'.[25]

Third, it was held that the Community did not enjoy exclusive competence to conclude GATS and TRIPS pursuant to the Opinion 1/76 principle because that was not inextricably linked to the attainment of the Community's objectives in the area of freedom of establishment and movement of services and the harmonisation of intellectual property rights in the Community context. Finally, the Court concluded that no exclusive competence could be conferred by Articles 95 and 308 EC in the absence of internal harmonising legislation.

The structure of the Court's ruling in Opinion 1/94 is very interesting. The starting point for the Court's analysis was to reaffirm the need for the CCP to be interpreted widely, express reference being made to the relevant extracts from Opinion 1/75 and Opinion 1/78.[26] It was after this point of principle had been made clear once again that the Court proceeded to rule that trade in services as defined in GATS fell beyond the scope of Article 133 EC.[27] The juxtaposition between the elaboration of general principles with far reaching normative implications and the pragmatic accommodation of various interests on the basis of practical considerations[28] was not a tendency confined to the area of CCP. The same approach was applied in *ERTA* where the Court introduced the so-called 'principle of implied powers'. In that case, the Court reached a twofold conclusion: on the one hand, it was held that the Community's competence to conclude an international agreement is implied from its competence to adopt internal legislation in the area and that the adoption of common rules renders this competence exclusive; on the other hand, the Court pointed out that exclusivity arose when negotiations on the conclusion of the agreement were under way and added that 'at that stage of the negotiations, to have suggested to the third countries concerned that there was now a new distribution of powers within the Community might well have jeopardised the successful outcome of the negotiations'.[29] It was for this reason that the Court concluded that Member States were

[25] Para 103.

[26] See Opinion 1/94, paras 38–9.

[27] This tendency of applying a broad principle in a restrictive manner is not unique to the external relations jurisprudence. A striking example was provided when the Court sought to define the circumstances under which a private applicant would be individually concerned by a decision addressed to a third person so as to challenge it before the Community's judicature. In Case 25/62 *Plaumann* v. *Commission* [1963] ECR 95, the starting point of the Court's analysis was that 'the words and the natural meaning [of Article 230(4) EC] justify the broadest interpretation' (106–7); however, this did not prevent it from interpreting the requirement of individual concern in an extraordinarily strict manner. For an analysis of the relevant issues, see Arnull, A. 'Challenging Community acts – an introduction' in Micklitz, H. and Reich, N. (eds.) *Public Interest Litigation before European Courts* (Nomos, Baden-Baden 1996) 39 and Arnull, A. 'Private Applicants and the Action for Annulment Since *Codorniu*', (2001) 38 *CMLRev* 7.

[28] See Tridimas and Eeckhout, above n 22.

[29] Para 86.

allowed to conclude the Agreement in question, albeit 'in the interest and on behalf of the Community'.[30] This case was quite revealing in so far as the Court, whilst articulating one of the foundations of the Community's external activities, was nonetheless receptive to a compromise which would not undermine the theoretical foundation of exclusivity.

An interesting feature of the construction of Article 133 EC is the fact that the Court is fully aware of the implications that the exercise of the Community's exclusive competence may have for the development of the internal Community policies. In relation to the issue of the protection of intellectual property rights, for instance, what lies at the core of the Court's ruling in Opinion 1/94 is an effort to avoid the introduction of harmonising legislation through the back door. This is why it referred to the different decision-making procedures laid down in Article 133 EC and Articles 94, 95 and 308 EC.[31] This is also why it, then, pointed out that any implications for the protection of intellectual property rights stemming from the adoption of autonomous measures and the conclusion of external agreements pursuant to Article 133 EC were of an ancillary nature and limited scope: viewed from this angle, they could not give rise to exclusive competence in that area.[32]

It is noteworthy that, in mapping out the legal framework of the EC external trade relations, the Court defines carefully the issues it deems of significance by ignoring or redefining questions put before it. This is illustrated in Opinion 1/94, where one of the questions submitted by the Commission was about the existence of the Community's competence to conclude GATS and TRIPS. However, the Court's ruling was focused on the issue of the exclusivity of that competence. Does this entail that the existence of the EC competence to conclude the TRIPS Agreement should not be denied?[33] This seems to be supported by the references to the *ERTA* principle. Referring to the area of transport law and Article 75(1)(a) (now Article 71(1)(a) EC), which is what the *ERTA* case was about, the Court recites the part of the judgment according to which 'the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements

[30] Para 90.

[31] Para 59.

[32] Paras 61–71.

[33] See Appella, A. 'Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO Agreement' (1996) 45 *ICLQ* 440, Timmermans, C. 'Organising Joint Participation of EC and Member States' in Dashwood, A. and Hillion, C. (eds.) *The General Law of E.C. External Relations* (London, Sweet and Maxwell, 2000) 239, 240. For a reading of Opinion 1/94 as affirming the Community's competence to conclude the TRIPS Agreement, see Dutheil de la Rochère, J. 'L'ère des compétences partagées', (1995) *RMCUE* 461, 469 and Eeckhout, P. 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal systems' (1997) 34 *CMLRev* 11, 18. However, see Dashwood, A. 'The Attribution of External Relations Competence' in Dahswood and Hillion, *ibid*., 115, 130.

with the third countries concerned'.[34] Then, the Court went on to point out that

> [h]owever, *even in the field of transport*, the Community's *exclusive* external competence does not automatically flow from its power to lay down rules at internal level. . . . Only in so far as common rules have been established at internal level does the external competence of the Community's become exclusive'.[35]

Be that as it may, the scope of Article 133 EC was defined in terms wide enough to make the CCP flexible but not wide enough to render it, for all intents and purposes, an all-encompassing instrument of external economic policy. Viewed from this angle, the Court endorsed the rejection of the Commission's proposal to the Maastricht Intergovernmental Conference for the transformation of Article 133 EC into an instrument of a 'common external economic policy'.[36]

B. *Diversity* de lege lata

The pragmatism illustrated in the Court's approach to the constitutional foundations of the Community's external policies had already been apparent in the substantive content of secondary legislation adopted within the framework of the CCP. Indeed, whilst Article 133 EC provided that the CCP 'shall be based on uniform principles', the policy adopted pursuant to that provision was anything but uniform, as the areas of import and export rules illustrate only too clearly.[37] In the former, even following the adoption of common provisions, a significant number of imports from third countries were subject to divergent rules. This was not only due to the right of the Member States to deviate from the common rules pursuant to an exceptional proviso which mirrored that of Article 30 EC;[38] it was mainly because a number of products were considered to be too sensitive in terms of the effect their importation would have on domestic production.[39] It was for this reason, for instance, that the volume of imports of Japanese cars to certain Member States was restricted on the basis of Commission authorisation.[40] Global quotas on imports, subsequently divided

[34] Para 76 of Opinion 1/94 referring to para 27 of the *ERTA* judgment.

[35] Para 77 of Opinion 1/94; emphasis added.

[36] For the Maastricht debate on the scope of CCP, see Maresceau, M. 'The Concept "Common Commercial Policy" and the Difficult Road to Maastricht' in Maresceau, M. (ed.) *The European Community's Commercial Policy after 1992: The Legal Dimension* (Dordrecht, Martinus Nihjoff, 1993) 3.

[37] See the overview provided in Völker, E.L.M. *Barriers to External and Internal Community Trade* (The Hague, Kluwer, 1993) ch. 2.

[38] Art. 24 of Reg. 3285/94 on the common rules for imports; OJ 1994 L 349/53.

[39] See Reg. 288/82/EEC on common rules for imports; OJ 1982 L 35/1.

[40] See Eeckhout, P. *The European Internal Market and International Trade: A Legal Analysis* (Oxford, Clarendon Press, 1994) ch. 6, where the cases of imports of textiles and bananas are also considered.

into national quotas, were imposed by the Community and were sanctioned by the Court.[41]

The fact that the Community external trade policy has consistently accommodated, at various degrees, a number of divergent interests is also illustrated in the area of export rules. Trade sanctions against third countries, for instance, were viewed for a long time as a *sui generis* category of measures within the, otherwise, rather strictly construed area of CCP.[42] Imposed pursuant to an Article 133 EC Regulation accompanied by a Decision adopted within the framework of European Political Cooperation, that is beyond the EC legal order, sanction regimes often covered areas which were not recognised to be within the scope of CCP as such, such as transport measures.[43] The same applied to exports of dual-use goods whose foreign policy objective was seen by the Council as sufficient to justify their regulation pursuant to a highly problematic system of rules based both on Article 133 EC and the Common Foreign and Security Policy.[44]

The considerable diversity characterising EC external trade policies has not only characterised secondary legislation. The new construction of Article 133 EC, first illustrated in the Treaty of Amsterdam and then reaffirmed, albeit amended, in the Treaty of Nice leaves no doubt as to the scope of CCP. Whilst the examination of the new Article 133 EC falls beyond the scope of this analysis,[45] suffice it to say that it formalizes the Court's approach to the position of

[41] See Case 218/82 *Commission* v. *Council (rum)* [1983] ECR 4063, Case 288/83 *Commission* v. *Ireland (potatoes from Cyprus)* [1985] ECR 1761.

[42] See Koutrakos, above n 19 at 60–66. The Court interpreted sanction regimes imposed under Art. 133 EC and EPC in Case C–124/95 *Centro-Com* (above n 15) Case C–84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. *Minister for Transport, Energy and Communications, Ireland and Attorney General* [1996] ECR I–3953 and Case C–177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd* v. *Prefetto della Provincia di Brindisi and Ministero dell'Interno*, [1997] ECR I–1111. For an analysis of this case law, see Canor, I. '"Can Two Walk Together, Except They Be Agreed?" The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law Through the Perspective of the European Court of Justice', (1998) 35 *CMLRev* 137 and Koutrakos, *ibid*. at ch. 7.

[43] It was made clear in Opinion 1/94, that international agreements in transport matters were not covered by Article 133 EC, whilst the practice of the Council to suspend transport services pursuant to Art. 133 EC measures imposing an embargo against a third country 'cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis' (para 52).

[44] Council Reg. 3381/94 setting up common rules on exports of dual-use goods; OJ 1994 L 367/1 and Dec. 94/942/CFSP; OJ 1994 L 367/8. Following the Court's judgments in Case C–70/94 *Werner*, above n 14 and Case C–83/94 *Criminal Proceedings against Peter Leifer and Others* [1995] ECR I–3231, this regime was replaced by Council Reg. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L 159/1 and Dec. 2000/402/CFSP repealing Dec. 94/942/CFSP on the joint action concerning the control of exports of dual-use goods. For an analysis of this case-law, see Koutrakos, *ibid*. at ch. 6.

[45] On post-Nice CCP, see Cremona, M. 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' in this Volume, Krenzler, H. and Pitschas, C. 'Progress or Stagnation?: The

trade-related intellectual property rights and services within the CCP framework. An example of extraordinarily convoluted drafting, Article 133 EC introduces unanimity for the adoption of agreements in that area and provides for an exception regarding trade in cultural and audiovisual services, educational services and social and human health services.

It is not only the amended Article 133 EC which indicates that the EC external relations are not as uniform as might have originally been envisaged. The European Union has been given treaty-making capacity pursuant to Article 24 TEU, first introduced in the Treaty of Amsterdam[46] and relied upon once so far.[47] Whilst the issue of legal personality of the EU has not been given a definite answer,[48] the application of Article 24 TEU is bound to become relevant to the conduct of EC external relations too, so much more so in the light of the increasingly variable nature of objectives covered by a single international agreement.[49]

C. *Managing Mixity*

The overview of the classic authorities on the constitutional foundations of the EC external relations indicates that, in practical terms, the implications of exclusive nature of the Community's competence were less severe than originally envisaged.

Furthermore, complete uniformity has never characterised external trade relations, either in legal or practical terms. This has been the case irrespective of the broad construction of the principle of exclusivity and the equally broad definition of the scope of the CCP. The reality of EC external relations as a system permanently based on the interaction between Community and national competence is reflected in the formula of mixity. Its unique nature, complex

Common Commercial Policy After Nice' (2001) 6 *EFA Rev*. 291. On Art. 133 EC as amended by the Amsterdam Treaty, see Blin, O. 'L'article 113 CE Après Amsterdam' (1998) *RMCUE* 420, 447 and Cremona, M. 'External Economic Relations and the Amsterdam Treaty' in O'Keeffe, D. and Twomey, P. (eds.) *Legal Issues of the Amsterdam Treaty* (Oxford, Hart Publishing, 1999) 225.

[46] See Dashwood, A. 'External Relations Provisions of the Amsterdam Treaty' in O'Keeffe and Twomey, above n 45 at 201, 218–221 and Marquardt, S. 'The Conclusion of International Agreements under Article 24 of the Treaty on European Union' in Kronenberger, V. (ed.) *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, T.M.C. Asser Press, 2001) 333.

[47] Council Dec. 2001/352/CFSP concerning the conclusion of the Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission in the FRY, OJ 2000 L 125/1.

[48] See de Zwaan, J. 'The Legal Personality of the European Communities and the European Union' (1999) 30 *Netherlands Yearbook of International Law* 75 and Wessel, R. *The European Union's Foreign and Security Policy—A Legal Institutional Perspective* (The Hague, Kluwer Law International, 1999) ch. 7.

[49] See Editorial Comments, 'The European Union—A New International Actor' (2001) 38 *CMLRev* 825.

application covering different types of relationships between Community and national competence depending on the subject matter of the policy in question[50] and multifarious practical and legal implications[51] should not disguise its common sense function:[52] mixity is a procedural device which allows both the Community and its Member States to participate in the negotiation and conclusion of international agreements in areas where competence is shared.

Therefore, the conclusion safely drawn from the development of the Court's jurisprudence in the last three decades is that mixity is here to stay. This does not only follow from the Court's jurisprudence outlined above but, in essence, is the logical conclusion of the following considerations: on the one hand, the principle of limited powers is the foundation of the Community legal order pursuant to Article 5 EC; on the other hand, there is increasing interaction between different policies at international level and, also, increasing interdependence in the international trade environment. It follows that the dynamic conduct of the EC external relations will not cease to give rise both to Community and national competence as a rule rather than the exception.

In the light of the above, what should become the crucial issue for both Community institutions and Member States is the development of legal mechanisms which would address the practical problems to which mixity may give rise. This is more so in the light of the Court's marked reluctance to delineate competences within the framework of mixed agreements. This was made clear both in Opinion 1/94 and in the more recent *Hermès*.[53] Two mechanisms capable of managing diversity within the context of EC external relations may be identified, both originating in the Court's jurisprudence: the first relates to the implementation of mixed agreements and consists of the broad jurisdiction of the Court; the second relates to the negotiation, conclusion and implementation of mixed agreements and consists of the principle of cooperation between Community institutions and the Member States.

The Court has been reluctant to define in express terms its jurisdiction to interpret mixed agreements.[54] It was in the late 1980s when, called upon to interpret the Association Agreement with Turkey and its Additional Protocol on the free movement of workers, it addressed the issue of the scope of its jurisdiction for the first time.[55] It rejected the argument of the British and German Governments that the free movement of workers provisions of the Agreement

[50] See the typology suggested in Rosas, A. 'The European Union and Mixed Agreements' in Dashwood and Hillion, above n 33 at 239.

[51] For an early analysis, see O'Keeffe and Schermers, above n 17.

[52] See Dashwood, A. 'Why continue to have mixed agreements at all?' in Bourgeois, J., Dewost, J.-L. and Gaiffe, M.-A. (eds.) *La Communauté europeénne et les accords mixtes: Quelles perspectives?* (Bruxelles, Presses Interuniversitaires Européennes, 1997) 93.

[53] Case C–53/96 *Hermès International* v. *FHT Marketing* [1998] ECR I–3603.

[54] The issue of the Court's jurisdiction is dealt with in Koutrakos, P. 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure' (2002) 7 *EFA Rev* 25.

[55] Case 12/86 *Demirel* v *Stadt Schwabisch Gnuend* [1987] ECR 1545.

fell within national competence and stressed the special nature of association agreements concluded under Article 310 EC. It, then, held that that legal basis covered all the fields covered by the EC Treaty, including the free movement of workers, whose inclusion in the Agreement with Turkey 'fell within the powers conferred on the Community by Article [310 EC]'.[56]

Whilst the implications of this judgment were rather unclear,[57] it was after ten years that the Court dealt expressly with the issue of the scope of its jurisdiction to interpret mixed agreements. In *Hermès*,[58] a Dutch court made a reference under Article 234 EC on the interpretation of Article 50(6) of the TRIPS Agreement. This provision refers to the duty of the authorities of the contracting parties to protect the intellectual property rights covered by TRIPS by means of provisional measures and states that a decision imposing such measures may be invoked or otherwise cease to have effect if adopted *inaudita altera parte* and if proceedings on the merits are not initiated within a reasonable time. The Dutch, British and French Governments argued that, in the absence of EC harmonising legislation, the interpretation of that provision of TRIPS fell beyond the Court's jurisdiction to Opinion 1/94. The Court rejected that objection. It pointed out the existence of Regulation 40/94 on the Community trademark[59] at the time of the signature of the Final Act and the WTO Agreement. It also pointed out that, in the presence of that Regulation, national courts were under a legal duty, when called upon to protect rights arising from the Community trademark, to apply national remedies in the light of Article 50 of the TRIPS Agreement. It was in the light of these considerations that it concluded that

> where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.[60]

What emerges from the above summary is that, in *Hermès*, the Court construes the scope of its jurisdiction in broad terms. Indeed, it has been viewed as 'a claim to interpretative jurisdiction' linked to the notion of 'judicial exclusivity'

[56] *Ibid*, para 9 of the judgment.

[57] See Dashwood, A. 'Preliminary Rulings on the Interpretation of Mixed Agreements' in O'Keeffe, D. and Bavasso, A. (eds.) *Judicial Review in EU Law. Liber Amicorum in Honour of Lord Slynn of Hadley. Volume I* (The Hague, Kluwer Law International, 2000) 167, Heliskoski, J. 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements' 69 (2000) *Nordic Journal of International Law*, 395 and the annotations by Neuwahl, N. (1988) 13 *ELRev* 360 and Nolte, G. (1988) 25 *CMLRev* 403.

[58] Case C–53/96, above n 53.

[59] OJ 1994 L 11/1.

[60] Reference was made to Case C–130/95 *Giloy* v. *Hauptzollamt Frankfurt am Main-Ost* [1997] ECR I–4291, paragraph 28, and Case C–28/95 *Leur-Bloem* v. *Inspecteur der Belastingdienst/ Ondernemingen* [1997] ECR I–4161.

which has underpinned the Court's approach to the Community's international relations.[61] The broad construction of the Court's jurisdiction to interpret mixed agreements has been evident in post- *Hermès* jurisprudence, too. In *Parfums Dior*,[62] another reference from a Dutch Court on the interpretation of Article 50 TRIPS, albeit in the area of industrial designs, the Court held that, as the TRIPS Agreement

> was concluded by the Community and the Member States under joint competence . . . [i]t follows that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular, Article 177 [now 234] thereof, the Court has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPS.[63]

In the light of the case law on the construction of Community competence, the broad jurisdiction of the Court is the price the Member States are expected to pay for the prevailing position of mixity. Furthermore, it illustrates two points: on the one hand, the management of mixed agreements in general and their uniform interpretation in particular are of utmost importance, all the more so as various institutions, interests and competences are intrinsically intertwined; on the other hand, it is for the Court to ensure that this system, whose main features it has shaped itself over the years, will be applied in a uniform way throughout the Community.

What is interesting is that, while the Court might appear to construe its jurisdiction to interpret mixed agreements in uncompromisingly broad terms, in fact it has granted national courts scope for autonomous action. This was regarding the issue of direct effect of Article 50 TRIPS. It is recalled that, in the *Portuguese Textiles* case, the Court had concluded that 'having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.[64] In *Parfums Dior*, it relied expressly upon the line of reasoning followed in the *Portuguese Textiles* judgment and concluded that 'the provisions of TRIPS, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law'.[65] However, in relation specifically to the procedural provision of Article 50 TRIPS, a distinction was made: in areas where the Community has already legislated, national courts 'are required by virtue of

[61] Cremona, M. 'EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders' in Weiler, J. (ed.) *The EU, the WTO and the NAFTA—Towards a Common Law of International Trade* (Oxford, OUP, 2000) 5, 31–32.

[62] Joined Cases 300/98 and 392/98 *Parfums Christian Dior SA and Tuk Consultancy BV and Assco Gerüste GmbH, Rob van Dijk, and Wilhelm Layher GmbH & Co. Kg* [2000] ECR I–11307.

[63] *Ibid.*, para 33; see also Case C–89/99 *Schieving-Nijstad vof and Others and Robert Groeneveld* [2001] ECR I–5851.

[64] Case C–149/96 *Portugal* v. *Council* [1999] ECR I–8395, para 47.

[65] Para 44.

Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPS';[66] in the absence of Community legislation, national courts may decide themselves whether individuals may rely upon Article 50 TRIPS directly. Whilst this distinction might appear problematic, especially given the line of reasoning followed in the rest of the judgment, it might be explained in the light of the specific nature of TRIPS in general and its Article 50 in particular. In other words, the Court was asked to adjudicate on a procedural provision of an agreement whose scope falls within the shared competence of the EC and Member States and without clear guidance as to where the dividing line lay. In relation to an agreement whose scope would fall within the concurrent competence of the EC and Member States, for instance a development cooperation agreement, national courts would not be free to decide the issue of direct effect themselves.

Another legal mechanism aiming at the rigorous management of the diversity underlying EC external relations is the principle of cooperation between Community institutions and the Member States. This had already been referred to in Opinion 2/91[67] regarding an ILO Convention which could only be concluded on behalf of the Community through the medium of the Member States.[68] The principle was given prominence in Opinion 1/94.[69] Having deemed the Commission's concerns over the effect of mixity on the Community's unity of action and negotiating power 'quite legitimate',[70] the Court stressed that 'it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into'.[71]

The function of the duty of cooperation is to ensure that the unity of the international representation of the Community would not be undermined by the simultaneous participation of the Member States. Therefore, the original

[66] *Ibid*., para 47.

[67] Opinion 2/91 *Convention No 170 of the ILO concerning safety in the use of chemicals at work* [1993] ECR 1061, paras 36–38.

[68] A similar duty had already been outlined in Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279 where Member States were deemed competent to conclude the North-East Atlantic Fisheries Convention only on a transitional basis. Having referred to Article 10 EC, the Court held that 'Member States participating in the Convention and in other similar agreements are now not only under a duty not to enter into any commitments within the framework of those conventions which could hinder the Community in carrying out the tasks entrusted to it, but also under a duty to proceed by common action within the Fisheries Commission . . . .' (paras 44/45).

[69] Paras 106–110.

[70] Para 107.

[71] Para 108. The Court went on to point out that the duty of cooperation was 'all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, and in view of the cross-retaliation measures established by the Dispute Settlement Understanding' (para 109).

core of the duty of cooperation involved the Community institutions and the Member States.[72] In *Parfums Dior*, the Court added another layer to the construction of this Community principle, as, in that context, it refers to the relationship between national courts and the Court of Justice rather than that between the Community and national institutions.

This emphasis, on the one hand, on the broad construction of the Court's jurisprudence to interpret mixed agreements and, on the other hand, the duty of close cooperation in its widest form has various connotations. In legal terms, it signifies a rigorous approach to the interpretation of agreements whose scope falls only partly within the Community's external competence; this rigor is all the more significant as it counterbalances the pragmatic approach to the definition of the scope of the Community competence and its legal implications. In practical terms, it is of great significance to Community lawyers, as it points out where the emphasis should be in the area of EC external relations: the acceptance of the principle of mixity as the rule rather than the exception should now give way to the elaboration of legal mechanisms which would ensure the effective management of the EC external relations. In theoretical terms, the Court's approach signifies the elevation of the duty of cooperation to the status of a constitutional principle whose application lies at the very core of all aspects of the system of EC external relations. Indeed, the duty of cooperation is bound to become the cornerstone of the development of the EC external relations in the post-*Parfums Dior* jurisprudence.

D. Reaffirmation of the Classic Authorities: Opinion 2/00

All the above trends underpinning the Court's external relations jurisprudence are apparent in the recent Opinion on the Cartagena Protocol on Biosafety requested by the Commission pursuant to Article 300(6) EC.[73] Attached to the Convention on Biological Diversity, the Protocol has the objective

> to contribute to ensuring an adequate level of protection in the field of safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.[74]

It was concluded unanimously under Article 175(1) EC, whereas the Commission's proposal had been based on Articles 133 EC and 174(4) EC.

[72] See Editorial Comments, 'The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competence' (1995) 32 *CMLRev* 385, Heliskoski, J. 'Should There Be a New Article on External Relations?' in Koskenniemi, M. (ed.) *International Law Aspects of the European Union* (The Hague, Kluwer Law International, 1998) 273, Timmermans, above n 33 at 239.

[73] Opinion 2/00 of 6 December 2001, not yet reported.

[74] Art. 1 of the Protocol.

For the purposes of this analysis, the ruling of the Court may be summarized as follows. First, the Court was clearly reluctant to define the dividing line between Community competence and national competence. Whilst the mixed character of the Protocol was not in dispute, the Commission argued for the inclusion of the CCP provision on both legal and practical grounds. As regards the latter, and in relation to the admissibility of the request for an opinion, the Commission pointed out that exercise of shared competence is always a source of difficulty as far as the exercise of voting rights are concerned. It was argued that 'in order that the institutions can establish the positions to be adopted on behalf of the Community in the bodies set up by the Protocol, the Member States must first acknowledge that they no longer have the power, individually or collectively, to act in the relevant matters'.

In its response, the Court implies that the issue of exact delineation between the EC and national competence in relation to a mixed agreement is irrelevant. It held that

> where the existence of the respective environmental protection powers of the Community and the Member States has been established, their extent cannot, as such, have any bearing on the very competence of the Community to conclude the Protocol or, more generally, on the Protocol's substantive or procedural validity in the light of the Treaty'.[75]

While it accepted that 'the extent of the respective powers of the Community and the Member States . . . determines the extent of their respective responsibilities'[76] and acknowledged the requirement for a declaration of competence to be submitted, the Court held that 'that consideration is not in itself such as to justify recourse to the procedure under Article 300(6) EC.[77]

Second, the emphasis attached by the Court to the duty of cooperation between the Community institutions and the Member States was illustrated in its reference to it prior to any consideration of the substance of the matter. In fact, it repeated the Opinion 1/94 *dictum verbatim*.[78] The reference to the duty of cooperation so early on in its ruling and the reaffirmation of the requirement of unity in the international representation of the Community as its *raison d'être* indicates that, according to the Court, the Commission had asked the wrong question. Instead of seeking to define which parts of the Agreement fall within whose competence, it should have asked 'whether the Protocol falls within exclusive Community competence or within shared Community and Member State competence'.[79] It is that question that the Court addresses in

[75] Para 15 of the Opinion.

[76] Para 16.

[77] Para 17. As the Court pointed out, Art. 300(6) EC 'is not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member States competence' (ibid).

[78] Para 18 of Opinion 2/00.

[79] Para 19.

Opinion 2/00. Whilst this is the crucial question, in the light of the Court's reluctance to delineate competence over a mixed agreement, it is worth pointing out that this was not a question asked by the Commission because it had already acknowledged the mixed character of the Protocol.

Third, the Court rejected the Commission's interpretation of the CCP in terms broad enough to cover most aspects of the Protocol. The Commission referred to the objective and content of the Protocol and, then, identified a number of provisions relating to issues that do not affect trade in living modified organisms between the EC and third countries, namely safety conditions to the development, transport, use, transfer and release of any living modified organisms outside international trade and unintentional transboundary movement of living modified organisms. Whilst it accepted that the EC competence over those provisions was shared with that of Member States pursuant to Article 174(4) EC, it sought judicial authority that the Community's exclusive competence extended to most aspects of the Protocol. The Commission's interpretation relied upon the broad interpretation of the scope of the CCP given by the Court in the past.[80]

The Court rejected all the Commission arguments. Whilst accepting that, according to its provisions, the focus of the Protocol is the transboundary movement of living modified organisms and that various of its provisions relate specifically to control those movements, it opines that 'the Protocol is, in the light of its context, its aim and its content, an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade'.[81] The Court was equally dismissive of the Commission's argument that the proliferation of agreements of multiple objectives would undermine the EC external trade policy. It ruled as follows:

> the fact that numerous international trade agreements pursue multiple objectives and the broad interpretation of the concept of common commercial policy under the Court's case-law are not such as to call into question the finding that the Protocol is an instrument falling principally within environmental policy, even if the preventive measures are liable to affect trade relating to [living modified organisms]. The

[80] The Commission argued that Art. 133 EC was applicable when the relevant measure is intended specifically to govern the Community's external trade, even if it served multiple objectives, with reference to Case C–62/88 *Greece* v. *Council (Chernobyl)* ECR I–1527; Case 45/86 *Commission* v. *Council* [1987] ECR 1493; Case C–70/94 *Werner* (above n 14); Case C–83/94 *Leifer* (above n 44); Case C–124/95 *Centro-Com* (above n 15); Opinion 1/78 (above n 6); Opinion 1/94 (above n 22). It also stressed that the proliferation of international agreements imposing restrictions on trade in response to non-commercial concerns and stressed that recourse to legal bases other than Art. 133 EC would deprive the CCP of its substance and prejudice the coherence of the EC policy towards its trade partners and the overall interests of the Community.

[81] Para 37. It was pointed out in para 39 that, whilst the focus of the application of the Protocol is on transboundary movement of living modifiged organisms, that term was left ostensibly wide, hence able to cover movements of no commercial purpose, for instance illegal movements and movements for charitable or scientific purposes or serving the public interest.

> Commission's interpretation, if accepted, would effectively render the specific provisions of the Treaty concerning environmental protection largely nugatory, since, as soon as it was established that the Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy. It should be noted that environmental policy is expressly referred to in Article 3(1)(1) EC, in the same way as the common commercial policy, to which reference is made in Article 3(1)(b) EC.[82]

This extract is worth quoting in full because it is couched in terms similar to those in which the Court had construed the CCP more than two decades ago.[83] In essence, the Court seeks to protect the autonomy of the Community's environmental policy from the expansionist interpretation put forward by the Commission. What is remarkable is not so much the very general terms in which the Commission's arguments were put forward before the Court, but the fact that this request was made following Opinion 1/94. In other words, the rejection of the Commission's overexpansive interpretation of CCP in the latter ruling was expected to have curtailed its claims to exclusivity, especially in the light of the rather clear objective of the Cartagena Protocol. On the other hand, the Commission's request might be explained by the fact that the mixed nature of the Protocol was not in doubt and, as a result, its line of reasoning might have appeared less maximalistic than it actually was. However, this was clearly contrary to the *rationale* of Opinion 1/94 and the well-known reluctance of the Court to delineate areas of competence within the framework of mixed agreements.

Finally, the Court was clearly dismissive of any link between the practical difficulties related to mixed agreements and the extension of the Community's exclusive competence. It pointed out that 'whatever their scale, the practical difficulties associated with the implementation of mixed agreements . . . cannot be accepted as relevant when selecting the legal basis for a Community measure'.[84] Reference was made to Opinion 1/94, where the same point had been made regarding the adoption of GATS and TRIPS. Once more, the structure of Opinion 2/00 is interesting: the Court starts and concludes its ruling by express and implied references to the duty of cooperation in the implementation of mixed agreements.

III. At the Other end of the Spectrum: the Regulation and Management of the Internal Market

What emerges from the above overview of the jurisprudence on EC external relations is the parallel development of two approaches. On the one hand, the

[82] Para 40.
[83] See Opinion 1/78, above n 6 and related developments.
[84] Para 41.

Court has indicated that Community and national competence are intrinsically intertwined. This follows from the principle of limited powers and, inevitably, entails the interaction between Community institutions and Member States in the process of negotiation, conclusion and implementation of international agreements. On the other hand, the management of these agreements in general and their interpretation in particular ought to be organised on the basis of legal mechanisms which, whilst protecting the coherence and credibility of EC policies, would not affect the application of Community law; it is for the Court to ensure that both objectives be served on the basis of its broad jurisdiction and its interpretation of the duty of cooperation.

This balanced approach, flexible in mapping out the foundation of external relations and rigorous in ensuring its efficient management, is not exclusive to the EC external relations. The following section shows how parallel developments have recently underpinned the construction of the internal market.

A. Diversity in the Establishment of the Internal Market

The process of the establishment of the internal market has been underpinned by tensions similar to those in the external relations area; they refer to, amongst others, the issue of linkages between Community and national competence, the extent to which the internal market could tolerate the existence of diverse regulatory regimes, the definition of the scope of the free movement provisions. These tensions are reflected only too clearly in the Court's jurisprudence in the area of free movement of goods. It is by no means a novelty to argue that the establishment of the internal market has involved a variety of different legislative techniques and regulatory models. The model of minimum harmonisation and the New Approach to Harmonisation have shaped the regulation of the internal market.[85] In seeking to define the scope of Article 28 EC, the Court has affirmed that uniformity is not at the core of right to free movement. Having introduced the broad *Dassonville* formula in the mid1970s[86] and then justified its application to indistinctly applicable national measures on the basis of the principle of mutual recognition,[87] the Court sought to define the outer limit of

[85] For an overview of the concept of harmonisation and the different models relied upon see, Dougan, M. 'Minimum Harmonisation and the Internal Market' (2000) 37 *CMLRev* 853; Pelkmans, J. 'The New Approach to Technical Harmonisation and Standardization' (1987) 25 *JCMS* 249; Schreiber, K. 'The New Approach to Technical Harmonisation and Standards' in Hurwitz, L. and Lequesne, C. (eds.) *The State of the European Community: Policies, Institutions and Debates in the Transition Years* (Harlow, Longman, 1991) 97 and Slot, P.-J. 'Harmonisation' (1996) 21 *ELRev* 378.

[86] Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] ECR 837, para 5.

[87] Case 120/98 *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung fuer Branntewein* [1979] ECR 649.

the scope of Article 28 EC in *Keck*;[88] in that judgment, it expressly recognised that national rules related to certain selling arrangements fall, by the very nature, beyond the scope of the EC Treaty prohibition provided that they are indistinctly applicable and that they affect domestic and imported products in the same manner, both in law and in fact.

It is beyond the scope of this analysis to focus on either the debate as to the merits of *Keck*[89] or the manner in which it was applied subsequently by the Court.[90] Suffice it to say that, in *Keck*, the Court sought to express a principle already implied in its past jurisprudence: in the absence of Community harmonising legislation, not all national measures which might impinge on free trade should require justification under Community law. The *Keck* judgment was seen to have deregulatory overtones in so far as it recognised the right of the Member States, in the absence of Community intervention, to make their own socio-economic choices regarding the regulation of their markets. Viewed from this angle, it signals a trend similar to that already underpinning the prevailing model of Community legislation in that area, namely the recourse to flexible legislative techniques which leave considerable scope for regulatory choices to Member States. This development highlights the parallelism between the models of positive and negative harmonisation underpinning the establishment of the internal market. More importantly, it indicates that diversity cannot be excluded from the process of the establishment of the internal market. This is an important conclusion, as the EC Treaty is silent in that respect, hence the rhetorical question of Advocate General Tesauro: '[i]s Article [28] of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?'[91]

In essence, what underlies *Keck* is the realisation that there is a limit, albeit a difficult one to define, to what the establishment of the internal market in the current development of EC law may entail in terms of uniformity of national measures. This rationale underlies the *Tobacco Advertising* judgment, too.[92]

[88] Joined Cases C–267–8/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I–6097, para 16.

[89] See, for instance, Chalmers, D. 'Repackaging the Internal Market – The Ramifications of the *Keck* Judgment' (1994) 19 *ELRev* 385; Gormley, L. 'Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*' (1994) *EBLRev* 63; Reich, N. 'The 'November Revolution' of the European Court of Justice: Keck, Meng and Audi Revisited' (1994) 31 *CMLRev* 459; Weatherill, S. 'Recent case law concerning the free movement of goods: mapping the frontiers of market deregulation' (1999) 36 *CMLRev* 51; Weatherill, S. 'After *Keck*: Some Thoughts on how to Clarify the Clarification' (1996) 33 *CMLRev* 885.

[90] See Barnard, C. 'Fitting the remaining pieces into the goods and persons jigsaw?' (2001) 26 *ELRev* 35.

[91] Case C–292/92 *Huenermund and others* v. *Landesapothekerkammer Baden-Wuerttemberg* [1993] ECR I–6787, para 1 of his Opinion.

[92] Case C–376/98 *Germany* v. *European Parliament and Council (tobacco advertising)* [2000] ECR I–2247. For a comment, see Hervey, T. 'Up in smoke? Community (anti)-tobacco law and

This most important ruling raises the question of the outer limits of Community competence in the regulation of the internal market, just as Opinion 1/94 had focused on the outer limit of Community competence in the regulation of external trade. This was an action brought by Germany against the Parliament and the Council challenging the adoption of Directive 98/43 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsoring of tobacco products.[93] That Directive was adopted pursuant to Articles 47(2) EC (right of establishment), 55 EC (services) and 95 EC (approximation measures which have as their object the establishment and functioning of the internal market). In its preamble, reference was made to the differences between national laws on the advertising and sponsorship of tobacco products and their likelihood to impede the functioning of the internal market by giving rise to barriers to the movement of advertising media and the exercise of freedom to provide services and to distortions of competition.[94] The main tenet of Directive 98/43 was to prohibit all forms of advertising and sponsorship of tobacco products[95] and any free distribution having the purpose or the effect of promoting such products.[96] The only exception provided for was in relation to communications between professionals in the tobacco trade, advertising in sales outlets and in publications printed in third countries which are not principally intended for the EC market.[97] Member States are free to lay down, in accordance with the EC Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary in order to guarantee the health protection of individuals.[98]

The main thrust of Germany's submissions was that the Directive should not have been adopted pursuant to Article 95 EC for two reasons: first, because the total prohibition on tobacco advertising imposed, in practice, under Directive 98/43 negated the freedom to promote trade in advertising media and to provide services in that area and was not necessary either to remove existing distortions of competition or to prevent the emergence of future obstacles to trade; second, because Directive 98/43 was focused on promoting public health rather than the internal market. This was a most important point, as Article 152(4)(c) EC provides that the Council may adopt incentive measures designed to protect and improve public health, albeit excluding any harmonisation of the laws and regulations of the Member States. This last contention was challenged

policy' (2001) 26 ELRev 101, especially 105–09 and 115–25 and Hillion, C. 'Tobacco advertising: if you must, you may' (2001) 60 *CLJ* 486.

[93] OJ 1998 L 213/9.

[94] First recital.

[95] Art. 3(1).

[96] Art. 3(4).

[97] Art. 3(5).

[98] Art. 5.

by the Parliament, Council and the Commission which all intervened in support of the measure.

In terms of the function of Article 95 EC, the Court stressed the following two points. First, the express exclusion of harmonisation designed to protect and improve human health laid down in Article 129(4) EC 'does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health'.[99] This point is supported by reference to Article 129(1), according to which 'a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities'. Second, be that as it may, other EC Treaty provisions 'may not . . . be used as a legal basis in order to circumvent' the express rule of Article 129(4).[100] Having referred to the internal market as defined in Articles 3(1)(c) EC and 14 EC, the Court concludes as follows:

> Those provisions, read together, make it clear that the measures referred to in Article 95 of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article . . . 5 EC that the powers of the Community are limited to those specifically conferred on it.[101]

As if the proper construction of Article 95 EC had not been brought home, the Court went on to explain that 'a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom [would not] be sufficient to justify the choice of Article [95] as a legal basis'.[102] To argue otherwise would be tantamount to preventing the Court from exercising its jurisdiction in accordance with Article 220 EC, namely to ensure that, in the interpretation and application of Community law, the law is observed.[103]

The Court went on to assess whether Directive 98/43 'in fact'[104] pursued the objectives stated therein. It reached the conclusion that that was not the case: the prohibition laid down therein would not facilitate trade in numerous types of advertising of tobacco products, such as in posters and items used in hotels, restaurants and cafes and in advertising spots in cinemas; the free movement of

[99] Para 78 of the judgment.

[100] Para 79 of the judgment.

[101] Para 83 of the judgment.

[102] Para 84 of the judgment.

[103] The conclusion that Art. 95 EC does not confer on the Community a general power to regulate the internal market was further supported by reference to the other legal bases, namely Arts. 47(2) and 55, in relation to which the Court pointed out that they 'are *also* intended to confer on the Community legislature *specific* powers to adopt measures intended to improve the functioning of the internal market' (emphasis added) (para 87).

[104] Para 85, where reference to Case C–350/92 *Spain* v. *Council* [1995] ECR I–1985, paras 25–41 and Case C–233/94 *Germany* v. *Parliament and Council* [1997] ECR I–2405, paras 10–21.

diversification products, whilst in conformity with the Directive, was not ensured; the absolute prohibition imposed on advertising agencies and producers of advertising media was not necessary in order to eliminate appreciable distortions of competition; the prohibition was not apt to eliminate appreciable distortions of competition in the market for tobacco products, as it would limit the means available for economic operators to enter or remain in the market. It was only in relation to advertising for tobacco products in periodicals, magazines and newspapers that the Court accepted that a prohibition could be imposed under Article 95 EC.

Rather unintentionally, one would have thought, the validity of the Court's conclusion was confirmed *ex post facto* by the Commission itself: its first official reaction consisted of a statement issued by Commissioner Byrne, responsible for health and consumer matters, on the very day the judgment was delivered. He stated that 'as soon as I can, . . . I am determined to bring forward new measures to tackle the pernicious effects of tobacco smoking', while he recognized that 'we need to ensure that the legislation concerned and legal bases are compatible'.[105] In any case, the *Tobacco Advertising* judgment is remarkable in many respects. First, in terms of its reasoning on the substance of the dispute, the Court's scrutiny of the contested measure in order to assess whether its purported objective was actually pursued was of a very high intensity. Second, in institutional terms, it reaffirms the role of the Court as the final arbiter of the outer limits of the Community legal order. However, the recipients of this message are the Community institutions rather than the Member States. In other words, the *Tobacco Advertising* judgment redefines the rather tired debate as to whether the Court is activist or not, in so far as its line of reasoning and conclusions may be construed as illustrating 'reverse' activism.[106] Third, in constitutional terms, the Court brings the principle of limited powers back to the centre of the Community legal order.[107] In that respect, the Court challenges the perception that the establishment of the internal market is an all-encompassing process impinging upon all aspects of market regulation. In the *Tobacco Advertisement* judgment the Court reaffirms not only that there is a limit to the internal market, but also that it is prepared to enforce it.

[105] Statement of 5 October 2000.

[106] On the debate between judicial activism and judicial restraint, see Hartley, T. 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *LQR* 95; Arnull, A. 'The European Court of Justice and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 *LQR* 411; Neill, 'The European Court of Justice: a Case Study in Judicial Activism, Minutes of Evidence taken before the House of Lords Sub-Committee on the 1996 Intergovernmental Conference' (Session 1994–95, 18th Report, 218), Tridimas, T. 'The Court of Justice and Judicial Activism' (1996) 21 *ELRev* 199; Rasmussen, H. 'Between self-restraint and activism: a judicial policy for the European Court' (1988) 13 *ELRev* 28.

[107] See Editorial Comments, 'Taking (the limits of) competences seriously' (2000) 37 *CMLRev* 1301, where the judgment is being viewed as a clear example of the Court acting in a constitutional capacity. See also, Hervey, T. 'Community and National Competence in Health after *Tobacco Advertising*' (2001) 38 *CMLRev* 1421, 1441.

B. Rigor in the Management of the Internal Market

The above references to the Court's approach to the establishment of the internal market illustrate a construction of the outer limits of the Community competence in a manner which would not render its scope all-encompassing. However, this balanced approach, based on the principle of limited powers, is accompanied by considerable rigor in the effective enforcement of Community law in areas which fall within the scope of Community competence without doubt.

The interpretation in *Keck* was attacked, not least for attempting to define the outer limit of Article 28 EC on the basis of a formalistic criterion, namely the distinction between product-related rules and rules relating to selling arrangements.[108] This criticism is overstated: neither was the *Keck* formula intended to provide a fully elaborated test capable of assessing with great precision the effect of each and every national measure on intra-Community trade nor has it been applied in that manner in the subsequent jurisprudence.[109] In *De Agostini*,[110] for instance, it was held that a Swedish rule prohibiting misleading advertising and television advertising aimed at children under 12 years of age ought to be assessed in the light of the manner in which imported products were affected in fact in comparison with domestic products; it was pointed out, in particular, that 'it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States'.[111] In *Heimdienst*[112] the Court accepted that an Austrian rule that prevented bakers, butchers and grocers from selling their products on rounds from locality to locality or from door to door in a given administrative district unless they also offered for sale the same goods at a permanent establishment situated in that district or in an adjacent municipality, whilst a selling arrangement, did not 'affect in the same manner the marketing of domestic products and that of products from other Member States'.[113] Furthermore, in *Gourmet*[114] it was held that a Swedish ban on advertising of alcoholic beverages on radio, television, satellite broadcast and in periodicals and other publications with the only

[108] See the detailed analysis of AG Jacobs in his Opinion in Case C–412/93 *Societé d'importation Edouard Leclerc-Siplec* v. *TFI Publicité & M6 Publicité* [1995] ECR I–179. See also Reich, above n 89, Ross, M. '*Keck*—Grasping the Wrong Nettle' in Caiger, A. and Floudas, D.A.M.-A. (eds.) 1996 *Onwards: Lowering the Barriers Further* (Chichester, Wiley, 1996) 45.

[109] See Koutrakos, P. 'On groceries, alcohol and olive oil: more on free movement of goods after *Keck*' (2001) 26 ELRev 391.

[110] Joined Cases C–34–6/95 *Konsummentombudsmannen* v. *De Agostini Forlag AB and TV-Shop in Sverige AB* [1997] ECR I–3843.

[111] Para 42 of the judgment.

[112] Case C–254/98 *Schutzverband gegen unlauteren Wettbewerb* v. *TK-Heimdienst Sass GmbH* [2000] ECR I–151.

[113] *Ibid*.

[114] Case C–405/98 *Konsumerntombudsmannen (KO)* v. *Gourmet International Products AB (GIP)* [2001] ECR I–1795.

exception of advertising in publications aimed mainly at manufacturers and restaurateurs did fall within the scope of Article 28 EC. It was concluded that '[i]t is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions'.[115]

This overview illustrates that, in recognising national regulatory autonomy in the absence of Community harmonising legislation, the Court has not abandoned its flexibility in assessing the effect that this autonomy might have on the establishment of the internal market. To argue that this approach shows signs of timidity towards national competence is to underestimate the overall approach of the Court in the area of free movement of goods.

The area of technical standards and regulations is a case in point. This area comprises measures which fall within the scope of Article 28 EC and is governed by Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations.[116] This measure applies to specifications

> contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures'.[117]

Directive 83/189 imposes two duties on national authorities: first, to communicate draft regulations to the Commission, along with a statement of the reasons justifying their adoption; second, to refrain from adopting the notified rule during a standstill period whose duration varies from three to eighteen months depending on the response its draft may attract.[118] A central feature of the system established under Directive 83/189 is that, in response to a notification, the Member States and the Commission may express reservations as to certain aspects of the notified measures and the Commission may even decide to propose or adopt secondary legislation in that area. The notification and standstill requirements are intended to ensure the interaction between a Member State

[115] Para 20 of the judgment. For the problems that this conclusion raised for the referring court which, then, had to determine whether the Swedish rule was proportionate, see Biondi, A. 'Advertising alcohol and the free movement principle: the Gourmet decision' (2001) 26 *ELRev* 616 and Koutrakos, above n 109 at 399.

[116] OJ 1983 L 109/8. It has subsequently been amended by Dir. 88/182, OJ 1988 L 81/75; Dir. 94/10, OJ 1994 L 100/30; Dir. 98/34, OJ 1998 L 204/37 and Dir. 98/48, OJ 1998 L 217/18. It is Dir. 98/34 which amended considerably the original procedure. For a detailed analysis, see Weatherill, S. 'Compulsory Notification of Draft Technical Regulations: the Contribution of Directive 83/189 to the Management of the Internal Market' (1996) 16 *YEL* 129.

[117] Art. 1(2) of Dir. 98/34. Dir. 98/34 makes the distinction between technical standards and technical specifications, that is non-compulsory and compulsory technical specifications respectively.

[118] *Ibid*., Art. 9 (1).

intending to adopt a technical standard or regulation and the Commission and the other Member States. This is the most important feature of Directive 83/189, that is the establishment of a preventive, non-judicial system with a twofold objective: on the one hand, to examine, albeit in a manner which would not bind the Court, the compatibility of national measures which fall within the scope of Article 28 EC with the prohibition contained therein; on the other hand, to enable the Commission to assess whether the adoption of Community legislation in that area is necessary or desirable.

The effectiveness of this system has been ensured by its rigorous interpretation by the Court. In *CIA Security*[119] it was held that Articles 8 and 9 of Directive 83/189 setting out the notification and standstill requirements respectively were directly effective. Furthermore, and in the light of the preventive system of control established under that Directive, it was held that violation of the notification requirement would lead to unenforceability.[120] More recently, in *Unilever*,[121] the Court held that non-compliance with the standstill period provisions also entailed unenforceability and reaffirmed the direct effect of the relevant provisions. This conclusion raised questions regarding, on the one hand, its consistency with the theoretical underpinnings of the longstanding insistence of the Court that directives should not be relied upon by individuals in horizontal relationships before national courts and, on the other hand, the legal certainty enjoyed by individual traders.[122] It was for these reasons that Advocate General Jacobs had asked the Court to give a negative response to both questions of direct effect and the extension of unenforceability. The Court did not follow his advice and held that, whilst directives were indeed non-horizontally directly effective, reliance upon Directive 83/189 against private parties did not, in fact, amount to horizontal direct effect because of the nature of that measure.[123] As for the remedy of unenforceability, the Court relied upon the line of reasoning already put forward in *CIA Security*, namely the preventive system of control established under Directive 83/189 and the need for its effective application.

The main merit of *Unilever*, following *CIA Security*, becomes more apparent when viewed within its specific context. It arose in relation to a New Approach directive whose scope falls beyond doubt within the purview of Article 28 EC and whose objective is the establishment of a constant channel of communication between Member States and the Commission aimed at the *a priori* decentralized

[119] Case C–194/94 *CIA Security International SA* v. *Signalson SA and Securitel SPRL* [1996] ECR I–2201.

[120] See the analysis in paras 48–50 of the judgment.

[121] Case C–443/98 *Unilever Italia SpA* v. *Central Food SpA* [2000] ECR I–7535.

[122] See the annotation by Dougan, M. (2001) 38 *CMLRev* 1503 and Weatherill, S. 'Breach of directives and breach of contract' (2001) 26 ELRev 177.

[123] The reason for this was that Dir. 83/189 comprised, essentially a number of procedural provisions which neither imposed duties nor granted rights on individuals: see paras 50–1 of the judgment.

control of potential obstacles to the free movement of goods. In other words, the Court's judgment in *Unilever* illustrates a rigorous approach to the application of procedural rules whose effectiveness lies at the very heart of the multilevel and decentralized structure underpinning the internal market. Therefore, the uncompromising approach of the Court counterbalances the flexible approach already illustrated in the definition of the scope of Article 28 EC. Viewed from this angle, the jurisprudence in the area of intra-Community trade is characterized by the parallel development of differentiated approaches to the establishment of the internal market and rigorous application of procedural rules central to the efficient management of the internal market.

IV. Conclusion

There is a parallel development of judicial interpretation emerging from the above analysis: in the area of external trade relations, the exclusive nature of the Community's competence has been couched in distinctly supranational language whilst applied with considerable caution; in the area of intra-Community trade, the EC Treaty prohibition has given rise to wide definitions interpreted with considerable flexibility and attention to the peculiarities of the national restrictions in questions. In both cases, the approach of the Court has been broadly consistent with the general tenor of legislative developments: on the one hand, the lack of uniformity characterizing the implementation of the CCP and the Nice construction of Article 133 EC and, on the other hand, the reliance upon an extensive panoply of legislative processes and harmonising techniques leading to the focus on minimum harmonisation, in general, and the New Approach to Harmonisation in the area of technical standards, in particular. In relation to intra-Community trade in goods, the flexibility of the Court's approach to the establishment of the internal market should be examined against the rigor it has exhibited in interpreting Community rules aimed the management of the internal market. In the area of external trade, it is the rigorous approach to the interpretation of mixed agreements and the construction of a multifaceted duty of cooperation that counterbalances the cautious approach to exclusivity.

In essence, this analysis of the EC external relations touches upon the very core of the Community legal order: in so far as this establishes a legal system founded on the principle of limited powers, developing incrementally whilst seeking to accommodate a variety of interlinked interests, the question of uniformity will be an impossible one. In a system accurately described as a 'constitutional order of States',[124] the focus should be on the elaboration of legal

[124] See Dashwood, A. (ed.) *Reviewing Maastricht—Issues for the 1996 IGC* (London, Sweet and Maxwell, 1996) 1. Also, Dashwood, A. 'States in the European Union' (1998) 23 *ELRev* 201 and 'The limits of European Community Powers' (1996) 21 *ELRev* 113.

mechanisms which would be both flexible enough to accommodate diversity and rigorous enough to ensure the effectiveness of those policies for which the Community is competent to act. This emphasis on the management of external relations might appear less inspiring than the endless discussions about which grand construct should shape European integration. In fact, it is of utmost importance, because it is what the current development of the Community legal order requires.

13

THE 'TBT AGREEMENT': A PERFECT TOOL TO MONITOR REGULATORY ACTIVITIES WORLDWIDE

Rodolphe Muñoz *

I. Introduction

The Technical Barriers to Trade (hereinafter TBT) Agreement was negotiated at the Tokyo Round (1973–1979).[1] However, at that time the GATT rules[2] comprised no legally binding mechanism to force Member States to respect their obligations. Indeed, Member States remained free to defer the dispute settlement system. Consequently, for a very long time the TBT Agreement remained a dead letter.

The signing of the WTO Agreements in Marrakech[3] made compliance with all the agreements part of the WTO legally mandatory.[4] Indeed, the Dispute Settlement Body (hereinafter the DSB)[5] provides for the condemnation of a Member State for non-application of WTO rules. States can no longer block the application of the rules or their condemnation for breach. Thereby, obligations under the TBT Agreement were also made compulsory, and thus, Member States began to increase their activity in this field.

* European Commission, DG Enterprise, Unit F1. The views expressed in this article are strictly personal and should not be attributed to the European Commission. The author would like to thank Fletcher Michelle for her help in revising the wording of this text.

[1] http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto03/wto3_4.htm

[2] Garcia Bercero, I. 'Trade laws, GATT and the management of trade disputes between the US and the EEC' (1985) 5 *YEL* 149–89 and an unofficial description of how a GATT panel works and does not, see Plank, R. 'An unofficial description of how a GATT panel works and does not' (1987) 29 *Swiss Review of International Competition Law*, 81.

[3] Uruguay Round of Multilateral Trade Negotiations (1986–1994)—Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations—Marrakech, 15 April 1994 (WTO) WTO OJ 1994 L 336/253.

[4] WTO dispute settlement. Davey, W. 'Has the WTO dispute settlement system exceeded its authority?' (2001) 4 *JIEL* 79.

[5] Mavroidis, P. 'Remedies in the WTO legal system: between a rock and a hard place' (2000) 11 *EJIL* 763.

The TBT Agreement primarily fulfils three aims:

First, and most importantly, *transparency*: all WTO members are informed of technical regulations and conformity assessment procedures set up by other States. Consequently, each Member State can anticipate technical regulations and conformity assessment procedures from other States.

Secondly, *communication*: this system also includes an instrument to allow reaction and discussion. By informing all WTO members of the various legislation of the non-member countries containing technical regulations before they are adopted, the system allows Member States:

— to prevent the adoption of measures if they are against the interests of their companies;
— to prepare and inform their companies of access conditions for each WTO member;[6]
— to discuss with the notifying State and obtain modification of the draft text before it is adopted.

Lastly, *harmonisation*: the TBT Agreement is a powerful harmonisation instrument. Indeed, the TBT Agreement stipulates that if there is an international standard in the sector of the notification, WTO Member States must notify their draft technical regulations if they decide to ignore this international standard. This encourages States to follow international standards, or at least to inform other States of national regulations that do not conform to them.

The ever-increasing number of notifications demonstrates that the forum offered by the TBT Agreement is used more and more. In 2001, 539 projects were notified under the Agreement. Among those, there are 7 projects of Community acts, 429 projects from third countries—these projects involved the drafting of 20 Community reactions—and 103 projects from EC member States. In 2002, this tendency has been confirmed. Since the beginning of 2002, the Secretariat has been publishing 'extensive' statistics every month.[7]

This paper will first give a broad overview of the content of the TBT Agreement. It will then concentrate on the notification procedure linked to technical regulation and conformity assessment procedures. Thirdly, the case of the European Community will be developed further i.e. the notification of a Community text, the notification of a Member State text and the analysis of notification from a non-member country. Finally, the paper will identify aspects, which need to be revised in order to improve TBT efficiency.

[6] By the 11 April 2002: 144 members.
[7] G/TBT/GEN/N/15: http://docsonline.wto.org/gen_search.asp

II. The Contents of the TBT Agreement

A. Brief Description of the Agreement

The TBT Agreement may be divided into five parts. The first part defines the scope of the Agreement. The second part deals with technical regulations and standards. The third tackles conformity with technical regulations and standards. The fourth lists the obligations related to information and assistance. Finally, the last part covers the bodies created to manage this Agreement and the procedure regarding the settlement of disputes between the parties.

Article 1 contains general provisions connected with the TBT Agreement and deals with links between the TBT Agreement and the Sanitary Phytosanitary Agreement (hereinafter SPS).[8]

First, with regard to terminology, Article 1 specifies that the general terms relating to standardisation, and to the methods of conformity are in line with the definitions adopted in the system adopted by the United Nations and by the international organisations involved in standardisation activity.[9] However, paragraph 2 of Article 1 specifies that terms defined in Annex 1 will have the meaning this annex gives them.[10] In addition, it identifies the products covered by the Agreement: 'all the products, i.e., industrial products and agricultural products'. It therefore appears that its scope is very broad. Nevertheless there are two exceptions, due to the *lex specialis* principle. First, specifications for purchases made by government agencies, or for the needs for production or for consumption by government agencies are not covered by this Agreement but by the Agreement on government procurement.[11] Secondly, the measure does not apply to health and plant health measures, which are governed by the SPS Agreement.[12]

Articles 2 to 4 specifically concern the notification of technical regulations and standards. Article 2 clarifies the obligations connected with the development, adoption and application of technical regulations by central government institutions. Article 2(9) lists the different steps during the notification of a draft text containing technical regulations. Article 3 develops the same obligations but in the field of local public institutions and of non-governmental bodies. Article 4 explains the development, adoption and application of standards. Under this aspect, the TBT Agreement has developed a 'Code of Good Practice' in order to help Members to implement the Agreement.[13]

[8] http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

[9] International Standard Organisation (ISO): http://www.iso.ch/

[10] See III.A.

[11] http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm#plurilateral

[12] See above n 8 and II.B.

[13] Art. 4(1) of the Agreement 'The Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in the Agreement as the "Code of Good Practice")'.

Articles 5 to 9 deal with conformity in technical regulations and standards. Having stated the same obligation of notification of these procedures, Article 6 of the Agreement refers to the recognition of the conformity evaluation by central government institutions. The aim of this article is to compel States to accept the conformity assessment procedures 'even if these differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures'.[14] Article 7 deals with the procedures for conformity assessment applied by local public institutions; and Article 8 deals with the procedures for conformity assessment followed by non-governmental organisms. Article 9 aims to encourage members to work out and adapt international systems of conformity evaluation whenever possible. If WTO Member States belong to such organisations at the time of the drafting of conformity evaluation procedures, they will not take measures contrary to Articles 5 and 6 of this Agreement.

Article 10 is a cornerstone, because it obliges Member States to develop an information contact point in order to assist members in obtaining information on topics linked to the TBT Agreement. Without this system, the Agreement could not produce concrete effects. First of all, there is an obligation to create an enquiry point, which will provide for the relevant documents (or information as to where they can be obtained) on all adopted or proposed standard or conformity assessment procedures. Also, it will inform on matters pertaining to membership and participation of relevant non-governmental bodies within its territory, in international and regional standardising bodies, and conformity assessment systems.

In addition, a single central government authority has to be created to manage notification obligations. The addresses of each such contact point has to be known by all WTO Members.[15] Indeed, as mentioned in the Introduction, the main goal of this Agreement is transparency. The best way to achieve it is to know whom to contact for each question.

Lastly, Articles 11 and 12 deal with the question of technical assistance to developing and least developed countries, and the exceptions which these countries are entitled to benefit from within the scope of application of this Agreement. Indeed, developing countries may have difficulty in implementing obligations with regard to technical regulations, standards and conformity assessment procedures due to financial, economic and technical problems. Consequently, the Agreement envisages technical assistance as well as a special treatment for these countries. The technical assistance includes advice and practical help in order to ensure that the international bodies, considering standards or conformity assessment procedures will also take into account the specificity of developing countries. In addition, these bodies must offer technical

[14] Art. 6(1) of the Agreement.

[15] G/TBT/CS/2/Rev.8: http://docsonline.wto.org/gen_search.asp

assistance in order to enable developing countries to establish institutions governing the relevant organisations within their territories responsible for the fulfilment of obligations of membership or participation in international or regional bodies dealing with conformity assessment procedures and standards.[16]

Exceptions: Article 12(8) specifies that the Committee in charge of the management of this Agreement can 'upon request, specify time-limited exceptions, in whole or in part, from obligations under this Agreement.'

Article 13 designates the Committee on Technical Barriers to Trade, which oversees Member States with their obligations under the Agreement.

Finally, Article 14 establishes the commencement of consultations and the settlement of disputes under the Dispute Settlement Body on any matter affecting the operation of the TBT Agreement.

B. A Similar Agreement, the SPS Agreement, might have the same Scope as, and Compete with, the TBT's

The SPS Agreement has the same goals: transparency, information and free trade. It is, however, more specific. First of all, its scope of application is different from that of the TBT. Indeed, the SPS Agreement specifically concerns measures whose aim is to:

- protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or foodstuffs;
- protect human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests;
- protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- prevent or limit other damage from the entry, establishment or spread of pests. [17]

In addition, one of the key differences is that any technical rules established in the field of this Agreement have to be supported by scientific evidence.[18] This implies the justification of all measures through scientific arguments.

A measure may fall within the scope both of TBT and SPS. In which case, the specific requirements[19] must be satisfied both at TBT and SPS levels. Therefore, it has to be notified under both procedures. In addition, it is advisable to mention, on the notification form those articles which have to be analysed under the TBT Agreement, and those to be scrutinised under the SPS

[16] G/TBT/W/163: http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

[17] http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

[18] Art. 2(2) of the SPS Agreement: 'Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.'

[19] http://www.wto.org/english/tratop_e/sps_e/spshand_e.pdf

Agreement. It is therefore of primary importance to know the difference between the two agreements. If no scientific evidence is required, it may be in the interest of a State only to notify under the TBT Agreement.

III. The Notification Procedure

A. What must be Notified?

1. Definitions

a) *Technical regulations* set out specific characteristics of a product—such as its size, shape, design, functions and performance, or the way it is labelled or packaged before it is marketed. In certain cases, the way a product is produced can affect these characteristics, and it may then prove more appropriate to draft technical regulations and standards in terms of a product's process and production methods rather than its characteristics *per se*.[20] The TBT Agreement allows both approaches in the way it defines technical regulations and standards (Annex 1).

The difference between a standard and a technical regulation lies in the way it is complied with. While conformity with standards is voluntary, technical regulations are mandatory. They have different implications for international trade, and will consequently affect imports in totally different ways. If an imported product does not fulfil the requirements of a technical regulation, it is prohibited to sell it. In the case of standards, non-complying imported products will be allowed on the market, but then their market share may be affected if consumers prefer products that meet local standards such as quality or colour standards for textiles and clothing. This approach means that standards are more trade-friendly.[21] Therefore the obligation is to notify technical regulations.

b) C*onformity assessment procedures* are technical procedures—such as testing, verification, inspection and certification—which confirm that products fulfil the requirements laid down in regulations and standards. Generally, exporters bear the cost, if any, of these procedures. Non-transparent and discriminatory conformity assessment procedures can become effective protectionist tools.[22]

2. The Conditions Connected with the Notification Regarding Technical Regulations and Conformity Assessment Procedures

The Member States of the TBT Agreement have to notify if three conditions are fulfilled:

[20] Annex 1 of the Agreement.
[21] Mattli, W. *et al* 'Governance and international standards setting' (2001) 8 *JEPP* 327.
[22] Annex 1 of the Agreement.

1. The measure has to be a technical regulation or an evaluation of a conformity assessment procedure. These points are developed in Annex 1 of the TBT Agreement. It stipulates that the technical regulation has to be obligatory, hence voluntary agreements are excluded.
2. There is no relevant international standard or the technical draft Regulation is contrary to a relevant international standard.
3. The technical regulation has to have a considerable effect on international Trade

It appears that the notification procedure only starts when all these conditions are fulfilled. Therefore the number of national measures which have to be notified will be limited. The first two conditions establish 'objective' criteria and the third one could be categorised as a 'subjective' condition.

The first condition is relatively easy to apply, although the difference between the acts whose application is voluntary and those which are compulsory can sometimes be difficult to trace within national legal systems. The second also makes it possible to limit the notification of texts repealing relevant international standards. It is clear that a technical regulation repealing a relevant international standard and making it compulsory should not be notified. But the principle of a standard is that it has a non-obligatory character thus enabling companies to choose either to conform to an international standard, or to develop a different system. If a State makes a standard obligatory, companies may be obliged to change radically their production methods. The third condition is probably the hardest to apply, as this clearly involves a 'subjective' judgement. Indeed, the concept of 'considerable effect on international trade' may prove difficult to define; there is no precise definition of such a term. In addition, interpretation may vary with each State, and this does not encourage legal certainty or ensure the complete and uniform application of the TBT Agreement.

B. How does one Notify?

The drafting of a notification involves the publication, by the secretariat of the TBT, of a specific form containing standardised information. This form was codified by a WTO document.[23] It is very important that States complete this form fully, in order to give the maximum information regarding the national draft regulation. It must be borne in mind that this is the only information that States receive from the WTO Secretariat in the three official languages of the WTO.[24] Any additional information must be requested from the notifying Member State. This information may be grouped into three main topics: the

[23] Second triennial review of the operation and implementation of the agreement on technical barriers to trade, Annex 3, 18, G/TBT/9 of 13 November 2000.

[24] French, English and Spanish.

identification of the notifying State, a summary of the draft text contents, and the due dates attached to the draft text.

First, the notification form must include the name of the notifying member, and also mention if a local government has drafted it. The second field concerns the national agency responsible for this notification. The TBT Article under which the text is notified must also be indicated, and this depends on whether the notification concerns technical regulations or conformity assessment procedures.[25] Furthermore Member States must indicate if they wish to notify under the emergency procedure.[26]

The following points are fields 4 to 8, which deal with the content of the measure. It is compulsory to mention which products are concerned, and to give a short description of the notified text. This point is very important as the full text is not distributed, and therefore, it is this summary which will be first used by States to analyse the national measure. One should mention relevant documents linked to the notification. Indeed, draft measures might modify or complement previous national measures.

Finally, States must indicate the proposed date of adoption, the proposed date of entry into force and the final date for comments. This information is fundamental as it informs other Members of the length of time at their disposal to screen the notification. It is also useful for companies to know when a specific legislation may enter into force in order to adapt their products accordingly where necessary.

C. Within Which Time limit?

Technical notifications should first be presented at draft stage, before the adoption of the text, and giving sufficient lead-time to enable comments from other States to be taken into account.[27] This point is quite important in order to have an efficient procedure. Indeed, if the notification is made at a stage of the legislative process where it is no longer possible to make changes to the notified text, then no account can be taken of comments from other States.

There is, however, an exception to this rule. Special procedures are in place in case of an emergency (public health, environmental protection, etc.). This does not preclude the necessity of notifying the text, however, and the conditions of access to these special conditions are set down in the Agreement.[28] Member States must justify the use of the emergency procedure and notify the text as soon as possible. Even in case of emergency, States still have to take into account, whenever possible, any comment sent by other members.

[25] Arts. 2.9.1. and 5.6.2. of the Agreement.

[26] Arts. 2.10.1 and 5.7.1. of the Agreement.

[27] Art. 2.9.4 of the Agreement.

[28] Arts. 2(10) regarding the notification of technical regulations and 5(7) regarding conformity assessment procedure of the Agreement.

D. The Life of the Text after the Notification.

Once a project is notified, States must wait 60 days, in order to give other States time to make comment on the measure. This period may be extended to 90 days whenever this is technically possible. Deadlines are not stated in the text of the TBT Agreement, but derive from the WTO triennial review conclusions.[29]

Usually, the text is notified without any other State intervening. However, if a text attracts the interest of one or more States, the various stages are as follows: States get in touch with the contact point in order to ask for the text, which is then provided in its original language. Whereas developed countries should provide a short resume in one of the three official languages of the WTO,[30] developing States are not subject to such an obligation.[31] If one or more States send comments, the notifying State must respond. Comments are transmitted directly from State to State and do not pass through the secretariat of the TBT Committee, which means that the other Member States are not informed of the written comments made by the other States (except in exceptional cases). On the face of it, this may appear strange, as one of the aims of the procedure is transparency and it would therefore seem desirable that each WTO Member State be informed of all comments made on a notification. The main reason is primarily that bilateral contacts make it possible to manage the requests of States more 'diplomatically'.

Comments sent by a State may be incorporated into the text or discussed with the notifying State in order to explain why they cannot be incorporated into the regulation. Meetings can be held, depending on the response of the notifying state, in order to find a common ground of understanding.

The total procedure takes more than 90 days, due to the delays in obtaining the full text of draft legislation, the necessity of having this translated and analysed, together with the bilateral or multilateral exchange of letters and meetings, which may take several months. Once the date for comments has expired, with no intervening comments modifying the initial date, the text is regarded as adopted. However, according Article 2.12 of the Agreement Member States of the Agreement allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members.[32]

[29] G/TBT/9: http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

[30] See above n 24.

[31] There are no WTO definitions of 'developed' and 'developing' countries. Members announce for themselves whether they are 'developed' or 'developing' countries. However, other members can challenge the decision of a Member to make use of provisions available to developing countries. Regarding the least-developed countries, the WTO uses the official list of the United Nations (for the moments 30 out of the 49 are Member of the WTO).

[32] During the last annual review, it was considered that 'a reasonable interval' equals three months.

IV. Agreement Management at WTO Level

A. Secretariat

Civil servants have been placed in charge of the management of the Agreement. They are responsible for the handling of notifications, the supervision of technical aids received by developed countries in the framework of the Agreement, and must also make sure that every member has a contact point and an effective contact address.

B. Committee

The Committee manages the Agreement. The President is elected at least annually from the Members of the WTO.

1. Formal meeting

This committee generally meets between two and four times a year. The aim of this committee meeting is to convene all the Member States of the WTO together with some observers[33] in order to discuss subjects of both a general and a specific nature connected with the TBT Agreement.

This committee gives every State the opportunity to raise any points related to the Agreement. General enforcement concerning the Agreement obligations are discussed, but most discussions concern specific notifications. States use this opportunity to expose publicly their concerns regarding notifications from other States. They may request further explanation regarding specific notifications, or they may use the Committee as a forum to air publicly comments they have previously sent to other States (despite provisions having been made to send comments directly from State to State), in order to facilitate the handling of economic and legal divergences. However, should a State fail to reply to comments, it may be called upon to respond to the Committee, which would then register this in the committee minutes. However, States publicly accused of default usually respond officially. Finally, this oral presentation of problems related to a given notification allows States to inform and mobilise other States on specific issues.

It is clear that States are interested in particular notifications and such a forum plays an important role as it remedies the lack of transparency as regards the exchange of comments between States.[34]

This Committee also serves as a vehicle to obtain information regarding future notifications. For example, if a State is monitoring the legislative process

[33] ACP, ALADI, EFTA, FAO, IEC, IMF, ISO, ITC, OECD, OIE, OIML, UNCTAD, UN/ECE, UNIDO, WHO, WHO/FAO *Codex Alimentarius* Commission and the World Bank, observers do not have the same rights as members.

[34] See VI. B.

of another State, and is aware of pending legislation concerning a topic of importance for its own economy, it may ask when the notifying State intends to bring this legislation into force. Therefore, these meetings are useful to manage the Agreement and to palliate any shortfalls.[35]

2. *Informal*

Delegations use the opportunity to hold numerous meetings related to more specific issues during Committee meetings. Bilateral or multi-lateral meetings are held to resolve divergence on technical issues. Most disputes concerning the TBT Agreement are solved at these informal meetings, which may also gather States from the same geographical region. Another example of specific meetings are QUAD meetings.[36]

C. The Specific Character of the Three-year Review

The TBT Agreement,[37] is revised every three years, apart from the various negotiation rounds, in order to guarantee optimum management. To date, two three-year reviews[38] have been concluded.

In the last three-year review in November 2000, a number of recommendations and decisions were adopted. This shows the need for reviews. Indeed, the review enables the improvement of the Agreement management independently of WTO rounds. Important measures were adopted in the field of notification during the last triennial review. Firstly, regarding notification format, recommendations were made in order to increase accuracy. It was stressed that all form fields must be completed. If information is not known, the field concerned must bear the mention 'unknown'. Moreover, to increase efficiency, the question of sending notifications in electronic format was discussed.

It was decided that the format had to be explained more clearly, so a concrete example was given, with the explanation of all the data to be provided. Another important point tackled was the time scheduled for comments. Indeed difficulties of acting within the deadlines have already been experienced. A recommendation was made that the usual 60–day period be extended, if possible, to 90 days. [39]

It was also decided that the Secretariat should provide a monthly summary listing all notifications. The list will enable classification according to countries,

[35] G/TBT/1/rev.7, 28 November 2000 decisions and recommendations adopted by the committee since 1 January 1995.

[36] Standing for Quadrilateral: United States, Japan, Canada and the European Community (represented by the Commission).

[37] Art. 15 (4) of the Agreement.

[38] G/TBT/5 and G/TBT/9: http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

[39] G/TBT/9, n 29.

products, objectives, dates and the articles of the TBT Agreement used as a legal basis.

Finally, and most importantly, the decision to have a meeting every two years with all the central authorities in charge of the notification procedure was taken, in order to enhance the quality and efficiency of the system.[40]

V. The Management of the Agreement by the European Community: Three Hypothetical Cases

A. Community Texts

1. Procedure

It is important to define broadly the procedure followed in the case of the notification of a Community text. A Community text containing technical regulations has to be notified under the TBT. The notification of Community projects is handled by a central authority[41] in order to permit a common evaluation between the service in charge of the file and all the other services concerned.

The Community text has to be notified whilst it is still possible to take any comments from the WTO States into account. Once notified, WTO members can ask to receive a full version of the draft text. Therefore a version must be made available to Commission services in order to answer requests from WTO countries. This point is quite important when you consider the legislative procedure of the European Community.[42] Normally, the notification is sent when the Final Commission proposal is available (therein after: COM final), and not before. This could be problematic because after the COM final document is approved, the power of the Commission is limited.[43] However, before such a document is adopted, no official document of the Commission legally exists. This scheme applies to European Parliament and Council Directives and Regulations. A much more difficult situation arises with Commission Regulations and Directives. Indeed, in this case there is no COM final document, therefore the Commission has to make available a version which is not yet a final document adopted by the Commission, but a real draft.

If a Member State of the WTO reacts, the Community has to take its comments into account and react officially. This phase enables the declaration of

[40] The first meeting was held on 24 of June 2001.

[41] The central authority in charge of the notification system is located in Enterprise Directorate-General, Unit F1.

[42] The EC is characterised by an intense debate through its legislative process, therefore a position has to be made available to third countries in order to express the official position of the EC.

[43] One of its ultimate powers would be to withdraw its proposition.

the position of the various parties. During the legislative process the Commission will inform the European Parliament and the Council about comments received. Thus, the TBT procedure directly influences the Community legislative process, as can be seen from the following concrete example.

2. *Example: The* 'Huskit *Case'*[44]

Rules here concerned the registration and use in the Community of aircraft driven by engines at low by-pass ratio, initially certified according to the standards of chapter 2, or initially not certified for their acoustic level, then modified in order to meet the standards of chapter 3,[45] either directly, by technical measures, or indirectly, by measures restricting use.

This regulation aims to establish conditions for the registration and the use of certain types of planes, viz. re-certified (second-hand) planes which have a higher noise level compared to new planes. This measure sets up a progressive system applying only to future re-certification measures, and does not deal with new planes. The aim of this measure is environmental protection, in particular with regard to noise, energy efficiency and pollution. This measure was notified under the TBT.[46] The United States reacted by stressing that this measure was, inter alia, contrary to the Chicago Convention.[47] The Community responded, and discussions were held between the US representative and the Commission, in order to find a suitable solution to this problem. This involved a transfer of the application of certain parts of the Regulation. Changes were made and a guarantee was given.

Further discussions were held in another forum, the ICAO. After several meetings the EC decided to repeal its former legislation and to adapt a less trade restrictive one.[48] However, complaints were lodged at the national level by several companies. The European Court of Justice received requests for preliminary rulings[49] concerning American aviation companies which have been refused accreditation for their planes.

[44] Council Reg. No 925/1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and re-certified as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993); OJ 1999 L 115/1.

[45] Standards established by the ICAO (International Civil Aviation Organisation).

[46] Notification G/TBT/Notif.99.75.

[47] Convention on International Civil Aviation: http://www.icao.int/icao/en/takeoff.htm

[48] Communication from the Commission on progress made in the consultations with the United States on the development of a new generation noise standard for civil subsonic jet aeroplanes and phase out measures for the noisiest categories of civil subsonic jet aeroplanes within chapter 3, COM(1999) 452 final, and Written Question E-1914/99 by Ria Oomen-Ruijten (PPE-DE) to the Commission. Implementation of Regulation on the registration and operation of certain types of subsonic jet aeroplanes. OJ 2000 C 219/45 E.

[49] Joint Cases C–27/00 and C–122/00 *Omega Air*, Judgment of 12 March 2002, nyr.

Therefore one sees here the influence, discussion and transfer of the adoption of the measure and risk before the Court of Justice for defective implementation of the TBT Agreement.

B. Texts from Community Member States

1. Procedure

Each Community Member State also has to notify their technical regulations. This concerns the notification procedure, and the European Community is not involved at this stage. This differs from the SPS, where the Commission is in charge of the notification procedure. This is major difference with the SPS procedure; in the field of the TBT Agreement, Member States of the EC are the ones deciding whether or not to notify.

However, the European Community intervenes if a Community Member State receives a comment from a WTO member. Indeed, Member States cannot react by themselves, but must send a draft reply to the Community, and the Community then draws up and sends the official answer to comments. Even though this may not seem to have an impact on Community harmonisation, it may have indirect implications within the framework of the Community legal framework.

Member States notify their text using two procedures. The example below shows the interaction between TBT notifications to the Community Member States and the Community legislative process. It also shows the existing links between the Community[50] and the TBT notification procedures.

2. The Asbestos *Case*[51]

On 30 October 1996, France notified a draft decree aiming at the prohibition of asbestos for professional and commercial uses, using the emergency procedure of Directive 83/189/EEC.[52] The Commission accepted its urgency, and considered the draft decree in conformity with Community legislation. France then enacted the decree (No 96–1133) on 24 December 1996 and published it in the

[50] Council Dir. No 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1983 L 109/8. This EC procedure is similar to certain aspects to the TBT procedure but it is far more stringent and complex (Lecrenier, S., *JTE*, No 35, January 1997, 1). Therefore Member States of the EC have to comply with two notification procedures—the EC one and the TBT one.

[51] European Communities —Measures affecting asbestos and asbestos-containing products. (DS135/R) and (DS135/R/Add.1). For an overview of the WTO jurisprudence, see Jackson , J. *The jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (Cambridge, CUP, 2000).

[52] Council Dir. No 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1983 L 109/8.

Official Journal on 26 December 1996. Under the terms of Article 2.10.1, France notified the decree (G/TBT/Notif.97.55) by using the emergency procedure.

On 28 May 1998, Canada required the opening of consultations with the European Community concerning the French decree. On 8 October 1998 Canada informed the DSB that consultations to find a solution to the disagreement had failed, and required the constitution of a special group (hereinafter, 'the panel'). Canada claimed that the French decree contravened the SPS Agreement, the TBT Agreement and GATT rules.

Our analysis will be focused on the alleged violation of Article 2 of the TBT Agreement. The question before the panel was whether the total prohibition of a substance, in this case asbestos, came within the scope of the TBT Agreement. In other words, can a decree prohibiting a substance be regarded as a 'technical regulation' within the meaning of the definition given to Annex 1 of the TBT Agreement? The panel found that the part of the decree referring to the general prohibition of marketing of asbestos and of asbestos-containing products did not constitute a 'technical regulation' within the meaning of the definition contained in Annex 1 of the TBT Agreement. Indeed, the decree prohibiting asbestos did not contain methods or methods referring to the production of asbestos or of asbestos containing products. Consequently, the decree did not meet the criteria to be described as a 'technical regulation'.

The panel specified that the part of the French decree on the total prohibition of asbestos did not enter into the scope of the TBT Agreement. However, this was not the case for the part of the decree describing the exceptions to this prohibition, however, the panel considered that Canada had not raised this objection.

In relation to the other GATT rules, the panel declared that a measure which was against GATT rules, in this cases Article III: 4,[53] can be justified by the use of Article XX(b).[54] In other words, the principle of precaution was considered indirectly applicable under GATT .[55]

[53] Art. III:4: 'the products of the territory of any contracting party imported on the territory of any other contracting party will not be subject to a less favourable treatment than the treatment granted to the similar products of national origin with regard to all laws, all regulations or all regulations affecting sale, the setting on sale, the purchase, transport, distribution and the use of these products on the internal market. The provisions of this paragraph will not prohibit the application of different tariffs for the inland based transports exclusively on the economic use of the means of transport and not on the origin of the product.'

[54] Art. XX(b): 'necessary for health and the people's life and animal protection or to the safeguarding of the plants'.

[55] Decision of the WT/DS panel 135/R item 0,193 'the special Group considers consequently that the elements of proof in front of it show more the existence of a health risk in the cases of intervention on products in cement-chrysotile than the reverse. It considers therefore that a decision-maker instructed to take measures on public health would conclude reasonably to the existence of a risk caused by the presence of products in cement-chrysotile because of the risks incurred in the event of intervention on these products.'

The question raised before the Appellate Body regarding the TBT Agreement was whether the Panel erred in its interpretation of the term 'technical regulation' in Annex 1.1 of the *TBT Agreement* in finding, in paragraph 8.72(a) of the Panel Report, that 'the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products' does not constitute a 'technical regulation' (. . .). The Appellate Body started its analysis by concluding that Canada's request for the establishment of a panel was based on Canada's complaint concerning the French decree as a whole.[56] The consequence of this starting point is to reverse the Panel's approach by examining first the prohibition, and then its application to the exceptions contained in the measure.

Next the Appellate Body analysed the term 'technical regulation'. It used the definition laid down in Annex 1.1 of the TBT Agreement.[57] One of the important elements of this is a discussion about the fact that a 'technical regulation' must, of course, be applicable to an identifiable product, or group of products. However, the Appellate Body stressed that this obligation does not imply that a 'technical regulation' must apply to 'given' products which are actually named, identified or specified in the regulation. Indeed, it would be easy for States to formulate their 'technical regulations' in order to take them beyond the scope of the TBT Agreement.

The Appellate Body concluded:

> 75. Viewing the measure as an integrated whole, we see that it lays down 'characteristics' for all products that might contain asbestos, and we see also that it lays down the 'applicable administrative provisions' for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a 'document' which 'lays down product characteristics . . . including the applicable administrative provisions, with which compliance is mandatory.' For these reasons, we conclude that the measure constitutes a 'technical regulation' under the TBT Agreement.
>
> 76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the TBT Agreement 'does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement.

However, the consequence of such a finding is limited by the fact that the Appellate Body did not have an adequate basis properly to examine Canada's claims under the TBT Agreement. Indeed, because the Panel did not analyse

[56] WT/DS135/3. In its request for the establishment of a panel, Canada stated: '(. . .) the Government of Canada requested consultations with the European Communities concerning certain measures taken by France prohibiting asbestos and products containing asbestos, and concerning the general asbestos regulations in force in France. *These measures and regulations include*, but are not limited to, *Decree No. 96–1133* (. . .)'.

[57] See above n 20.

Canada's claims under the TBT Agreement, there are no 'issues of law' or 'legal interpretations' regarding them to be analysed by the parties, and reviewed by us under Article 17.6 of the Dispute Settlement Understanding.[58]

C. Text from Countries Outside of the European Community

Notifications are centralised by Directorate General 'Enterprise'.[59] They are thereafter distributed according to the various subjects in the relevant Directorates General (DGs), to the person responsible for WTO notifications. If necessary, the full legislative text is requested to permit more detailed analysis. Following this analysis, the specialised department reacts and sends comments. An official answer is sent after consultation with other services affected by the scope of the notification. This system makes known the legislation of non-member countries, permits a timely intervention to prevent measures contrary to the interests of Community companies, and allows the latter to be prepared and informed of the conditions of access to non-member country markets.

VI. Limits of the Agreement: Technical Problems

It is not difficult to appreciate that this system, set up by the WTO, has a real influence on international harmonisation, and indeed, some WTO members use this procedure to a great extent. Although this agreement is very technical, it enables the monitoring of States' legislation in many areas. Analysis of all such legislation, may prove very advantageous to each State, since, at best, attempts to influence the legislation process in third countries may be made in order to alter potential industrial restrictions, and, at the very least, home industries can be informed of potential risks following a change of legislation in a specific sector. However, this system is far from perfect, as many technical and administrative burdens block potential developments.

A. The TBT Agreement can be seen more as a Vehicle for Diplomatic Contacts Rather than a Tool to Ensure Compliance with Legal Obligations

First, this agreement is based on diplomatic contacts rather than on legal obligations, even if it is clearly stated, in Article 14 of the Agreement, that in case of infringement of one of the Agreement obligations, Members of the Agreement

[58] 17. 6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

[59] DG Enterprise Unit, F1.

might start a consultation in order to settle a dispute. However, currently, it seems difficult to imagine States launching the DSR mechanism solely because a Member of the Agreement has not notified a draft text to the TBT.

Usually, there is a link between the notification content and the infringement of WTO rules. All the cases[60] in which the TBT Agreement was mentioned during discussions in panels or appellate bodies involved the infringement of other WTO Agreements. Moreover, no Member State has ever instigated legal proceedings on the grounds of non-notification to the TBT Agreement contrary to the EC notification procedure,[61] as the procedural violation of non-notification is not considered as a sufficient legal argument in itself. The consequence of this situation is that the notification obligation appears more as a diplomatic obligation, even if discussions on non-notification have been a real issue in recent TBT committee meetings.

B. There is no Access to Comments made by Other Member States

This is another aspect that emphasises the diplomatic side of the TBT Agreement. Most comments on notifications are sent from State to State. Occasionally, there is an exception; States send them to the WTO and this comment is posted on the public WTO website.[62] The TBT Agreement mentions the exchange of information regarding notifications, but, it does not oblige members to send their comments to the WTO secretariat.

This has a two-fold effect:

— First, Members are unaware of comments made by other members on notifications. Therefore, it is impossible to check if other Members share the same concerns regarding a specific notification.
— Second, developing countries cannot check the contents of all notifications. The compulsory publication of comments would help them, as this would inform them of the legal concerns raised by other countries.

Therefore, the publication of an increasing number of comments might help to develop a better understanding of the TBT Agreement, as this would serve to develop discussions on the understanding of the Agreement. This would help

[60] This list contains the appellate body and panel reports adopted referring to the TBT agreement: WT/DS2 and WT/DS4—United States—Standards for Reformulated and Conventional Gasoline; WT/DS26—European Communities—Measures Affecting Meat and Meat Products (Hormones); WT/DS48—European Communities—Measures Affecting Livestock and Meat (Hormones); WT/DS56—Argentina—Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items and WT/DS135—European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products.

[61] Lecrenier, above n 50.

[62] See G/TBT/W/171, comments on notifications G/TBT/N/EEC/6 and G/TBT/N/EEC/7 from the European Communities made by Argentina.

to clarify many of its obligations and in-depth discussions would show that clarifications may be needed regarding Articles of the Agreement.

C. The Other Major set of Problems Encountered in the TBT Agreement is Procedural Difficulties

First of all, the time given for the formulation of comments is too short. Indeed, once the notification is published on the WTO website, many different steps have to be achieved (translation, text analysis, the drafting of comments, consultations. . .) whereas strict deadlines for comments are maintained. This delay for comments cannot be too extensive, and thus block the legislative process of members; however 60 days is far from sufficient for the analysis of a complex notification. The recommendation to increase this delay to 90 days would solve this problem. For example, the European system of notification (Directive 98/34/EC)[63] implies a *statu quo* of three months which might be prolonged up to 6 months. In addition, the EC notification procedure has worked well for nearly twenty years. The European Court of Justice has increased EU Member States' compliance with the notification obligations.[64]

Another administrative blockage is the difficulty of obtaining texts of some notifications. Indeed, the notification 'fiche' may include a web-link but most often, the national enquiry points must be contacted directly in order to obtain texts. In addition, the Agreement allows the sale of draft text. This financial burden undermines the possibility for developing countries to have access to the notification text.

The Agreement lacks a real follow-up system. It would be useful to have a database encompassing all final texts (adopted texts). First, this would create a real tool to monitor legal texts from all Member States. Secondly, this would enable the scrutiny of the final texts to check if comments have been taken into account in the final drafting.

Finally, it appears that many States do not fulfil their obligations adequately. Indeed, 611 notifications for 144 States does not represent the real quantity of technical regulations and conformity assessment procedures undertaken by all the WTO members. The Agreement insists on regional bodies notifying to the TBT Agreement. However, it appears that, for the most part, this obligation is not complied with.

[63] Art. 9 of Council and Parliament Dir. 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204/37.

[64] Case C–194/94 CIA Security [1996] ECR I–2201.

VII. Conclusion

The criticisms made above in no way undermine the undoubted utility of the notification procedure. Solutions are already being found, through a system revision (three-year Examination) which analyses and attempts to prevent the repetition of problems encountered by Member States. Resulting actions based on this analysis should make the application of the TBT Agreement more effective and therefore extend its influence.

All the opportunities offered by this Agreement must be exploited at Community level. Indeed, Canada,[65] for example, has set up a website in order to maximise the transmission of notifications. European companies must be involved more directly, and with greater transparency, in an agreement the ramifications of which, for the most part, they ignore.

This Agreement is the perfect tool to monitor international trade. Indeed, the possibility of initiating legal proceedings may be important to companies, but it is not always the best solution, as actions instigated before problems starts allow a less protracted and onerous settlement of commercial disputes. The development of such a system may encourage States to take a more global approach to their regulations, and many barriers would be avoided if States were aware of potential difficulties.

Moreover, it will be interesting that this type of ex-ante control system should be set up in the future for the regulations connected with services (GATS Agreement). Similar systems are already being developed under the Council of Europe regarding Information society services.[66]

The main idea behind the development [of this type of system] is that States and companies become more interested in this sort of ex-ante control system. It helps to develop contacts and discussions regarding legislative procedure and permits the avoidance of trade restrictions before they produce their negative effects.

[65] http://www.scc.ca/

[66] Convention on information and legal co-operation concerning 'information society services', Council of Europe—European Treaty Series—No. 180 Moscow, 4. X. 2001. Muñoz, R. 'L'application concrète du principe de transparence dans la sphère des services de la société de l'information' *Revue Europe* (Chronique), Dec. 2001, 3.

14

THE STATUS OF MEMBER STATES NOT PARTICIPATING IN THE EURO

David O'Keeffe and Catherine Turner***

I. Introduction

In May 1998, the Council, meeting in the composition of Heads of State or Government, unanimously decided, in accordance with Article 121(2) EC, that eleven Member States fulfilled the necessary conditions to move towards the third and final stage of economic and monetary union (EMU) with the adoption of the single currency on 1 January 1999.[1] This article will discuss the legal position of the Member States which did not initially progress to the third stage of EMU, in particular, the opt-outs exercised by the United Kingdom (UK) and Denmark. There follows an analysis of the extent of the UK and Danish opt-outs and the derogation which exists in relation to Sweden (and previously Greece) together with the role of these Member States in the new institutional framework as in operation from 1 January 1999. The current political discussions on the Euro taking place within the UK and Denmark will be highlighted. The legal position of the non-participating Member States will be examined as early examples of 'closer co-operation', now enshrined in the Amsterdam Treaty, together with the possibility of using the closer co-operation provisions

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[1] See Council Dec. C/98/124 of 2/3 May 1998 at http://europa.eu.int/euro/html/dossiers/00140/00140–en.pdf. In addition, it is important at this stage to point out that the necessary conditions to be met are referred to as the 'convergence criteria'. These criteria can be found at Art. 121(1) EC and more specifically at Protocol 21 on the convergence criteria as attached to the Amsterdam Treaty (ex Protocol 6, attached to the Maastricht Treaty). The convergence criteria can be summarized as follows: first, the achievement of a high degree of price stability: in order to determine whether or not this has been achieved, the average rate of inflation will be examined; second, avoidance of an excessive government budgetary deficit; third, the observance of the normal fluctuation margins provided by the Exchange Rate Mechanism (ERM) for at least two years without severe tensions and without devaluation against the currency of any other Member State; finally, the durability of convergence achieved by the Member State as reflected in long-term interest rates.

to adopt measures related to EMU by the participating Member States. Finally, the position of the accession countries in respect to EMU and any problems which may arise will also be discussed.

II. The Pre-ins[2]

The legal position and the terminology used to describe those Member States not moving to stage three of EMU can be confusing. According to Article 122(1) EC, those Member States which do not fulfil the convergence criteria as laid down in Article 121(1) EC shall have a derogation. This Article states that such Member States are to be referred to as 'Member States with a derogation'. Greece and Sweden were clearly Member States with a derogation as both failed to meet the convergence criteria. Sweden is still a Member State with a derogation.[3] The question arises as to whether legally speaking, the UK and Denmark can be referred to as Member States with a derogation or should they rather be referred to as Member States with an opt-out. Protocol 26 on certain provisions relating to Denmark as attached to the Amsterdam Treaty (ex Protocol 12, attached to the Maastricht Treaty) provides that the effect of Denmark's exemption is that all Articles of the Treaty and the Statute of the European System of Central Banks (ESCB) referring to a derogation shall apply to Denmark. The practice of academics in this area[4] has been to note that Denmark can be assimilated to a Member State with a derogation, whereas the UK is treated like a Member State with a derogation although it has additional derogations. In this article, we have chosen to make a distinction between the legal position of Greece and Sweden on the one hand and the UK and Denmark on the other, as subtle legal distinctions do exist.

A. The UK

The legal position of the UK in relation to EMU III is governed by Protocol 25 on certain provisions relating to the UK of Great Britain and Northern Ireland as attached to the Amsterdam Treaty (ex Protocol 11, attached to the Maastricht Treaty). According to Article 311 EC, protocols which are annexed to this Treaty by the common accord of the Member States form an integral part of it. The main elements of this Protocol can be broken down into four

[2] The glossary page of the Euro website uses the term 'pre-ins' to refer to the four Member States that did not participate in adopting the Euro and a single monetary policy on 1 January 1999. As such, when referring to all four Member States, this term will be used in this article.

[3] Council Dec., above n 1.

[4] See Usher, J. *The Law of Money and Financial Services in the European Community* 2nd edn (Oxford, OUP, 2000) 202, and Louis, J-V. 'A Legal and Institutional Approach for Building a Monetary Union' (1998) 35 *CMLRev*. 33.

parts. First, the UK is not obliged nor committed to move to EMU III without a separate decision by its Government and Parliament (first recital to the Preamble). Secondly, Article 1 of the Protocol places an obligation on the UK to notify the Council whether it intends to move to the third stage. This notification should take place before the Council makes its assessment under Article 121(2) EC. The UK officially notified the Council in the negative at the end of 1996 and again in October 1997. Thirdly, Article 5 of the Protocol lists those EC Treaty Articles in relation to EMU which do not apply to the UK.[5] Article 7 of the Protocol provides that the voting rights of the UK in relation to those articles are also suspended. Article 6 of the Protocol provides a list of the EC Treaty Articles which continue to apply to the UK.[6] Finally, Article 10 of the Protocol states that the UK may change its notification to join the single currency after the beginning of the third stage. Indeed, this Article grants the UK a *right* to move to the third stage provided *only* that it satisfies the necessary convergence criteria and the Council will decide whether these conditions are met. In addition, the Council is under an obligation to take all necessary decisions to enable the UK to move to the third stage.

The question remains as to what obligations and rights still exist in respect of the UK under EMU. As the opt-out exercised by the UK is in relation to the third stage of EMU, it follows that there are still a number of obligations in relation to the general Treaty provisions on EMU and under its first and second stages. In this respect, one should note Article 2 EC in which the UK is bound to accept the common goal of non-inflationary growth (price stability); Article 98 EC which requires the UK to conduct its economic policy with a view to contributing to the achievement of the objectives of the Community, as defined in Article 2 EC, and Article 99 EC which requires the UK to regard its economic policy as a matter of common concern. In addition, the UK Protocol specifically provides that Article 124 EC will still apply to the UK. This Article states that until the beginning of the third stage, each Member States shall treat its exchange-rate policy as a matter of common interest. According to Article 124(2), this obligation applies from the beginning of the third stage and shall apply by analogy for as long as a Member State has a derogation. As the Protocol provides that Article 124 shall apply to the UK as if it had a derogation, it would seem that it is at least arguable that this should apply to the UK. An investigation of the practice in this area is needed.

In addition to obligations, the UK has a number of rights in relation to EMU, which, in essence, flow from derogations from various Articles of the EC Treaty. The UK still has the right to run excessive budget deficits due to its derogation from Article 104 EC and the right to maintain the 'ways and means'

[5] According to Art. 5 of the Protocol, the following articles do not apply to the UK: Arts. 4(2), 104(1), 104(9), 104(11), 105(1) to (5), 106, 108, 109, 110, 111, 112(1), 112(2)(b), 123(4), and 123(5) EC.

[6] According to Art. 6 of the Protocol, the following articles continue to apply to the UK: Arts. 116(4), 119, 120 EC. Arts. 114(4) and 124 EC shall apply to the UK as if it had a derogation.

facility with the Bank of England, notwithstanding Articles 101 and 116(3) EC.[7] The legal position of the UK can be distinguished from that of Sweden, in that when and not if (as the status of a Member State with a derogation is regarded as temporary) the latter Member State meets the convergence criteria as laid down in Article 121(1) EC and following a decision by the Council to this effect, it will lose its derogation and move to the third stage.[8] This is not the case with the UK. As can be seen from Article 1 of the Protocol, the UK is under no obligation to move to the third stage unless it notifies the Council that this is its intention. This is reinforced by Article 5 of the UK Protocol which provides that Article 123(5) EC does not apply to the UK. Article 123(5) EC provides for the measures to be taken subsequent to a Council decision to abrogate a derogation once the convergence criteria have been met.

B. Denmark

The legal position of Denmark is slightly more complex than that of the UK in that it is governed by two separate legal acts whose relationship to each other initially appeared rather ambiguous. The first such act is Protocol 26 on certain provisions relating to Denmark attached to the Amsterdam Treaty (ex Protocol 12, attached to the Maastricht Treaty).[9] The second is the Conclusions of the European Council meeting in Edinburgh in 1992.[10]

The Danish Protocol states that Denmark is under an obligation to notify the Council of its position concerning participation in the third stage of EMU before the Council makes its assessment under Article 121(1) EC. If Denmark notifies the Council that it will not participate in stage three of EMU, the Protocol states that Denmark shall have an exemption. The effect of the exemption is that all Articles and provisions of this Treaty and the Statute of the ESCB referring to a derogation shall be applicable to Denmark.[11] In essence, it would appear that Denmark *de facto* has a legal position analogous to that of the Member States with a derogation, i.e. Sweden and, formerly, Greece. This appears to be true except in one respect. According to Article 4 of the Protocol, Denmark will not be assessed to see if it meets the convergence criteria as laid down in Article 121(1) EC unless it initiates the procedure. As such, the automatic abrogation of a derogation will only apply if two conditions are met: first, if Denmark requests that the procedure under Article 122(2) EC[12] be

[7] Art. 11 of the UK Protocol.

[8] Art. 122(2) EC.

[9] Again, Art. 311 EC on the legal force of protocols attached to the Treaty.

[10] Denmark and the Treaty of the European Union, Edinburgh European Council, 11 and 12 December 1992, Conclusions of the Presidency, OJ 1992 C348/1.

[11] Art. 2 of the Protocol.

[12] Art. 122(2) EC provides that, 'At least once every two years, or at the request of a Member State with a derogation, the Commission and the ECB shall report to the Council in accordance with the procedure laid down in Art. 121(1).'

initiated and second, if Denmark actually meets the convergence criteria. For Greece and Sweden, on the other hand, Article 122(2) EC applied automatically. If Member States with a derogation satisfy the criteria they move to EMU III, as occurred in the case of Greece.

Part B of the Conclusions of the European Council meeting in Edinburgh, entitled 'Denmark and the Treaty on European Union', is of interest, in particular, Annex 1 of Part B which contains a 'Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union'. Section B of the Decision notes that Denmark has given notification that it will not participate in the third stage. The legal consequences of this notification are also spelled out in this section in that Denmark will not participate in the single currency and will not be bound by the rules concerning economic policy which apply only to the Member States participating in EMU III. In addition, Denmark will retain its existing powers in the field of monetary policy according to its national laws and regulations, including powers of the National Bank of Denmark in the field of monetary policy. It is important to note that these provisions are also exempted by the Danish Protocol. This apparent duplication reinforces the idea that the purpose of the Edinburgh Decision was to give added assurance to the Danish people that Denmark would not take part in EMU III.

There has been considerable speculation as to the legal nature of the Danish decision.[13] The decision is unusual in three respects. First, the decision was taken by the Heads of State or Government, *meeting within the European Council*. This is a relatively rare formulation for certain high-level political decisions which are taken by the Heads of State or Government meeting without the President of the Commission. Thus, the decision was not an ordinary act of the European Council as the President of the Commission did not participate in the adoption of the decision, as is required under Article 4 EC. Second, it was clearly indicated in the decision that the Member States intended to be legally bound by it. Third, the text of the decision was published in the 'C' series of the Official Journal.

According to Curtin and Van Ooik, this decision is *sui generis* and is not binding under Community law.[14] Howarth, however, notes that this decision is

[13] For a more detailed discussion of this point see, in particular, Curtin, D. and Van Ooik, R. 'Denmark and the Edinburgh Summit: Maastricht without tears: A Legal Analysis' in O'Keeffe, D. and Twomey, P. (eds) *Legal Issues of the Maastricht Treaty* (London, Wiley, 1994), 349, 356–58, and Howarth, D. 'The Compromise on Denmark and the Treaty on European Union: A legal and Political Analysis' (1994) 31 *CMLRev.* 765.

[14] Curtin and Van Ooik, above n 13 at 355. In this respect note the conclusion of Curtin and Van Ooik that the Danish decision was not part of the Community legal order as there were no organic or normative links between the decision and the Community legal order and that all terms of the decision were not justifiable by the ECJ. Howarth, above n 13, disagrees with this last point in that he believes that Section B of the decision would be justifiable before the ECJ as it concerns interpretations of the Rome Treaty.

'the principal—and the only unquestionably legally binding part—of the Agreement'.[15] Howarth regards the decision as, 'a binding promise achieved in the form of a pseudo-international law'.[16] This view is more strongly expressed by Curtin and Van Ooik[17] who state that the decision is binding as a matter of public international law according to Article 11 of the Vienna Convention on the Law of the Treaties.[18]

The next issue is the relationship between the Protocol and this Decision. Curtin and Van Ooik state that it is possible to conclude that this Decision is the notification by Denmark of its intention to opt-out of EMU III, thus constituting notification as required by Protocol 26.[19] This notification was simply activated early, coming into force at the same time as the Maastricht Treaty. Howarth reaches the same conclusion by stating that Section B of the Decision transforms the optional Danish opt-out on EMU III provided for in the Maastricht Treaty into an automatic opt-out upon Denmark's ratification of the Treaty.[20] The views of Curtin, Van Ooik and Howarth seem to be shared by the Commission. In a speech made by Yves-Thibault de Silguy, European Commissioner for the Euro, it was stated that,

> Le gouvernement danois a annoncé en 1992, *à l'occasion du Conseil européen d'Edinbourg, son intention d'exercer* [le droit de ne pas participer à l'Union économique et monétaire].[21]

However, Denmark did join ERM II on 1 January 1999.[22]

On 28 September 2000, the Danish Government held a referendum on the adoption of the Euro, in which 53 per cent of the 80 per cent turn out voted against the Euro. There has been criticism of the Danish Government's handling of the 'yes' campaign. Its concentration on economic issues was argued to be to the detriment of the real issues with which the people were concerned, i.e. that further integration would lead to greater political union and the loss of national identity. Apparently, the current Government policy in Denmark is to exclude

[15] Howarth, above n 13.

[16] *Ibid*.

[17] Curtin and Van Ooik, above n 13.

[18] Art. 11 provides that '[t]he consent of a State to be bound by a treaty may be expressed by signature . . . acceptance, approval . . . or by any other means if so agreed.' As such, the fact that the decision did not expressly state that in order for the Member States to be bound ratification was required, then signature was enough.

[19] Curtin and Van Ooik, above n 13.

[20] Above n 13.

[21] 'Le Danemark et l'euro – Copenhague, jeudi 19 novembre 1998', http://europa.eu.int/euro/html/section5.html?section=159&lang=5. [Emphasis added]. This point has also been confirmed by the fact that Denmark made no separate notification to the Council under the Protocol after this date.

[22] ERM II is the system which governs the relationship between the currencies of the pre-ins with the Euro. It was established by a European Council Resolution of 16 June 1997. The UK and Sweden are not members of ERM II.

the possibility of another Euro referendum for at least 4 years, for fear of another negative result.

C. Greece

The case of Greece can be distinguished from that of the UK and Denmark. Greece clearly fell into the category of a Member State with a derogation according to Article 122(1) EC. Unlike the UK and Denmark, Greece did not benefit from an opt-out clause and, indeed, did not seek to do so. Greece was willing to move to EMU III, but according to the Council decision of May 1998, did not meet a number of the convergence criteria as laid down in Article 121(1) EC. However, the situation of Greece subsequently improved. On 9 March 2000, Greece submitted a request for the preparation of the reports provided for in Article 122(2) EC.[23] On 3 May 2000, the Commission adopted a proposal for a Council Decision in accordance with Article 122(2) EC proposing that Greece fulfilled the necessary conditions for adoption of the single currency and that the derogation of Greece should be abrogated from 1 January 2001. The Council adopted a decision to this effect on 19 June 2000.[24] As a result, Greece joined the single currency as from 1 January 2001.

D. Sweden

Sweden also clearly falls into the category of a Member State with a derogation according to Article 122(1) EC. According to the Council Decision of May 1998, Sweden likewise did not meet the convergence criteria as laid down in Article 121(1) EC. The reasoning of the Council was based on Sweden's absence from the ERM in which it had not participated. According to the Council, in the two years under review, as required by the Treaty, the fluctuation of the Swedish Krona against the ERM currencies was excessive, reflecting among others the absence of an exchange rate target. Sweden had met all the other convergence criteria.

The example of Sweden can lead one to some interesting reflections. It would appear that in order to meet the convergence criteria, a Member State must be a member of the ERM, or rather the ERM II.[25] As membership of the ERM is voluntary, a Member State can deliberately not meet the convergence criteria, which means that the move to EMU III could be regarded as voluntary.[26] This

[23] Above n 12.

[24] OJ 2000 L167/19.

[25] Above n 22.

[26] This point is made by Usher, J. 'Legal Background of the Euro', in Beaumont, P. and Walker, N. (eds.) *Legal framework of the Single European Currency* (Oxford, Hart, 1999), 15. For a criticism of the way in which ERM II functions in that it is outside the framework of the EC Treaty, see Usher above n 4.

would appear to be contrary to the belief, at least in principle, that the legal position of a Member State with a derogation is transitional. It is interesting to note that the UK has never officially taken account of the requirement to join the ERM II, and, indeed, it may be politically unacceptable for it to do so given its exit from the ERM in 1992. If the UK were to decide, following a referendum, to join the monetary union, it might nevertheless join the ERM again for a shorter period than two years with the approval of a political decision at European Council or Heads of State or Government level. As the example of other countries shows, the two-year time limit has not been fully met by other Member States, for example Italy and Finland.

As regards the negative evaluation concerning fluctuation in the value of the Swedish currency, it is interesting to note that fluctuations in currency value was not raised in the case of Ireland, despite the fact that Ireland had revalued its currency on 16 March 1998 against the bilateral central rates of the Irish Pound in relation to all other ERM currencies. Article 121(1) third indent, requires 'the observance of the normal fluctuation margins provided for by the exchange-rate mechanism ... for at least two years, without devaluing against the currency of any other Member States'. The decision in respect of Ireland would seem to suggest that Article 121(1), third indent, was being interpreted as being aimed at devaluations against the currencies of other Member States rather than at fluctuations or revaluations. Sideek comments on the flexibility and imprecision inbred in Article 121(1), third indent.[27] Considering that the aim of this particular criterion is to ensure convergence through exchange rate stability, the interpretation given to it by the Council in the case of Ireland is surprising.[28]

Another issue in relation to Sweden concerns the position of its national central bank. When the Council took its decision on whether the Member States had met the convergence criteria, Sweden had not ensured the independence of its national central bank in accordance with Articles 108 and 109 EC. These Articles required that the national central banks of all the Member States should be independent at the latest at the date of the establishment of the ESCB. It is curious that the Council still took a decision as to whether Sweden met the convergence criteria when it had not fulfilled its obligations under stage two of EMU. One unresolved issue (more theoretical than practical, given the political reality) is whether the Commission could bring an action against Sweden under Article 226 EC for failure to ensure the independence of its national central bank in accordance with Articles 108 and 109 EC. [29]

[27] Sideek, M. 'A critical interpretation of the EMU convergence rules' in *Legal Issues of European Integration* (London, Kluwer Law International, 1996–1997).

[28] See Editorial Comments 'The birth of the Euro' (1998) 35 *CMLRev.* 584, 590–91.

[29] *Ibid*. at 591, where the question is raised as to whether the Commission could in theory have brought an action for failure to act under Art. 226 EC together with Art. 10 EC on the failure of Sweden to secure the independence of its national central bank.

E. Horizontal Issues

Despite the opt-outs and derogations in this field, the pre-ins exercised and exercise a number of common rights, as clarified by Dunnett.[30] These include, under Article 121(2) and (3) EC, the right to vote in the Council on which Member States fulfilled (and fulfil) the necessary conditions for the adoption of the single currency and take part in the decision as to whether to go ahead with the third stage; Articles 119 and 120 EC in respect of difficulties experienced by a Member State and mutual assistance granted by the Council still apply to the pre-ins; the pre-ins participate in the General Council (as discussed below); according to Article 114 EC, the pre-ins all participated in the Monetary Committee (which is dissolved) and now participate in the Economic and Financial Committee; all pre-ins vote on financial matters requiring unanimity in the Council. Obviously they do not participate in the Eurogroup meetings.[31]

Another common feature between three of the pre-ins, Denmark (although to a lesser extent), Sweden and the UK, is in respect to their positions vis-à-vis the ERM and what will be required of them before they meet the convergence criteria in this regard. Following the Council's decision in relation to Sweden and the probability that Member States must be members of ERM II before they can join the single currency, the question arises as to how the Council will approach the question of whether these Member States have fulfilled the criteria? It is important to note that the Council has adopted a flexible interpretation in relation to the convergence criteria on the ERM, in that Italy and Finland were held to have satisfied the criteria even though they joined the ERM in November and October 1996 respectively, falling slightly short of the two year period required. As such, what will be requested of the above pre-ins in order to meet the criteria? The view has been expressed above[32] that what is of importance is not that the two year period is strictly adhered to, but rather that there is no devaluation of the currency of the Member State under review against the currency of another Member State and that perhaps the degree of fluctuation (if any) is 'acceptable'.

III. The Extent of the Opt-out/Derogations for the 'Pre-ins'

According to Article 122(3) EC, the following Articles do not apply to Member States with a derogation: Articles 104(9) and (11) (in relation to measures which the Council may take to ensure compliance with the Member States' obligation to avoid excessive government deficits), 105(1), (2), (3) and (5) (in respect of the

[30] Dunnett, D.R.R. 'Legal and Institutional Issues affecting Economic and Monetary Union' in O'Keeffe and Twomey, above n 13, 135 at 146.

[31] Eurogroup is the new term for the Euro 11.

[32] Above n 28.

objectives and role of the ESCB), 106 (concerning the issuing of Euro banknotes and coins), 110 (concerning measures adopted by the European Central Bank (ECB)), 111 (concerning the conclusion of international agreements), and 112(2)(b) (concerning the appointment of members of the Executive Board). The exclusion of the Member States with a derogation and their national central banks from rights and obligations within the ESCB is laid down in Chapter IX of the Statute of the ESCB and the ECB.[33] According to Article 122(5) EC, the voting rights of the Member States with a derogation shall be suspended for Council decisions in respect of the above Articles.

As Article 2 of the Protocol in relation to Denmark provides that all Articles and provisions of this Treaty and the Statute of the ESCB referring to a derogation shall be applicable to Denmark, the Articles mentioned in Article 122(3) EC also do not apply to Denmark. In addition, Denmark is subject to Article 122(5) EC.

As for the UK, its Protocol specifically provides a list of all those Articles which do not apply to the UK.[34] This Protocol mentions all Articles provided for in Article 122(3) EC in addition to Articles 4(2), 104(1), 105(4), 108, 109, 112(1), 123(4) and 123(5) EC. Furthermore, the voting rights of the UK are suspended in respect of acts of the Council referred to in the Articles which do not apply to the UK.[35]

All national central banks are part of the ESCB by virtue of Article 1(2) of the Statute of the ESCB. Article 1(2) is not included in the list of articles which do not apply to the Member States with a derogation and to the UK and Denmark by virtue of their opt-outs. However, Article 14(3) of the Statute states that only those Member States without a derogation are actually an integral part of the ESCB. This is the case as Article 14(3) does not apply to Member States with a derogation by virtue of Chapter IX of the Statute of the ESCB, nor to the UK and Denmark by virtue of their respective Protocols.[36]

Article 107 EC provides that the ESCB shall be governed by the two decision-making bodies of the ECB, the Governing Council and the Executive Board. In addition, Article 45(2) of the Statute of the ESCB provides that, without prejudice to this provision, the General Council shall be constituted as a third decision-making body of the ECB. As the Governing Council and the Executive Board do not include representatives from the pre-in countries, it was thought that there should be a structure in which these countries were involved. This took the

[33] The Statute of the ESCB and the ECB can be found in Protocol 18 as attached to the Amsterdam Treaty (now Protocol 2). Chapter IX sets out those provisions of the Statute which do not apply to the Member States with a derogation and is extended to Denmark and the UK by virtue of their respective Protocols.

[34] See above n 5.

[35] Art. 7 of the Protocol.

[36] Art. 8 of the UK Protocol with lists those articles of the Protocol on the Statute of the ESCB which do not apply to the UK.

form of the General Council. The idea is that the General Council is a temporary organ which will only last for as long as there are Member States with a derogation. One of the main tasks of the General Council is to monitor the functioning of ERM II. The members of the General Council sit in their personal capacities. The members must act independently of their Member States in accordance with Article 108 EC.

According to Article 110 EC, the ECB shall make regulations, take decisions and make recommendations and deliver opinions. These measures are given the same definition as to be found in Article 249 EC. As such, a regulation is defined as being directly applicable in all Member States. In order to limit this to only those Member States without a derogation, Article 122(4) EC provides that the words 'Member States' in Article 110 EC shall be read as 'Member States without a derogation'. As such, regulations of the ECB would not apply to Sweden, nor to Denmark and the UK by virtue of their respective Protocols. This is an example of the fragmentation of the *acquis communautaire* is discussed in part V below.

IV. Opting-In—the UK

When the current British Labour Government came to power in 1997, the first major economic step taken was to grant independence to the Bank of England, the Central Bank, a step which coincided with the Maastricht requirements for EMU.[37] As regards the third stage of EMU (or EMU III), the British Government adopted a policy of 'prepare and decide' replacing the previous 'wait and see' policy. Apart from the semantics involved in this policy change, there is widespread expectation (although the exact date is not yet known) that a referendum will be held on this subject in the UK during the lifetime of the current Parliament. The Treasury has committed itself to making an assessment of the five tests within the first two years of the current Parliament. Under this policy, the Prime Minister (who is also First Lord of the Treasury) will take political responsibility for preparing for EMU III, including approval by Government and Parliament and the holding of a referendum, while the Chancellor of the Exchequer is responsible for making an assessment as to whether the UK should join EMU III. The assessment will be based on the fulfilment of five economic tests. At the Labour Party Conference at Brighton held in October 2001, the Prime Minister stated that if the five economic tests were met, there was no reason why the UK could not join the Euro in the lifetime of the current Parliament.

[37] Art. 116(5) EC placed an obligation on Member States to start progress leading to the independence of their central banks during the second phase of EMU. Furthermore, Arts. 108 and 109 EC required the independence of national central banks of all the Member States at the latest at the date of the ESCB.

The criteria set by the UK have to be met before it informs the Council, pursuant to Article 10 of Protocol 25 EC Treaty that it wishes to move towards EMU III. The five economic tests are as follows:

1. Sustainable Convergence *Between Britain and the Economies of a Single Currency*

Are business cycles and economic structures compatible so that the UK and others could live comfortably with Euro interest rates on a permanent basis? The different business and economic cycle of the UK compared to participant Member States is highlighted below as a problem unique to the UK. Without sustainable and durable convergence, adoption of the Euro would not be successful for the UK.

2. Whether there is Sufficient Flexibility *to Cope with Economic Change*

If problems emerge is there sufficient flexibility to deal with them? The principal concern of the UK seems to be in relation to whether there are structures to deal with high unemployment. An albeit dated document released by HM Treasury on 'UK Membership of the Single Currency' concluded that, in labour markets particularly, the UK has not yet achieved sufficient flexibility to meet the challenges of EMU membership.[38]

3. The Effect on Investment

Would joining EMU create better conditions for firms making long-term decisions to invest in Britain? This test is recognition that the UK faces stronger competition from firms established in participating Member States. Again, only sustainable and durable convergence will encourage investment.

4. The Impact on the UK Financial Services *Industry*

What impact would entry into EMU have on the competitive position of the UK's financial services industry, particularly the City's wholesale markets? Clearly this sector will be affected more profoundly and immediately than other sectors. However, the City has prepared itself for the Euro with the help of the Bank of England. As such, the Euro should not have any negative effects on the financial services industry and a good case could be made to argue that the effects for the leading financial services centre in the EU would be positive.

[38] HM Treasury website at http://www.hm-treasury.gov.uk. However, these conclusions date from pre-1999 and there is no consolidated update on the HM Treasury website.

5. Whether it is Good for Employment

In summary, will joining EMU promote a lasting increase in jobs? This is of particular importance in that the UK Government's central economic objective is to achieve high and stable levels of growth and employment.

The debate on monetary union in the UK is clearly focused. Participants on both sides of the Euro debate recognise that a monetary union is a leap towards a stronger political union. Monetary union within the internal market may have a snowballing effect, possibly leading to further integration as regards other policies, especially taxation, social policy and industrial policy, strengthening further the political union. The debate, therefore, centres on sovereignty and political issues, although some technical questions also arise. These issues are examined immediately below. With the exception of the first such issue, not all are necessarily peculiar to the UK.

First, the UK has a different business and economic cycle when compared to that of the rest of the EU. One could argue that greater economic convergence should also lead to a convergence of business cycles, but for the moment this is not the case. The UK's five economic tests are a means of ensuring that the UK does not join the Euro before there is sustainable and durable convergence. Although it would appear that the UK has shown greater economic convergence recently with Euro members, it would be reckless to draw too many conclusions from this. As the UK recovers from recessions earlier than its European partners, it is more likely that as the UK's growth slows down, the Euro members play catch up.[39]

Second, there is a lack of flexibility inherent in the 'one size fits all' rates policy set by the European Central Bank (ECB). This is particularly topical at the time of writing in the presence of a slow German economy and totally different levels of economic growth prevailing in some other (particularly the peripheral and smaller) Member States. The success of this single rate policy is dependent on the first point above, the sustainable and durable convergence of the economic and business cycles of the Euro States. As shown above, the greatest challenge will be the alignment of the UK's business and economic cycles with those of the Euro members. A further challenge will undoubtedly arise with enlargement. The greater the number of Euro members, the greater the potential for diverging cycles.

Third, the 'one size fits all' rates policy could be palliated by the provision of central funds available to regions or states enduring hardship, as is the case with the United States which also has a single rates policy set by the Federal Reserve Board. Oddly, there seems to be no plan envisaged by the EC to introduce such a system despite the fact that the availability of such transfers has proved central to ensuring stability in the United States in the case of a state

[39] The UK's economic cycle and convergence is discussed at the HM Treasury website, above n 38, under 'UK Membership of the Single Currency—an assessment of the five economic tests'.

enduring hardship. In the absence of such a plan, how will the EC prepare itself for such hardships endured by regions or whole Member States? When hardships of this nature arise, the term 'asymmetric shock' is used. Professor Elspeth Guild points out that if an asymmetric shock occurred in a Member State which led to increased unemployment, a crisis could result through the funding of unemployment benefit.[40] Asymmetric shocks may not necessarily occur and former Commissioner de Silguy maintains that they are unlikely to do so.[41] Nevertheless, surely a system should be devised, at least, as a precautionary measure. Van Vambergen and Wachenfeld point to the dangers of intranational fixed transfers and look towards a stabilization scheme as in operation in the US as the most desirable approach.[42] Guild refers to two means of giving effect to Van Vambergen's and Wachenfeld's proposed system.[43] First, by using the existing cohesion fund and amending it accordingly (there are currently discussions on amending the cohesion funds to meet the challenges of an enlarged EU) and second, using Article 100(2) EC which permits financial aid in the event of exceptional circumstances beyond the Member State's control. Currently the decision on whether financial aid should be granted is taken unanimously in the Council, although the Nice Treaty would replace unanimity with qualified majority voting, making the legal decision to grant aid easier.

Fourth, the safety valve of free movement of persons to offset any crises, which exists in the US in the event of regional economic disparities, does not really apply in the EU which only has some five million Community migrant workers. Guild also makes this point by stating that labour does not migrate substantially between Member States and has not done so for decades.[44] *Eurostat* figures show that in the EU 1.5 per cent of the total population on average across the Member States consists of nationals of other Member States. What may appear a surprising statistic given the unemployment figures in various Member States, is merely a reflection of the different languages and cultures co-existing in the EU together with the remaining barriers to the free movement of people. David Currie also discusses labour mobility as a channel to meet social objectives without a change in the exchange rate, but notes that this may be a long way in coming.[45] Currie states that,

> Language and loyalty to nation and the national way of life mean that few people move around Europe in search of a job in the way that they move within the USA.

[40] Guild, E. 'How can social protection survive EMU? A UK perspective' (1999) 24 *ELRev.* 22.

[41] De Silguy, Y-T. *L'Euro* (Paris, Librarie Générale Française, 1998), 285.

[42] Van Vambergen, W. and Wachenfeld M.G. 'Economic and Monetary Union in Europe: Legal Implications of the Arrival of the Single Currency' (1998) 22 *Fordham International Law Journal* 41.

[43] Guild, above n 40.

[44] *Ibid*.

[45] Currie, D. 'The Pros and Cons of EMU' *The Economist Intelligence Unit*, 1997.

> This may change, but until then the main burden of adjustment in any country with above-average unemployment will be downward pressure on wages.[46]

Finally, the fluctuation in value of the Euro vis-à-vis the Dollar and the overall loss in value since its inception is another issue, although this may be attenuated over time. The implication here is that the UK (and other non-participating States) would be joining a weak currency. The Euro started trading against the Dollar on 1 January 1999 at $1.18. On average, the Euro is down about one-fifth against the Dollar from its launch in 1999. Although the Euro has made a recovery as of late, it is still a long way off its starting value. Van Vambergen and Wachenfeld map out the two possible routes that the Euro may take.[47] The first scenario is that of a successful Euro to rival the Dollar, in which the European financial markets become increasingly important and foreign reserve holdings are converted out of Dollars/Yen into Euro. The second scenario is at the other extreme with the termination of an unsuccessful Euro for any or a combination of the problems outlined above. Nevertheless, Van Vambergen and Wachenfeld conclude that '. . . the risk of a political and macro-economic failure of EMU is very remote. . . .'[48]

An interesting point is also how the Sterling fares against the Dollar in comparison with the Euro. Professor Stephen Bush stated that the Pound was more stable against the Dollar than against the Deutsche mark.[49] The inference from this was that Sterling would also be less stable as against the Euro considering the central importance of the Deutsche mark in Europe. Although the Deutsche mark no longer exists, the German economy is still central for the success and stability of the Euro. This stability issue is used to argue against UK adoption of the Euro. However, assuming the UK can attain convergence of its business and economic cycles with its European partners, it may follow that the Sterling will achieve greater stability vis-à-vis the Euro.

Although the issues discussed above are technical in nature, it is likely that the debate preceding a UK referendum will turn on these and political issues such as sovereignty and the desirability of greater integration as it did in the recent Danish referendum.

V. Closer Co-operation

Flexibility, differentiated integration, 'Europe à la carte', a two-speed Europe and variable geometry are all concepts used to depict further integration at

[46] *Ibid*.

[47] Van Vambergen and Wachenfeld, above n 42 at 40.

[48] *Ibid* at 41.

[49] Critical European Group website, http://www.keele.ac.uk/socs/ks40/ceghome.html under 'Articles of Interest', 'Britain's Future: Business, Industry, and a new relationship with the EU'. Professor Stephen Bush was the vice-chairman of the Campaign for an independent Britain (CIB) from 1991 to 1998.

European level. Although each definition is technically different, all necessarily include one or more Member States choosing not to progress with or not to progress at the same speed as other Member States in a given area. Such concepts stem from the original dichotomy on the widening and deepening of the EU. While some Member States fear (others desire) that enlargement (widening) of the EU will be at the expense of further integration (deepening), there are those Member States who believe that deepening is feasible even in an enlarged EU.[50]

There are two ways in which the Member States can and, indeed, have approached this dichotomy. First, Member States desiring further integration have co-operated outside the institutional and procedural framework of the EC. The Schengen agreement is one such example which, pre-Amsterdam, fell outside the scope of Community law. Care should be taken that such arrangements in no way conflict or lead to a watering down of the EC's *acquis communautaire*. Members of the Schengen agreement sought to avoid this happening by inserting a provision into the agreement providing that conflicts between its provisions and those of the EC Treaty were to be avoided. The second way to approach this dichotomy is where a group of Member States co-operate on a matter coming within the scope of Community law using the EC's institutional and procedural framework. Before the introduction of the closer co-operation provisions in the Treaties, the ability of a group of Member States to co-operate more closely on an area within the scope of EC law was dependent on receiving the consent of all Member States, including non-participating Member States. The agreements reached at Maastricht in relation to the Social Protocol and Social Agreement, in which the UK agreed that eleven Member States could co-operate on closer provisions under Social Policy, was the first example. EMU III is also an example of this second type of flexibility, although it was the Council which decided on the ability and number of Member States to progress with this stage.

Legally, Member States may not be obliged to join the club at a later date. As already shown in relation to the UK and Denmark, there is at present no political consensus within these countries on the joining of EMU III. Nevertheless, every effort is made to ensure that Member States outside the club have no difficulty at a political/legal level in joining later. This, together with the fact that the use of the closer co-operation provisions is a measure of last resort, reflects the continued optimism that all Member States eventually will reach the same stage in European integration. Howarth notes the significance of a degree of flexibility in respect to EMU (although one would have thought that flexibility under Social Policy is also identified as one of the central components of European integration),

[50] For an in-depth discussion on this point see the seminal analysis by Gaja, G. 'How Flexible is Flexibility under the Amsterdam Treaty?' (1998) 35 *CMLRev*. 855; see also Kortenberg, H. 'Closer Co-operation in the Treaty of Amsterdam' (1998) 35 *CMLRev*. 833.

> For the first time since the creation of the Community, its Member States accepted that one of them could avoid participating in a central component of European integration accepted by the others—namely EMU.[51]

As by its nature not all Member States will participate, special provisions have to be drawn up to distinguish between the rights and obligations of participating and non-participating Member States, thus creating a sometimes confusing read of the EC/EU Treaties. This confusion is likely to be exacerbated the more Member States resort to such measures. According to Usher, the type of flexibility adopted in relation to the EMU was the model used for the new Title of the EC Treaty on visas, asylum and immigration introduced by the Treaty of Amsterdam.[52] It is this second model in relation to the EMU which is of interest for our purposes.

Gaja states that there were two reasons for this type of flexibility being adopted in respect of EMU.[53] First, there was a reluctance by certain Member States to take part in EMU III and second, the realisation that even those Member States willing to take part were not guaranteed admittance to the third stage if failing to satisfy any of the convergence criteria. Neither reason was considered valid to prevent those Member States willing and able from moving forward with the adoption of a single currency.

With continuing disagreement as to the extent of integration under the EC/EU Treaties, the Treaty of Amsterdam established set procedures to be followed by Member States wishing to embark on closer co-operation. Although closer co-operation is not defined as such in either the EC or EU Treaties, the fundamental concept is that a group of Member States seek to further their integration within the structure of the EC/EU. Kortenberg gives his interpretation of the closer co-operation provisions whereby images of a two-speed Europe or the existence of a hard core group of Member States are rejected.[54] Instead, he defines closer co-operation as a temporary departure from participation by all Member States in pursuit of the objectives of the EC/EU, whereby non-participating Member States join as soon as possible. This definition excludes an awareness that Member States are not always in agreement as to the degree of integration involved in pursuing EC/EU objectives —hence the whole widening/deepening debate. Instead it is founded on the mistaken premise that a Member State 'opting out' (to use the old terminology) does so, not because they oppose the measure *per se*, but for other reasons, transitory in nature. This view is optimistic at best. However, a possible explanation of Kortenberg's interpretation could be the political and economic pressures (especially in respect to EMU III) on a non-participating Member State resulting in its joining the club. An application of this can be seen in that

[51] Howarth, above n 13.
[52] Usher, above n 4.
[53] Gaja, above n 50.
[54] Kortenberg, above n 50.

although there is no legal obligation on the UK or Denmark to join EMU III if the convergence criteria are satisfied, non-participation may be temporary if they are subjected to economic pressures whereby it would be in the country's interest to join. Nevertheless, the premise that Member States may disagree that further integration is needed in a certain area should be recognised, especially given an EU of 28 Member States with different history, background and beliefs.

Three advantages are gained by including the closer co-operation provisions in the Treaties. First, it is no longer the case that a non-participating Member State must consent to the remaining Member States cooperating closely—and thereby vetoing this desire (although see the Luxembourg compromise in Article 40 EU and Article 11 EC). Second, Member States relying on these provisions will be able to make use of the institutions, procedures and mechanisms as laid down by the Treaties. Third, the provisions on closer co-operation lay down basic rules that must be adhered to.

The Treaty of Amsterdam introduced three separate provisions on closer co-operation: Articles 43 and 44 TEU and Article 11 EC. Article 43 TEU provides that certain criteria has to be met before closer co-operation by a group of Member States can be envisaged within the framework of the EC/EU. This Article includes two important conditions. First, that closer co-operation is only to be used as a last resort where the objectives of the Treaties could not be attained by applying the relevant procedures laid down therein[55] and second, that co-operation is open to all Member States allowing them to become parties to the co-operation at any time on complying with the basic decision and with the decisions taken within that framework.[56] Article 44 TEU provides that *all* Member States must take part in the deliberations concerning the adoption of acts and decisions necessary for the implementation of the co-operation referred to in Article 43. However, only those representing participating Member States must take part in the adoption of decisions. Article 11 EC provides for specific co-operation in respect of the EC Treaty, but is subject to Articles 43 and 44 TEU.

The provisions on closer co-operation in the Treaty of Amsterdam show similar traits to the opt-outs and derogations granted under EMU. The main similarity in this respect is in relation to the position of non-participating Member States. Member States with a derogation will join the single currency when they meet the convergence criteria, indeed they are legally obliged to do so (although see the position of Sweden above). Likewise, the UK and Denmark, according to their respective Protocols,[57] will join the single currency if and when they declare their willingness to do so and on the condition that they meet the convergence criteria. No further obligations are placed on the non-

[55] See Art. 43(1)(c) TEU.

[56] See Art. 43(1)(g) TEU.

[57] In respect of the UK, it is stated explicitly at Art. 10(a) of the Protocol that the UK has a right to move to the third stage of EMU.

participating Member States. This ties in with the condition laid down in Article 43(g) TEU and with the views expressed by Kortenberg mentioned above.[58]

These provisions have undergone, for the most part, minor changes in the Nice Treaty, which at the time of writing is awaiting adoption by the Member States. One change worth referring to is the removal of the infamous Luxembourg Compromise which the Amsterdam Treaty had incorporated into Article 40 TEU and Article 11 EC. Currently, non-participating Member States can require that the matter proposed for closer co-operation be referred to the European Council where 'important and stated reasons of national policy' arise. In effect, non-participating Member States could still veto an attempt at closer co-operation, although the political viability may lead to it being used rarely. Usher advanced the hypothesis that a non-participating Member State may invoke the Luxembourg Compromise where closer co-operation is proposed in respect to taxation, this being of importance to the Member States.[59] With Nice, a member of the Council may *request* that the matter be referred to the European Council, but the matter still comes back to be adopted by the Council by qualified majority vote.

In addition, the Nice Treaty has altered certain wording to reflect the realities of the closer co-operation provisions. Currently, it is provided that the closer co-operation provisions should not, 'affect the competences, rights, obligations and interests of those Member States which do not participate'. However, closer co-operation will affect to some degree, if not the competences, rights and obligations of non-participating Member States, then surely their interests. It would be naïve to assume that a group of Member States moving towards harmonisation on tax issues would not affect the interests of non-participating Member States, even if just to the extent that their markets are less attractive/competitive. With Nice, closer co-operation envisaged must, 'respect the competences, rights and obligations of those Member States which do not participate'. This provision recognises that implications, although perhaps slight in cases, may flow for non-participating Member States.

VI. EMU and Accession

There are currently twelve countries negotiating accession to the EU.[60] Presently, these countries are undergoing intense changes to their national

[58] Kortenberg, above n 50.

[59] Although it is possible to use the closer co-operation provisions in respect to taxation, the only move in this respect so far has been the proposal to use the closer co-operation provisions for adopting measures on energy tax. Whether these provisions will be used to adopt more central taxation measures, is yet to be seen.

[60] The countries currently negotiating accession are ('negotiating countries'): Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic and Slovenia. Turkey is a candidate country but is not currently involved in accession negotiations.

legislation and structures in order to incorporate the *acquis communautaire*. The question arises as to the commitments which the accession countries will have to undertake in respect to EMU. According to Agenda 2000, the accession countries have no choice but to join the different stages of EMU, no opt-outs are on the table as was the case for the UK and Denmark. This is testimony to the view that variable geometry, whereby all countries eventually join the club, is still preferred to a Europe à la Carte, whereby certain countries have a choice about not joining the club.

The Commission identified, in its Composite Paper of 1998, three phases which map the progression of the accession countries through to the adoption of the Euro. These are: the pre-accession phase; the accession phase and the Euro phase. During the pre-accession phase accession states must fulfil general EU membership criteria, for example, the adoption of the *acquis communautaire*. During the accession phase the new Member States shall treat the 'exchange policy as a matter of common interest' and eventually co-ordinate their policies through a structure similar to the ERM. It is at this stage that the governors of the new Member States' central banks will also join counterparts in the General Council of the ECB. The third and final phase is as the name suggests, the adoption of the Euro.

Agenda 2000 did not rule out the possibility of a two-phase process, whereby EU and Euro membership could be simultaneous, effectively joining together phases 2 and 3. However, the Composite Paper seems to have excluded this possibility, thereby clarifying the position of the accession countries.

On 13 November 2001, the Commission issued its yearly reports on the progress made by the candidate countries, together with an accompanying Strategy Paper. The Commission takes the view that of the twelve negotiating countries, ten have target dates for accession compatible with the timeframe laid down by the European Council meeting in Gothenburg on 14 June 2001.[61] As regards EMU and the Euro, the Commission notes that 'some time after accession', new Member States will be expected to join the ERM II. It rules out any unilateral adoption of the Euro which it considers must take place as part of a structured convergence process within a multilateral framework. It is to be hoped however that the Union will not adopt an unduly rigid posture and that individual countries should be allowed to join the Euro when they are ready, without waiting for all the others.[62]

There is also the question as to what difficulties may be experienced by the new Member States in trying to meet the convergence criteria and to what problems may arise by the Euro members as a whole once these countries have joined the Euro. Technically, one could argue that unless the new Member States meet the convergence criteria as laid down above, they will not be able to

[61] i.e. all negotiating countries with the exception of Bulgaria and Romania.

[62] See Editorial Comments 'Towards accession' (2001) 38 *CMLRev*. 1329.

join EMU III, i.e., they need to show a degree of stability and convergence with the present Euro members. As such, the question of asymmetric shocks and measures needed to counteract such shocks is particularly pertinent. As to whether special measures will be adopted with the accession countries in mind, is yet to be seen.

VII. Conclusion

This article has discussed the different legal positions of the Member States with a derogation, Sweden (and previously Greece), and Member States with an opt-out, the UK and Denmark, as regards the third stage of EMU. Whereas Greece has now joined the single currency on 1 January 2000, the legal position of the UK, Denmark and Sweden has remained unaltered. Indeed, until the UK and Denmark notify the Council of their intention to join the single currency and until Sweden (and arguably the UK) joins ERM II, the position of these Member States is not likely to change in the near future. The legal position of the Member States in this context marks an early example of closer co-operation. However, the difficulty created in allowing flexibility within the framework of the Treaties is the surrendering of a certain degree of clarity in that Treaty provisions will be subject to derogation and opt-outs on the part of the non-participating Member States, a worrying prospect in light of a deepening and widening EC/EU. Fortunately, closer co-operation is regarded as a last resort and, on at least one optimistic interpretation, a temporary solution.

Two other points are of vital concern. In the first place, it should be borne in mind that up to ten new Member States will shortly be acceding to the EU, all of which will be committed by the terms of their accession to join EMU and to proceed to the third stage as soon as possible. The enormous disparities between the economies of the existing Member States and the Accession States will be a further strain on the stability of the Euro but also on the single rate policy. The effect on the Accession countries is difficult to estimate and may vary from one country to another. The impact of Euro membership, the financial discipline of the EMU and competitive pressures within the currency union may be exceedingly difficult for some new Member States. In fact, unless the principle of solidarity is applied in such a way that convergence is assisted by large-scale transfers to the Accession States, it is probable that significant problems could arise in the context of the EMU. However, it is likely that appropriate transitional periods would be chosen to allow for an appropriate degree of convergence if not total convergence to occur.

Finally, one should consider the extent to which the opt outs which apply to the UK and Denmark may continue to be feasible—politically if not legally—in the context of a vastly enlarged internal market where all other Member States are in a currency union. It is not inconceivable that at some point in the future, if real disparities arise between EMU countries and opting out countries

(in practice, this is most likely to be the UK because of its different economic pattern and the size of its economy), tensions may arise if there are major differences over a certain period of time. Certainly, within the context of the internal market, the effect of having one single currency for up to 25 or 26 Member States and two separate currencies for the two remaining Member States, will increasingly be perceived as incongruous and perhaps as unworkable. Fluctuations in value of the currencies of the opting-out countries could produce tensions, and in the case of devaluations, could lead to anti-competitive pressures. Only time will tell whether such internal market concerns, translated into political tension, will prevail over the legal guarantees afforded by the opt-outs.

15

HARMONY AND DISSONANCE IN FREE MOVEMENT

*Miguel Poiares Maduro**

I. Introduction

There is a generalised perception that the European Court of Justice has adopted different approaches to the different free movement rules included in the Treaties. In particular, the free movement of goods has 'benefited', until 1993, from a wider scope of application. Contrary to what has for long constituted the standard approach to the free movement of persons, the free movement of goods was constructed as requiring more than national treatment and non-discrimination in regard to goods from other Member States. Even non-discriminatory restrictions on trade in goods could constitute a violation of Community rules if not justified as necessary and proportional to the pursuit of a legitimate public interest. The freedom to provide services has somewhat occupied a middle ground between the interpretation given to the goods and persons provisions.[1] Following the Court's decision in *Keck & Mithouard* in 1993,[2] a reversal of fortune appears to have taken place regarding the Court's approach to the different free movement provisions, with the free movement of persons and the freedom to provide services now benefiting from a more 'aggressive' interpretation in comparison with the free movement of goods. This article reviews, in a comparative and historical perspective, the Court's approach to the different free movement provisions,[3] arriving at some new and

* Faculdade de Direito da Universidade Nova de Lisboa. I am indebted to Jukka Johannes Snell, Damian Chalmers, Bruno de Witte, Joseph Weiler and Julio Baquero for discussions on the main topic of this paper. A slightly different version of this paper will be published in a book edited by Mads Andenas (*The Law of Services in the European Union*, Oxford, OUP, 2002). The differences are not so substantial as to lead me to use a different title.

[1] For the purposes of this essay, the freedom to provide services will generally be considered as distinct from the free movement of persons (which in turn will include free movement of workers and the right of establishment). Although the freedom to provide services may require a movement of persons (which leads some authors to include it in the context of the free movement of persons) that is increasingly not the case.

[2] Joined Cases C–267 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097.

[3] Excluding the free movement of capital.

even paradoxical conclusions and proposals: first, the article reviews the most recent developments of the Court's case law and defends the idea that a uniform approach to the different free movement rules may be emerging in the ECJ jurisprudence; second, it is argued that this uniform approach is based on the application of a two-fold test reviewing the impact of national measures on free movement either through the imposition of a double burden or the prevention of market access; and third, the article ends by defending the notion that, contrary to the common assumption, a totally uniform test may not be a good thing and the Court would do better in continuing to follow its post-*Keck* approach of primarily allocating its judicial resources to the free movement of persons.

The starting point of the article is that judicial resources are limited and that the explanation for the fluctuations in the Court's case law is precisely because that judicial constraint prevents courts from doing all they want to do and requires them to do what they can do best. It is argued throughout the article that the definition of where the Court ought to primarily devote its judicial resources depends on the institutional alternatives to the Court in different areas of the law, and that this requires the Court to assume fully the institutional character of its judicial choices.

I. Harmony and Dissonance I: Presto, Assai Meno Presto

A. *Presto: From* Dassonville *to* Sunday Trading

The broad scope granted to the free movement of goods until 1993 was a result of successive developments in the Court's case law in which its interpretation of Articles 30 and 36 (now 28 and 30) EC interacted with the legal community in such a way as to make possible the review of any national regulation restricting trade under the tests of necessity and proportionality vis-à-vis a Community recognised public interest. The first step in the development of a balance test in the application of the rules on the free movement of goods was taken in *Dassonville*.[4] The fact that it was sufficient for a measure to be 'captured' by Article 28 for it to be 'capable of hindering directly or indirectly, actually or potentially, intra-community trade',[5] in effect subjected all market regulations to a 'balance test' review under Article 28, since they all have by their very nature an impact on trade. In other words, such a test did not require a national measure to be protectionist or to discriminate against foreign products to be subject to review under Article 28. However, in spite of the broad character of the Dassonville *ratio decidendi*, especially after the abandonment of the 'trading rules' words, subsequent decisions kept a close link with a discrimination test.

[4] Case 8/74 *Dassonville* [1974] ECR 837.
[5] Para 5.

It was *Cassis de Dijon* that awoke the 'sleeping beauty' and gave new life to the *Dassonville* doctrine. In itself *Cassis de Dijon* was not particularly revolutionary. It could even be seen as restricting *Dassonville* once it broadened the scope of public exceptions capable of justifying restrictions on trade.[6] Moreover, it could also be constructed as proposing a discrimination test based on the double burden imposed on imports by having to comply with a new set of rules (the legislative disparity between the French and German rules required Cassis de Dijon producers to adapt to the German national requirements, therefore imposing on their products a double cost to which, arguably, the German domestic products would not be subject).[7]

What made *Cassis de Dijon* revolutionary is the change in the expectations of legal and economic actors it promoted and the reversal of the burden of proof on the admissibility of national measures restricting trade. The Court stated;

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[8]

In *Dassonville*, the Court of Justice made no distinction between discriminatory and non-discriminatory measures with an impact on intra-Community trade, but in *Cassis de Dijon* it made it clear that all such measures were only acceptable if necessary to pursue objectives recognised as legitimate by the Community, such as those already set out in Article 36 (now 30) EC. This was enhanced by the introduction of what came to be known as the 'principle of mutual recognition' of national regulations. According to this principle, a State has to accept the marketing in its own territory of products lawfully produced and marketed in other Member States. In the words of the Court:

> There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced to another Member State.[9]

This constituted an 'invitation' to litigate and explore the limits of the *Dassonville* concept of measures having an equivalent effect to a quantitative restriction. In other words, the Court was signalling to the legal and economic communities its willingness to review all national legislative disparities, becoming, in effect, the Community market regulator.[10] The process by which

[6] See Case 120/78 *Cassis de Dijon* [1979] ECR 649, para 8.

[7] On the problems of such understanding, see below.

[8] Case 120/78 *Cassis de Dijon* [1979] ECR 649, para 8.

[9] *Ibid*., para 14.

[10] Further on this point, see Maduro, M. P. *We The Court—The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998) ch. 3.

the scope of action of Article 28 was extended to include virtually any national regulatory measure had its paradigmatic cases in *Oosthoek's* and *Cinéthèque*.

In *Oosthoek's*,[11] which concerned national rules that prohibited a certain method of sales, the Court interpreted the scope of the *Dassonville* doctrine as including indistinctly applicable measures that do not even require any changes to be made to imported products (in the form of different production methods or labelling for example). A simple requirement to comply with different or stricter marketing methods would affect the marketing opportunities of imported products and therefore would be considered as a measure having an equivalent effect to a quantitative restriction. The Court argued that:

> to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme he considers particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic and imported products without distinction.[12]

It can be argued that this decision constitutes the most important step in using Article 28 to review practically any national measure regulating the market. It can be seen as going beyond *Cassis de Dijon* by including in the scope of application of Article 28 even national measures, of the type referred to in *Oosthoek's*, that do not appear to impose a double burden on imported goods but simply require the abandoning of particularly effective marketing strategies or sales methods. However, it can also be argued that the reason for including such type of rules under the concept of measures having equivalent effect to a quantitative restriction is identical to that commanding the inclusion of rules requiring changes to be made to imported products (rules on product requirements, such as those at stake in *Cassis de Dijon*): there is a double burden imposed on foreign producers when they are forced to change their strategies and methods of marketing (as when they have to change the characteristics of their products).[13]

That a measure did not need to be discriminatory to come under Article 28 was clearly stated by the Court in *Cinéthèque*[14]. The case concerned French legislation which prohibited the commercial exploitation of cinematographic works in recorded form, mainly video-cassettes, before the end of a set time-limit:

> it must be observed that such a system, if it applies without distinction to both video-cassettes manufactured in the national territory and to imported video-cassettes, does not have the purpose of regulating trade patterns; *its effect is not to favour*

[11] Case 286/81 *Oosthoek's* [1982] ECR 4575.

[12] *Ibid.*, para 15.

[13] See the discussion below on how this notion may be finding its way back to the case law of the Court.

[14] Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605.

> *national production as against the production of other Member States*, but to encourage cinematographic production as such.
>
> *Nevertheless, the application of such a system may create barriers to intra-Community trade* (. . .). In those circumstances a prohibition of exploitation laid down by such system is not compatible with the principle of free movement of goods provided for in the Treaty unless any obstacle to intra-community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law.[15]

The outcome of these developments in the Court's case law was that almost any national regulatory measure became susceptible to review under Article 28 EC. The proportionality test meant that a balance had to be struck between their costs and their benefits. What is normally at stake in these cases is the general restriction imposed on access to the market and competition therein. Under the balance test developed by the Court following *Dassonville* and *Cassis de Dijon*, many measures of this kind have been subjected to the balance test, even where they did not discriminate against foreign products. Examples include: rules on advertising and sales methods;[16] national health-system rules on subsidies on medical products and on pharmaceutical monopolies;[17] price regulations;[18] national recycling systems;[19] prohibition on Sunday trading or on employing workers on Sundays;[20] public law monopolies on the approval of equipment;[21] and the organisation of dock work.[22] This gave the Court a leading role in defining the adequate regulatory level of the common market and transformed Article 28 into a potential 'economic due process' clause. Whether or not the Court intended to include in the scope of Article 28 all national regulatory measures became quite irrelevant once the test adopted was so broad as to allow economic operators to challenge virtually any national regulation of the market. Even a double burden test would lead to the review of any national measure whose content was not consistent with another State's regulatory policy regarding either the characteristics or the marketing of a product.

The way the Court applied its necessity and proportionality tests to the review of national regulatory measures under Article 28 tells us that the final

[15] Paras 21 and 22, emphasis added.

[16] See *Oosthoek's*, above n 11; Case C–362/88 *GB–INNO* [1990] ECR I–667; Case 382/87 *Buet* (Canvassing) [1989] ECR 1235; Joined Cases C–1/90 and C–176/90 *Aragonesa* [1991] ECR I–4151; and Case C–126/91 *Yves Rocher* [1993] ECR I–2361.

[17] Case 238/82 *Duphar* [1984] ECR 523 and Case C–369/88 *Delattre* [1991] ECR I–1487.

[18] For example, Case 29/83 *Leclerc* (Prix du Livre) [1985] ECR 1.

[19] Case 302/86 *Commission* v. *Denmark* [1988] ECR 4607.

[20] Case C–145/88 *Torfaen Borough Council* [1989] ECR 3851, Case C–312/89 *Conforama* [1991] ECR I–991, Case C–332/89 *Marchandise* [1991] ECR I–1027, Case C–169/91 *Stoke-on-Trent* [1992] ECR I–6635.

[21] Case C–18/88 *RTT* (Telephone Equipment) [1991] ECR I–5941.

[22] Case C–179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I–5889.

objective of the Court was to address legislative disparities and not to control the level of public regulation of the market. As I have argued elsewhere the case-law of the Court in this area of the law could be characterised as a form of majoritarian activism:[23] such case-law is more understandable as the product of a '*legislateur de substitution*'[24], which does not intend to impose a constitutional conception of the market and of economic organisation, but which aims to transfer economic decisions affecting the internal market from State level to the Community level, in the pursuance of the judicial harmonisation of State rules the diversity of which is capable of restricting free trade and the optimal gains offered by the common market. I have argued that the criterion guiding the Court in balancing the costs and benefits of national regulations has not been a specific (de)regulatory ideology but an attempt to identify the majoritarian view on that issue, taking the EC as the relevant polity.

For the Court, the common market could not support the costs of non-harmonised national rules. This means that State regulations can no longer diverge on the basis of different national traditions and policy choices. The Court distrusted the national political process to regulate the common market but, at the same time, it also distrusted the ability of the EC political process to bring about the necessary harmonisation between the different national regulatory traditions. The consequence was the Court signalling to the legal and economic community its willingness to review different national regulations and bring about harmonisation through the judicial process. This was done through the broad interpretative scope given to Article 28.

The broad scope given to Article 28 by the European Court of Justice was not intended to promote the review of all market regulation. The aim was not to construct Article 28 judicially as an economic due process clause controlling the degree of public intervention in the market.[25] The broad scope granted to Article 28 is more understandable when viewed in the light of the Court's suspicion that State regulation of the market may either impose a greater burden on products from other Member States or not take into account the Community interest in harmonised rules to prevent restrictions on free trade arising from differing national rules. It was this wariness of intervention by the national political process in a common market coupled with the incapacity for harmonisation of the Community political process that explained the broad scope given by the Court to Article 28 and the degree of control which, as a consequence, was exercised by the Court over national regulatory powers.

The problem was that, once the Court had formulated a criterion which was so broad as to subject to a proportionality test any State regulation of the common market, the other participants in the legal community were also able to use

[23] See Maduro, above n 10, ch. 3.

[24] This expression is taken from Bettati, M. 'Le "Law-Making Power" de la Cour' (1989) 48 *Pouvoirs* 57, at 62.

[25] See Maduro, above n 10, ch. 3.

that criterion to challenge any market regulation which opposed their economic freedom.[26] The broad scope given to Article 28, designed to push for the europeanisation of regulatory law and so to reduce the costs of non-harmonised regulations, caught in its net any national regulatory measures, even those where those concerns were irrelevant or did not exist at all. Since the Court of Justice's distrust of national political processes found expression in a criterion submitting all national regulation to judicial review, economic operators were able to second-guess national regulatory policies through courts even when the original judicial concerns underlying such a criterion were not at stake. What occurred was a shift of the regulatory role from national political processes to courts. The Court of Justice (and, through it, national courts) became the institution responsible for deciding the adequate level of market regulation.

The primary example of this were the *Sunday Trading* cases where the Court of Justice and national courts reviewed the proportionality of a national measure whose impact on free movement was merely a neutral by-product of its general impact on the market. In these cases, the Court was called in to review the validity of national measures prohibiting trade on Sunday upon the pretext that such prohibition restricted the free movement of goods. The Sunday trading cases were also representative of the type of legal challenge that was increasingly over-burdening the workload of the Court.

B. Services and Persons—Assai Meno Presto

While, from *Dassonville* to *Sunday Trading*, the Court extended the scope of application of the free movement of goods, the same did not happen with regard to the other free movement rules. Following upon the literal content of some of these free movement rules the Court elaborated the principle of National Treatment, which requires that a State should treat nationals of other Member States in the same way that it treats its own. The controlling rationale in the application of the other free movement provisions was non-discrimination and not an extended concept of restrictions on trade. However, the principle of National Treatment contains more than an obligation on states to apply the same legislation to its own nationals and to nationals of other Member States. The principle of National Treatment dependence upon the principle of Non-Discrimination determines that nationals of other Member States should be treated the same as home nationals, which does not mean that they should be subject to the same rules. In reality, equal treatment may mean different treatment. It is well known that the principle of equality implies a criterion for ascertaining what are identical situations deserving similar treatment and what are different situations deserving different treatment. The principle of National Treatment also requires such a criterion. In other words the application of the

[26] See Maduro, above n 10, ch. 3.

principle of national treatment had to be developed in accordance with a material notion of non-discrimination.

To determine what equal treatment in the field of the free movement of persons and services should consist of, the Court has elaborated what has been called the 'principle of equivalence'[27]. The first application of this principle was given in *Thieffry*.[28] Here the Court started by saying that the right of establishment is not necessarily dependent upon the adoption of the directives provided for by Article 57 of the EC Treaty (now 47). In certain cases, it can be ensured 'either under the provisions of the laws and regulations in force, or by virtue of the practices of the public service or of professional bodies.'[29] In the case before the Court, Mr. Thieffry's law degree from a Belgian university had already been recognised as equivalent to a French law degree by a French university. The Court went on to state:

> In particular there is an unjustified restriction on that freedom where, in a Member State, admission to a particular profession is refused to a person covered by the Treaty who holds a diploma which has been recognized as an equivalent qualification by the competent authority of the country of establishment and who furthermore has fulfilled the specific conditions regarding professional training in force in that country, solely by reason of the fact that the person concerned does not possess the national diploma corresponding to the diploma which he holds and which has been recognized as an equivalent qualification.[30]

In this way, the Court considered that States are obliged to do more than merely apply the same rules to nationals of other Member States as they apply to their nationals. Non-discrimination requires States to take into account the qualifications obtained by nationals of other Member States in their State of origin to determine if they are substantially equivalent to the qualifications required by home nationals. Moreover, where those qualifications have already been recognised as similar to national qualifications by a competent authority in the State of establishment, this fact must be taken in consideration when deciding on the request of establishment. In *Webb*,[31] a case on the provision of services, the Court made it clear that this previous recognition is not a necessary condition to the application of the principle of equivalence. Instead, the latter imposes on States the obligation to 'take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the

[27] See, for example, Watson, P. 'Freedom of Establishment and Freedom to Provide Services: Some Recent Developments' (1983) 20 *CMLRev* 767.

[28] Case 71/76 *Thieffry* v. *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

[29] Para 17.

[30] Para 19.

[31] Case 279/80 *Webb* [1981] ECR 3305.

Member State of his establishment'.[32] In this way, the principle of equivalence is the basis for a substantive and material principle of non-discrimination, which imposes on States the obligation to take into account the requirements fulfilled by a national of another Member State in his country of origin. Although the requirements made in both Member States can be formally distinct they may, in substance, be identical.

Such principle of equivalence could, however, easily amount to proportionality. Proportionality becomes an issue in assessing the equivalence of the conditions imposed on and the requirements fulfilled by the different nationals.[33] This was particularly obvious in services cases once the Court considered, for example, that the temporary nature of the provision of services would justify less strict rules than those applicable to those established in the home state. In *Van Weseamel* and *Webb* the cross-over between material non-discrimination and the proportionality of the national measures was already evident. In *Van Wesemael*, the Court held that the requirements imposed by a Member State on the provider of a service must be 'objectively justified by the need to ensure observance of the professional rules of conduct', and in order to protect the interests that such rules intend to safeguard.[34] In *Webb* the Court stated:

> freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment.[35]

This link between proportionality and non-discrimination was even clearer in a case concerning the insurance sector, where the Court ruled that:

> requirements may be regarded as compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment and that *the same result cannot be obtained by less restrictive rules*.[36]

[32] Para 20. See also Joined Cases 110 and 111/78 *Van Weseamael* [1979] ECR 35: 'Such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the service is established in another Member State and in that State holds a license issued *under conditions comparable to those required by the State in which the service is provided* and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the State in which the service is provided', para 30 (emphasis added).

[33] This confirms that the important question on the free movement of goods is not whether the Court should or should not use a balance test but when this test should be used.

[34] Joined Cases 110 and 111/78 *Van Weseamael* [1979] ECR 35, para 29.

[35] Para 17.

[36] Case 205/84 *Commission* v. *Germany* [1986] ECR 3755, para 29.

However, in spite of these developments, the case law of the Court was never characterised, even in the area of services, as requiring more than non-discrimination from national regulations. The reason for the different understandings of the Court's approaches to goods, persons and services lies in the different institutional and litigation dynamics related to these different branches of case-law. As we have seen, the broad understanding of non-discrimination in the area of services and persons could well include an application of proportionality in assessing the legitimacy of national measures restricting those freedoms. But this has never amounted to an 'invitation' to litigate by the Court in these areas. Instead, in goods, the reversal of the burden of proof inherent in the principle of mutual of recognition had a clear institutional message which was supported by the majoritarian approach of the Court: the willingness of the Court to review non-harmonised national rules capable of restricting trade in goods; in this area of the law, the Court was ready to second-guess national political processes and therefore created a new forum where economic actors could attempt to reverse policy choices. This was further enhanced by an understanding of the restrictions to the free movement of goods that went beyond mutual-recognition and no longer required a comparison with the treatment to which those goods where subject in their home state.[37] Due to its limited judicial resources and the higher political sensitivity of free movement of persons, the Court was more restrictive with regard to services and persons (mainly the latter). But this limited application was not so much a consequence of the substantive criteria used in interpreting the different free movement rules (we have seen that proportionality could also be involved in assessing equivalence in services and persons) as it was a consequence of the institutional elements inherent in the different case laws of the Court and its interplay with the litigation dynamics of economic actors.

II. Harmony and Dissonance: Andante, Poco Sostenuto

A. The Sunday Trading *Saga and the* Keck *Outcome*

The Court's approach to free movement of goods was capable of generating a great degree of market integration and, to a considerable extent, the Court of Justice promoted or supplied the legislative harmonisation which the Community political process had difficulties in delivering due to its institutional problems (such as its dependence upon unanimity, until the Single European Act). This role was, however, placing a heavy burden on the resources and legitimacy of the Court. The problems arising from the traditional approach were

[37] The *Sunday Trading* Cases are a perfect example of this. The rules where initially considered as measures having an equivalent effect to quantitative restrictions on imports independently on whether or not those imports where subject to similar rules in their country of origin.

twofold: first, the workload of the Court was becoming increasingly burdened by the growing number of cases challenging any national regulation affecting the economic freedom of economic actors; second, the legitimacy of the Court was being eroded by its degree of involvement in judging the reasonableness of any market regulation, something that always involves a sizeable margin of discretionary powers and complex economic and social policy analyses. These problems were expressly mentioned by the Advocate-General Van Gerven in his Opinion in the first *Sunday Trading* Case. Referring to the traditional approach of the Court, the Advocate-General stated:

> the Court will inevitably have to decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products. The question may arise whether excessive demands would not then be put on the Court, which would be confronted with countless new mandatory requirements and grounds of justification.[38]

The *Sunday Trading* Saga, through which many national economic operators challenged, under Article 28, national regulatory policies whose impact on trade was only marginal,[39] worked as a wake up call to the Court, stressing both the limits of its judicial resources and the problems of legitimacy involved in such policy judgments. At the same time, the Community political process was able, after the Single European Act, to intervene much more effectively in harmonising national measures and promoting the emergence of an internal market.[40]

The decision in *Keck and Mithouard*[41] can be seen as a natural consequence of these developments. In part, it responded to calls from legal commentators to increase certainty and to reduce the overload of cases in the Court. But, as we will see, it can also be presented as part of a broader change in the philosophy behind the Court's case law with regard to the different free movement rules.[42] In *Keck,* the Court renewed its approach to Article 28. Its main concern was to discourage 'the increasing tendency of traders to invoke Article [28] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States'.[43] To this end the Court starts by reinterpreting *Cassis de Dijon* in a way that restricts its application to product-requirements:

> In '*Cassis de Dijon*' it was held that, in the absence of harmonisation of legislation, measures of equivalent effect prohibited by *Article [28] include obstacles to the free*

[38] Para 25 of AG Opinion.
[39] See above.
[40] Mainly in the area of goods and services. See Article 100A (now Article 95) EC.
[41] Joined Cases C–267 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097.
[42] See below.
[43] Para 14.

> *movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods* (such as requirements as to designation, form, size, weight, composition, presentation, labelling, packaging) *to goods from other Member States where they are lawfully manufactured and marketed*, even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.[44]

Thus, measures laying down product requirements are submitted to a balance test: the benefits to the public-interest objective must be superior to the costs that flow from the restriction imposed on free movement of goods. However, the same is not the case with regard to 'national provisions restricting or prohibiting certain selling arrangements.'[45] In the case of such measures the Court decided to reverse the interpretation given to *Dassonville* in subsequent decisions concerning national measures governing 'selling arrangements'. It held:

> contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgement, provided that those provisions apply to all affected traders operating within the national territory and *provided that they affect in the same manner, in law and in fact*, the marketing of domestic products and of those from other Member States.[46]

In the case of measures prohibiting or restricting certain selling arrangements it is therefore not sufficient that they may constitute an obstacle to the free movement of goods to fall under Article 28. Such measures must now discriminate 'in law or in fact' against imported products.

Keck has however left us with three open questions:

1) How does the distinction between product characteristics and selling arrangements operate in practice? To borrow an expression from Stephen Weatherill: does the clarification need clarifying?[47] And has the Court performed this clarification in its recent case law?
2) What justifies the different approaches to rules on product requirements and selling arrangements arising from *Keck*? In other words, what is the normative criterion legitimating the different degrees of judicial activism in the free movement of goods and how does that criterion impact on the distribution of market competencies between courts, the Community political process and the national political processes?

[44] Para 15, citation omitted and emphasis added.

[45] Para 16.

[46] Para 16, citation omitted and emphasis added.

[47] Weatherill, S. 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *CMLRev* 885.

3) Finally, how does the present judicial approach to the free movement of goods relate to the other free movement rules and how should it relate?

B. The Present Criterion I: The Double Burden Test

Keck was bound to raise much criticism since it symbolised a paradigmatic turn in the Court's constitutional approach to free movement.[48] But even among those which welcomed the change in perspective adopted by the Court the decision raised many requests for clarification and fine-tuning in some of its more debatable aspects.[49] The case law subsequent to *Keck* has helped to clarify some of these points while also raising important new questions. A first question regarded the concept of 'selling arrangements'. Was this concept to be understood literally or was the Court ready to include in that concept other rules regulating market circumstances and not product requirements? As I have argued elsewhere, my understanding was that the Court was adopting a broad notion of 'selling arrangements' which corresponded to the distinction between product requirements and market circumstances advanced by Eric White at the time of the *Sunday Trading* Cases.[50] Recently, Joseph Weiler has also argued that there are no reasons to interpret the concept of 'selling arrangements' as excluding other 'market regulation rules—whether selling arrangements or otherwise—that do not bar access'.[51] I will submit that, in effect, the notion of 'selling arrangements' does include other types of market regulation rules which do not regulate the characteristics of a product but simply govern the conditions and methods of sale or other marketing circumstances. The best evidence for this are two cases regarding rules restricting television

[48] See, notably: Gormley, L. 'Two Years After Keck' (1996) 19 *Fordham International Law Journal* 1996, 866; Mattera, A. 'De l'arrêt "Dassonville" à l'arrêt "Keck": l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions' (1994) *RMUE* 117.

[49] The literature on Keck is infinite. The following are some of my favourites, representing a wide range of different views: Reich, N. '"The November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited' (1994) 31 *CMLRev*, 459; Chalmers, D. 'Repackaging the Internal Market—The Ramifications of the *Keck* Judgement' (1994) *ELRev* 385; Bernard, N. 'Discrimination and Free Movement in EC Law' (1996) *ICLQ* 82; Weiler, J. 'The Constitution of the Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Craig, P and de Burca, G. *The Evolution of EU Law* (Oxford, OUP, 1999) at 349, Weatherhill, above n 47; Gormley, above n 48; Mattera, above n 48.

[50] White, E. 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 *CMLRev* 235. The distinction can also be related to a previous proposal by Marenco in 'Pour une interprétation traditionelle de la mesure d'effet equivalent à une restriction quantitative' (1984) *CDE* 291. According to this author indistinctly applicable national measures could be classified as one of two types: measures that require products to be manipulated and those that do not require such manipulation. Briefly restated, the argument was that measures that require changes to products such as labelling, packaging, composition or controls normally impose costs on imported products (in the form of double-controls, re-labelling etc.) which are not imposed on similar national products (see 308–09, 312, 320).

[51] Weiler, above n 49, at 372.

advertising.[52] These rules do not directly relate to 'selling arrangements'. Nevertheless, the Court did include them in the notion of selling arrangements and was satisfied with the fact that they did not discriminate against imports even if they were capable of restricting the importation of goods.[53]

A different and more complex question regards the extent to which non-discriminatory rules governing selling arrangements or market circumstances are in effect totally excluded from the concept of measures having an equivalent effect to quantitative restrictions. Recent cases have stretched the boundary of the distinction between selling arrangements and product requirements. A first line of cases regards selling arrangements which have a side effect on product requirements. These are the easier to make compatible with the *Keck* criteria. The key element in determining whether a measure *prima facie* falls under the scope of application of Article 28 EC is whether it affects the characteristics or contents of the product (product requirements). It has become clear in the case law of the Court that the other face of this definition is that national rules governing 'selling arrangements' or marketing circumstances but which have an impact on the characteristics of the product will also be caught under Article 28. In *Familiapress*[54] the non-discriminatory Austrian rules prohibiting offering consumers free gifts linked to the sale of goods was a regulation of a selling arrangement and not a product requirement. But this did not prevent the Court from considering it a measure having an equivalent effect to a quantitative restriction once it applied to promotions of free gifts advertised in the product itself. For the Court, the 'national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in *Keck* and Mithouard' because 'even though the relevant national legislation is directed against a method of sales promotion, in this cases it bears on the actual content of the products' (newspapers).[55] This was a confirmation of the previous *Mars* decision[56] where the Court classified as rules on product requirements, national legislation which prohibited an advertising campaign that involved the promotion of the campaign in the labelling of the product. Recently, the Court has confirmed this doctrine with regard to registration rules that may require the products to be adapted to domestic standards.[57]

[52] Case C–412/93 *Leclerc* v. *TF 1 Publicité* [1995] ECR I–179 and Case C–6/98 *PRO Sieben Media* [1999] ECR I–7599

[53] 'legislation which prohibits televised advertising within a certain sector concerns selling arrangements since it prohibits a particular form of promotion of a particular method of marketing products' (*PRO Sieben Media*, para 45 and *Leclerc*, para 22).

[54] Case C–368/95 *Vereinigte Familiapress* v. *Heirich Bauer Verlag* [1997] ECR I–3689.

[55] Para 11.

[56] Case C–470/93 *Mars* [1995] ECR I–1923.

[57] In *Aher-Waggon*, the Court subjected the German prohibition of a first national registration for aircraft exceeding certain noise limits to a test of proportionality: Case C–389/96 *Aher-Waggon* [1998] ECR I–04473 (in particular paras 18–25). See also Case C–390/99 *Canal Satellite Digital* Judgment of the Court of 22 January 2002, nyr (mainly, para 30) and Case C–123/00, *Christina Bellamy*, [2001] ECR I-02795.

There is an important conclusion to be taken from these decisions: rules on selling arrangements or other market circumstances which indirectly require changes to be made to the products also fall within the scope of Article 28 pupm if they do not discriminate de jure or de facto against imported products. In other words, the impact on any characteristic of the product takes precedence over the regulation of selling arrangements. In these cases there is also a double burden imposed on the imported products by having to change their characteristics even if by reason of rules on selling arrangements.

But there is a second line of cases which is more difficult to reconcile with the *Keck* test. In *Franzé*,[58] the Court struck down the Swedish rules which subjected the sale, production and importation of alcoholic drinks to a licensing system (to which both home nationals and nationals of other Member States could apply). The Court considered that such a system restricted the free movement of goods and that it was not proportional to the public health aim pursued.[59] In this case, the Court only referred to the broad *Dassonville* test and ignored the *Keck* distinction. *Schutzverband*[60] regarded a geographic restriction prohibiting bakers, butchers and grocers to make sales on rounds in a given territory (administrative district) unless they have an establishment in that territory where they offer for sale the same products as that which was sold on the rounds. It was also considered as a measure having an equivalent effect to a quantitative restriction.

The easiest way to reconcile these cases with the *Keck* ruling would be by treating them as *de facto* discriminatory rules regulating selling arrangements. This justification was actually advanced by the Court in *Schutzverband* but not in *Franzé*. In this case, the Court only required the measure to have a restrictive effect on trade, appearing to return to the pure *Dassonville* criterion. Even in *Schutzervand*, if it is true that the measure imposes additional costs on traders from other Member States, the same costs are also imposed on Austrian traders established in other administrative districts of Austria and therefore such requirement does not discriminate on the basis of nationality.

However, the notion of 'additional costs' and 'double-burden' appears to play an important role in explaining the Court's inclusion of all these measures regulating 'selling arrangements' in the scope of article 30. Albeit not referring to *Keck* or to a discriminatory impact, the Court stated in *Franzén* that 'the licensing system constitutes an obstacle to the importation of alcoholic beverages from other Member States in that it imposes additional costs (. . .)'.[61] These cases could therefore be related to the other cases, such as *Mars* and *Familiapress*, where the Court has prima facie prohibited measures regulating 'selling arrangements' or 'marketing circumstances' that imposed an additional burden by reason of its indirect requirement to change the products. In *Franzén*

[58] Case C–189/95 *Harry Franzén* [1997] ECR I–0599

[59] See paras 69 to 76.

[60] Case C–254/98 *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I–09187.

[61] Para 71.

and *Schutzverband*, there is no indirect impact on product requirements but there is an additional cost to imported products arising from either the licensing system or the obligation to have another establishment. These obligations impose on traders from other Member States a double-cost similar to that imposed by product requirements legislation. If a trader has to change its product to enter into another national market it incurs on an additional cost to which home producers usually (but not always) are not subject.[62] It appears that the decisions mentioned extend the rationale of product requirements to measures regulating selling arrangements that also give rise to additional costs. This can constitute a partial return to *Oosthoek's*.[63] In this decision the Court gave two reasons justifying the review of non-discriminatory national measures on marketing methods (selling arrangements). The first reason consisted of the double burden imposed on foreign producers in compelling them to 'adopt advertising or sales promotion schemes which differ from one Member State to another'.[64] The second reason did not require a double burden to be imposed on foreign producers to bring the national measure under review. It would be sufficient that the producer will be forced 'to discontinue a scheme he considers particularly effective'.[65] It would appear from its recent decisions that the Court revives the first argument it provided in *Oosthoek's*. The Court's recognition that the regulation of some selling arrangements may fall within the concept of product requirements may be partly aimed at reviving the concept of measures which, although regulating marketing methods or selling arrangements, also impose a double burden. This double burden argument can even be presented as a form of discrimination (an additional cost imposed on imports but not on domestic products).[66]

C. The Present Criterion II—The Prevention of Market Access Test

The recent decisions of the Court also reflect a concern with measures that bar market access even if non-discriminatory, not regulating product requirements or not imposing a double burden. In *Monsees*[67] the Austrian rules restricting the

[62] According to Advocate-General Tesauro, nothing has changed in the Court's approach to measures affecting product requirements: '[t]hose measures made marketing subject to certain requirements that, if applied to imported products, compelled the producer to incur additional costs in order to gain access to the market of another Member State'; see 'The Community's Internal Market in the light of the Recent Case-law of the Court of Justice' (1995) 15 *YEL* 1, at 4.

[63] Case 286/81 *Oosthoek's* [1982] ECR 4575.

[64] Para 15.

[65] *Ibid*.

[66] Something which was proposed some years ago by Defalque ('Le concept de discrimination en matière de libre circulation des marchandises' (1987) *CDE* 471, mainly at 481). Of course, this means that any sort of legislative disparity is a discrimination and also does not take into account that those domestic products may in turn have to adapt to the standards of the States to which they may also be exported.

[67] Case C–350/97 *Monsees* [1999] ECR I–02921.

transport by road of animals for slaughter by requiring such transport to be carried out only as far as the nearest suitable abattoir and without exceeding a total journey time of six hours and a distance of 130 Kms were considered a violation of Article 28.[68] The Court stated that the effect of the Austrian rules 'is, in fact, to make all international transit by road of animals for slaughter almost impossible in Austria'.[69] The rule was barring access to the market even if not imposing a double burden on imported products.

Another case on the Swedish market rules on alcoholic drinks appears to confirm this trend. In *Gourmet International*,[70] the Court of Justice developed an approach on advertising rules already initiated in *De Agostini*.[71] The Court considered that the Swedish rules prohibiting advertising of alcoholic drinks (notably in specialised magazines) constituted a measure having an equivalent effect to a quantitative restriction. For the Court an almost total ban on advertising would prevent access to the market having a higher impact on imports (since it would reinforce local habits of consumption).[72] Though the Court considers that such a rule amounts to *de facto* discrimination, what is really at stake in this case is a move from a focus on higher impact on imports to prevention of access to the market. *Keck and Mithouard* already included a reference to rules that either prevent access to the market or impede access to imported products any more than they impede the access of domestic products.[73] The Court appears ready to pay greater attention to rules of the first type even if this means rules on selling arrangements.

That the Court may be moving to a test based on market access has been suggested by Weatherill,[74] as well as, with some reservations, by Snell and Andenas.[75] More recently, Weiler has argued for a test of this type to be adopted by the Court. Weiler envisions a reading of Keck restricting the scope of Article 28 but maintaining two types of prima facie prohibitions. The first will be the general rule of free movement prohibiting discrimination, *de iure* or *de facto*, against imported products.[76] The second, which he calls the special rule of free movement, prohibits 'national measures which prevent access to the market of imported goods'.[77] The latter would mean that practically all national measures regarding product-characteristics, to which the Court refers in *Keck*, would have to be justified according to a legitimate and proportional public interest.

[68] See paras 23 to 31.

[69] Para 29.

[70] Case C–405/98 *Gourmet International* [2001] ECR I–01795

[71] Joined Cases 34/95 to C–36/95 *De Agostini and TV-Shop* [1997]ECR I–3843.

[72] Paras. 19–21.

[73] Para. 17.

[74] Weatherill, above n 47.

[75] 'Exploring the Outer Limits—Restrictions on the Free Movement of Goods and Services' (1999) 10 *EBLRev* 252, notably at 272.

[76] Weiler, above n 49 at 372.

[77] *Ibid*., at 373.

In this regard, Weiler's criterion would be quite similar to that of the Court in *Keck*. But Weiler would also prima facie prohibit market regulations or selling arrangements barring access to the national market such as an absolute prohibition on the sale of a certain product.[78] The key to understand Weiler's criterion is the notion of a bar to market access. Hindering market access is not sufficient for a measure to be caught by the prima facie prohibition of Article 28, it is necessary that such measure bars market access for public interest justification to be required.

The cases discussed indicate that the Court is expanding the *Keck* criterion in two ways: first, by including in Article 28 national rules which, although governing selling arrangements or marketing circumstances, also impose an additional cost on products from other Member States in having to comply with a different set of rules from those of their State of origin; second, by considering as measures having equivalent effect to a quantitative restriction, national measures which bar access to the market. Interestingly, such developments in the free movement of goods can lead to a more uniform interpretation of the different free movement rules.

D. The Other Free Movement Rules—From Dissonance to an Emerging Uniform Approach

Soon after *Keck* was decided, the Court appeared to shift its judicial activism to the other free movement rules. In the freedom to provide services the enhanced activism of the Court could be said to pre-date *Keck* since, as we have seen above, there was a progressive tendency towards uniformity with the free movement of goods. The Court has, since *Säger*, adopted a test similar to the wide interpretation of *Cassis de Dijon*. It stated:

> Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'. [Moreover . . .] as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person

[78] *Ibid*., at 372–73. Weiler departs from a parallelism with Article XI of the GATT as recently interpreted by a panel and the Appellate Body in the *Beef Hormones* Case. As Weiler describes, the recent developments of the WTO trade law appear to highlight a two-fold strategy regarding trade restrictions: one path, corresponding to the more traditional interpretation of GATT, focusing on discrimination oriented restrictions on trade; another path, derived from a reborn Article XI, focuses on obstacles-oriented prohibition on points of entry and/or market access denial (at 358).

> providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.[79]

More striking than the developments in the freedom to provide services is the shift visible in the case law on the free movement of persons (establishment and workers). Two decisions signalled the shift in approach in areas where the Court had long remained closely attached to the principle of non-discrimination or national treatment. In *Gebhard*, the Court interpreted the right of establishment as a fundamental freedom guaranteed by the Treaty and proceeded to state that:

> national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[80]

In the famous *Bosman* Case, the Court extended such criteria to the field of the free movement of workers.[81] This could indicate that in return for less activism on the free movement of goods there would be a corresponding increase in activism with regard to the other free movement rules.[82] However, there are also elements of convergence in the case law of the Court. The revival of Article 28 EC, which I have noted before, is one of them. The reference in *Gebhard* and *Bosman* to fundamental freedoms in general is another. The reasoning in these cases can also be read in this light. Both in *Bosman* and *Gebhard* the Court argued that the provisions at stake prevented market access to the individuals in question. They are therefore similar to the decisions barring market access to imported products which, as I have argued, the recent

[79] Case C–76/90 *Säger* [1991] ECR I–4221, paras 12 and 15. See, confirming this decision: Case C–275/92 *Schindler* [1994] ECR I–1039, Case C–3/95 *Reisebüro Broede* [1996] ECR I–6511, and Case C–398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion* [1997] ECR I–03091

[80] Case C–55/94 *Gebhard* [1995] ECR I–4165, para 37.

[81] Case C–415/93 *Bosman* [1995] ECR I–4921, paras 102–104. This decision, however, comes in the sequence of a progressive activism of the Court in this area of the law. According to Johnson and O'Keeffe, writing in 1994, also in the area of free movement of workers, the Court has, 'over the past five years, begun to demonstrate a more open hostility towards national measures which although not discriminatory, are capable of hindering the free movement of workers'. Johnson, E. and O'Keeffe, D. 'From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989–1994' 31 (1994) *CMLRev* 1313 at 1314.

[82] Weatherill makes an excellent attempt to make a global and common reading of the recent case-law on the four freedoms. However, even this author appeared to recognise, at that time, that his reading was more a proposal to the Court (offering the possibility to construct a future single approach to the different freedoms) than a faithful interpretation of the decisions of the Court. See Weatherill, above n 47.

case law includes under the scope of measures having equivalent effect to quantitative restrictions. Moreover, the same ban occurs with regard to all those national measures which require nationals of other Member States to comply with specific qualifications or requirements. These rules both prevent market access and impose a double burden on nationals of other Member States. Previously, those type of measures were only subject to a principle of equivalence but now those requirements can no longer be imposed, even in the absence of equivalent requirements in the country of origin, if they are not proportional and necessary to the pursuit of a legitimate public interest.[83]

The same occurs with regard to other restrictions on the free movement of persons which directly affect market access, even if not discriminating against nationals of other Member States.[84] This movement towards harmony would also explain recent decisions regarding the free movement of persons which did not accept a *prima facie* challenge to measures which nevertheless restricted the free movement of persons. In *Futura Participations*,[85] regarding the impact of certain tax benefits on the right of establishment, the measure challenged was neither discriminatory, nor a ban on market access, nor did it impose an additional burden on companies from other Member States. As a consequence the Court did not even apply a proportionality test and dismissed the case.

In the free movement of services the approximation with the free movement of goods was already expected (and to some extent already happening) and should be welcomed. First, the free movement of services has, in economic terms, many similarities to the free movement of goods. Second, as with goods, most Community legislation on services is subject to majority voting in the Community legislative process and therefore it is in the same position as goods in terms of legislative harmonisation. Third, it would frequently be extremely difficult for the Court to distinguish the effects on the free movement of goods from the effects on the freedom to provide services. National rules that are no longer subject to strict review under the *Keck* test applicable in Article 28 may be repropose to the Court as restrictions to the free movement of services: rules on pharmaceutical or liquor retail sales monopolies can be challenged as a restriction on the freedom to provide services (imagine such products are sold through the internet by certain online shops or service providers), for example. The same can be said of restrictions on advertising which may be seen as restrictions on the provision of advertising services by foreign companies.[86] Recent decisions of the Court have stressed once again how difficult it is for the latter

[83] Case C–234/97 *Bobadilla* [1999] ECR I–04773

[84] See Case C–378/97 *Wijsenbeek* [1999] ECR I–06207

[85] Case C–250/95 *Futura Participations* [1997] ECR I–2471.

[86] See Joined Cases C–34, 35 and 36/95 *Konsumentombudsmannen (KO)* v. *De Agostini* [1997] ECR I–1141, and the comment by Cruz Vilaça 'An Exercise on the Application of Keck and Mirhouard in the Field of Free Provision of Services' in *Mélanges en Hommage à Michel Waelbroek* (Bruxelles, Bruylant, 1999), who argues, however, that it would have been possible for the Court to apply *Keck* in this Case and arrive to the same final outcome (see 806–07).

to prevent challenges to national rules under the free movement of services which it will no longer review under article 28.[87] This explains why the Court appears, with some hesitation,[88] to be moving towards a uniform approach in the free movement of goods and the freedom to provide services. The *Alpine Investments* differentiation from *Keck* could be seen as reflected in the more recent decisions on the free movement of goods which focus on the prevention of market access and/or market ban. In *Alpine Investments*, the Court argued that the measure was prima facie prohibited under the freedom to provide services because it directly prevented market access.[89] We have seen that recent free movement of goods cases appear to share that rationale.

In this way it would be possible to reconcile the case law of the different free movement rules relating to non-discriminatory provisions under the following tests:

a) All national measures which impose an additional burden on products, services or nationals of other Member States by reason of having to comply with a different set of rules from that which they have had to comply with in their country of origin are *prima facie* prohibited and need to be justified as necessary and proportional to the pursuit of a legitimate public interest.
b) All measures which, as a matter of law or of fact, bar access to the market to products, services or nationals of other Member States are also to be considered as *prima facie* prohibited and need to be justified as necessary and proportional to the pursuit of a legitimate public interest.

This, with some hesitation, could be presented as an emerging uniform approach to free movement rules. Against this, it must be noted that the Court of Justice has, so far, never applied the *Keck* distinction in the area of the free movement of persons. When asked to do so, it has always found a way to distinguish the case at hand from *Keck*. If a uniform approach is emerging, should we really have it? And are the tests currently suggested for this approach the best normative criteria?

E. Problems with the Emerging Tests

The double burden test arises from a concern with the additional costs imposed on imported products by having to comply with a new set of rules. This is particularly clear in the case of measures affecting product requirements. Those

[87] See Case C–67/98 *Questore di Verona* [1999] ECR I–07289; Case C–124/97 *Markku Juhani* [1999] ECR I–06067. See also, the Commission decision to start an infringement proceeding against Germany over restrictions on the marketing of CDs (for violation of the freedom to provide services).

[88] *Ibid*.

[89] Case C–384/93 *Alpine Investments* [1995] ECR I–1141. Whether that was actually the case is a different question. See Maduro, M. P. 'The Saga of Article 30 EC Treaty' (1998) 5 *MJ* 298, at 315.

measures that require changes to be made to products in the form of requirements on labelling, packaging, shape, composition or controls will normally impose costs on imported products that are not imposed on national products. This is so because imported products will have to conform to two sets of rules: those of the domestic market and those of the importing market. Thus, they will have to comply with two sets of requirements regarding composition, labelling, packaging, etc. As stated before, such requirements could even be said to constitute discrimination against imports as they impose on them an extra cost to which national products are not subject. Therefore, it is common to associate the double-burden test with a broad rationale of non-discrimination and anti-protectionism. Its extension to measures not related to product requirements would simply reflect the fact that frequently there are also additional costs involved in changing aspects of the marketing or sales strategies of a product to conform with a new set of national rules.

There are however strong normative problems involved in the justification of a double burden test which, as stated, can be linked to a broad concept of discrimination. Under the double burden test, discrimination becomes any sort of burden incurred by foreign nationals, including the cost involved in adapting to different national legislation. The difference between discrimination and lack of harmonisation is thus trivial or, even, non-existent. It is certainly possible to argue that whenever there is a double burden imposed on imports from the lack of harmonisation of national regulations there is discrimination against those imports. The relevant questions are: why should the Court be involved in reviewing all non-harmonised national measures? Shouldn't that harmonising role be performed by the Community political process? A double burden test, even if justified to prevent discriminatory effects, allocates to the Court the review of all non-harmonised national rules.

The second element of the emerging harmonised construction of the free movement rules by the Court is the prevention of market access or, as put forward by Joseph Weiler, the notion of a bar to market access. Hindering market access is not sufficient for a measure to be caught by the prima facie prohibition of Article 28; it is necessary that such measure bars market access for it to require a legitimate and proportional public interest justification. By focusing on prevention of market access, Weiler is prima facie prohibiting either absolute bans on the sales of a product or national measures which do not authorise the entry into a national market of a product exactly as it is produced in its market of origin (this second case corresponds to the double burden test). There are also problems with this criterion. If, for example, a product is required to include a label in the language of the importing country that will be considered as barring its entry into that market (because, without the label, it cannot be imported). On the other hand, if a company sells products via catalogue from another State and is required to change the language used in that catalogue, that would not be taken as barring access to the market by those products (they can still be sold, though not

through those catalogues).[90] However, the latter national regulation may constitute a higher burden for imported products than the former. In the first case, the costs of adding a new label will be marginal for the company and it could easily continue to sell its products on the market of the importing State after complying with that minimum requirement. In the second case, though the product is not physically barred, the economic costs involved in changing the entire catalogue or altering a market strategy may strongly restrict the imports of those products. A strong normative criterion based on market access prevention would have to focus on the economic costs involved in changing either product characteristics, selling arrangements or other marketing conditions. Such economic cost could even be considered as amounting to *de facto* discrimination. But such criterion would immediately require complex economic and social judgments by courts, which is what the test of prevention or bar to market access was precisely designed to avoid. All the uncertainty and litigation that such test was supposed to reduce will return to the Court through the test of *de facto* discrimination. Second, the concept of prevention of market access will also include all legislative disparities regarding products characteristics in the *prima facie* prohibition of Article 28 (all those disparities amount to a prevention of market access for the imported products that do not comply with national requirements). In the end, underlying the double burden or market access tests is a suspicion that national measures of that type are discriminatory since they will impose an additional cost on imported products. But such a broad notion of discrimination ends up coinciding with the problem of legislative disparities. As stated before, the question becomes whether the Court of Justice should review all non-harmonised national regulations?

Of course, these tests attempt to make a delicate balance between the use of judicial resources and the normative aims embraced by the authors as inserted in the free movement rules. One of the conclusions out of *Keck* is that what the Court gains in certainty and freeing of resources it loses in normative coherence. But this is not, in itself, a bad choice. As I have repeatedly stated throughout this article, judicial resources (both physical and in legitimacy) are limited and this means that there are important choices regarding the allocation of judicial activity to be made. Constant trade-offs take place between what the Court should do and what it can do. The only valid question regarding the present trends in the jurisprudence of the Court is whether there is a better alternative in addressing the normative questions of free movement while efficiently allocating the resources of the Court.

[90] Of course, it is still possible to complement the first test with a second one designed to capture measures whose economic impact on the products would amount to a prevention of market access. But, if that is done, the legal certainty and judicial restraint brought by the original test will be lost.

III. Harmony and Dissonance: Allegro Assai, Sostenuto

The question regarding the interpretation of the different free movement rules in the post-*Keck* period should not be whether the Court's present criteria are effective in reviewing all national measures restricting trade but whether the Court's choice to review some measures and not others is the right choice, taking into account the other sources of demand for judicial activism. In a world of scarce judicial resources, where should they be primarily allocated? The answer to this question depends on the institutional alternatives to the Court in promoting free trade with regard to the different free movement rules. It depends on the degree of trust we have on national political processes to regulate in those areas of the law. It also depends on the capacity of the EU political process to bring about harmonised legislation in those different areas of the law. Finally, it depends on the market structures in the economic areas corresponding to the different free movement rules and the way those structures may hinder or facilitate economic integration. Only by looking at these different institutional alternatives can one appropriately allocate the available judicial resources and decide on the different degrees of judicial activism that may be required with regard to the different free movement rules.

In the area of the free movement of goods, the Court has chosen to restrict the scope of Article 28 and increase the certainty of its application. The Court's case law will not mean that, as feared by Gormley, we are in 'an open season for all sorts of restrictions'.[91] It may be true that some national measures restricting trade will no longer be reviewed by the Court but that tells us nothing about whether the Court should review those measures. First, there are restrictions on trade arising from legislative disparities that can be better dealt with by the legislative process of the European Union. Second, even where there may be good arguments in favour of the judicial review of national measures restricting free movement, there may be better arguments for the Court not to do it. The Court has to allocate its resources among different functions and areas of the law. As we have seen, the strong activism followed by the Court in the area of free movement of goods was possible because of their being less litigation generated in other areas of Community law and a more restricted scope being given to other Treaty provisions such as the free movement of persons. There may now be good reasons for the Court to shift its activism and resources to promote the free movement of persons and the review of Community legislation.

After *Keck*, it appeared that, whilst it was restricting the scope of the free movement of goods, the Court was expanding the scope of application of the free movement of services and persons.[92] Yet the more recent developments in

[91] Gormley, above n 48 at 885.

[92] As stated above the most emblematic decisions of this expansion were the rulings in *Sager*, *Gebhart* and *Bosman*. See my analysis of this trend in *We, The Court* above n 10, and in 'The Saga of Article 30', above n 86.

the different areas of the Court's case law discussed above indicate that it may be moving towards a uniform approach based on the formal concepts of double burden and prevention of market access. Such a uniform approach may be praised for attempting finally to generate a higher degree of legal certainty and coherence in the interpretation of the different free movement provisions. On the other hand, a uniform approach may ignore the different claims for judicial activism arising from the different institutional contexts of the different free movement provisions.

The institutional contexts of services and goods may justify an identical degree of judicial activism to these free movement rules, since the capacity for intervention of the EU political process tends to be similar in these areas of the law and the market structures of services and goods also tend to be similar. Furthermore, the frequent coincidence between restrictions to services affecting goods, and vice versa, makes it difficult to have different approaches in those areas. But the same is not the case with the free movement of persons. The areas of free movement of persons tend, at this stage of the common market, to remain more strongly dominated by national interest groups since they tend to regulate access to work, professional activities, and services whose conditions are normally set up on the basis of the conditions of the national market, national education and national qualifications. Moreover, these type of requirements associated with the free movement of persons (e.g.: professional qualifications) normally impose a higher burden on out of state nationals, further contributing to the lower mobility of people as compared to goods. Furthermore, this is an area where, unlike goods and services, the European Union decision-making process is still (to some extent) dominated by a unanimity rule[93] and by high transaction and information costs. This makes the EU political process a less viable alternative to promote market integration through legislative harmonisation (contrary to what is now the case in goods and services). The free movement of persons is the area which has deserved less legislative attention[94]. To this, one should also add the higher information and transaction costs associated with many of the litigants who would profit more from the free movement of persons (mainly independent professionals and workers who tend to be one-shot litigants, contrary to companies who are usually repeat litigants). This requires the Court to set higher incentives for litigation in these areas.

The problems highlighted in the institutional alternatives available to the Court in integrating the market in free movement of persons, justify a reversal

[93] See the exceptions imposing unanimity voting in the specific empowering clauses of the free movement of persons (Articles 42 and 47) and, for the other legislative areas affecting the free movement of persons, the exclusion of majority voting for legislation on free movement of persons adopted under the internal market competences (Article 95, n.2).

[94] According to Johnson and O'Keeffe, free movement of workers is 'an area of law which, in recent years at least, has received scant legislative attention from the Council', see above n 78 at 1313.

of fortunes in the Court's case law to the different free movement rules. A higher priority for judicial activity should be given to the previously more 'neglected' area of free movement of persons. This means that the Court should concentrate its judicial resources in those areas where market integration is less developed. In a world of limited judicial resources it makes more sense, in reviewing national measures which restrict free movement, to give judicial priority to those restrictions which are less likely to be overcome by the other institutional alternatives.

Still, it may be argued that there is no basis in the Treaty to adopt a more active approach with regard to the free movement of persons and that it will also be difficult to keep the two strands of case law separate. The problems arising from the lack of a uniform legal criterion presented above in the context of the relation between goods and services may also, albeit to a lesser extent, resurface in the relation between goods and persons. For example, cases which presently are not accepted for review under Article 28 could now be challenged under the free movement of persons: Sunday trading has already been challenged under the right of establishment[95]; even the prohibition of a resale at a loss such as that in *Keck* can be seen as a restriction on the right of establishment of supermarket companies. This would again raise the issue of legal coherence.

The solution to this problem lies in a clear assumption of the institutional aspects involved in the legal options faced by the Court. Only a comparative institutional analysis can provide this by taking seriously the fact that the scope of the different free movement rules must also depend on the different capacity in different instances of the institutions available to promote those freedoms. Such a criterion will recognise the institutional choices made by the Court. It would determine the degree of judicial intervention on the basis of the available institutional alternatives to the Court in promoting market regulation and integration. It will safeguard legal coherence while authorising the Court to exert different degrees of judicial activism on the basis of those different institutional alternatives. I have already designed such a test in the context of Article 28, arguing that the Court of Justice should only second-guess national political processes where these are suspected of under-representing the interests of nationals of other Member States. I have made a distinction between rules affecting cross-national interests (rules that regulate issues where the interests are uniform between home nationals and nationals of other Member States) and national interests (rules that regulate issues where the interests of home nationals and nationals of other Member States are not uniform). The latter type of rules would be prone to suffering from an institutional malfunction in the representation of the interests of nationals of other Member States (national

[95] See Joined Cases C–418/93, C–419/93, C–420/93, C–421/93, C–460/93, C–461/93, C–462/93, C–464/93, C–9/94, C–10/94, C–11/94, C–14/94, C–15/94, C–23/94, C–24/94 and C–332/94 *Semeraro* [1996] ECR I–2975.

bias).[96] I suggest that the application of such criterion to the other free movement rules would maintain legal coherence while authorising the Court to be more activist in the area of the free movement of persons. This is so, because, as argued before, the regulation of the free movement of persons tends to be subject to a higher degree of capture by national interest groups. In many instances of national regulations affecting the free movement of persons the interests embedded in the issues tend to be different for home nationals and nationals of other Member States as a consequence of the differences in qualifications and market structures. In these cases, the national measures are prone to under-represent out-of-state interests and would be subject to strict review (under the tests of proportionality and necessity). The need for judicial intervention in this area is further enhanced by the problems with the institutional alternatives to the Court in promoting market integration in the area of the free movement of persons. A criterion based on institutional alternatives would therefore authorise the Court to have different degrees of judicial activism with regard to the different free movement rules on the basis of their different levels of market integration and on the basis of the different conditions for intervention of the EU and national political processes.

[96] See, for example, Maduro, above n 10 at 166 ff.

16

TRESPASSING ON SACRED GROUND: THE IMPLIED EXTERNAL COMPETENCE OF THE EUROPEAN COMMUNITY

*David L. Scannell**

I. Introduction

This article is about reaching a closing door before it shuts. The door in question is the academic and institutional approach which has been taken since 1971 to the Court of Justice's seminal decision on the Community's implied external competence[1] in Case *Commission* v. *Council* (the '*AETR*' case).[2] A recent study of the rules enunciated by the Court is prefaced by an apologetic justification for daring to trespass on the sacred ground of the old authorities[3], exemplifying the sclerotic complacency which now seems to characterise disquisition in the field. There is much to be regretted in this, since it is by no means clear some thirty years after the *AETR* decision that the correct analysis of those authorities has been unearthed. It is hoped that there is still room for debate on the matter.

So far as Community external relations law is concerned, the *AETR* case is traditionally taken as authority for the following propositions of law:

1) The Community is clothed not only with legal personality, but with international legal personality and capacity to act in the international arena (paragraphs 13–14);

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[1] The concept of implied competence traces its provenance to the early jurisprudence of the U.S. Supreme Court, *McCullough* v. *Maryland* 4 Wheaton 400–437 (1819) *per* Marshall, CJ, generally being considered to be the *locus classicus*: Zuleeg, M. 'International Organisations, Implied Powers', in Bernhardt, R. (ed.) *Encyclopaedia of Public International Law* (1995), 1312, 1312; Skubiszewski, K. 'Implied Powers of International Organisations' in Dinstein, Y. (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, Martinus Nijhoff, 1989) 855, 855.

[2] Case 22/70 [1971] ECR 263.

[3] Dashwood, A. and Heliskoski, J. 'The classic authorities revisited' in Dashwood, A. and Hillion, C. (eds.) *The General Law of E.C. External Relations* (London, Sweet & Maxwell, 2000) 3, 3, para 1.01.

2) The Community's external competence is not confined to those fields in respect of which competence is expressly conferred by the Treaty (paragraphs 12 and 15);
3) External competence may arise expressly or by implication (paragraph 16);
4) Implied external competence may arise from the scheme of the Treaty;
5) Alternatively, implied external competence may arise pursuant to what is commonly called the '*AETR* principle', where Community rules have been enacted and their operation might be affected if the Member States were free to accept international commitments in relation to the same subject-matter (paragraphs 17–19 and 22);[4]
6) Implied external competence which arises pursuant to the *AETR* principle is exclusive in nature (paragraphs 17–18).

It is chiefly, though not exclusively, with proposition number 5, above, that this paper seeks to join issue. A clear and reasonably recent articulation of the common interpretation of the so-called '*AETR* principle' has been provided by Dashwood and Heliskoski:

> the principle was treated by the Court as having a dual function. It may seem, on its face, to be about the circumstances that deprive the Member States of competence they previously enjoyed to act internationally in a certain matter, thereby rendering Community competence in the matter in question exclusive. . . . However, that is only its secondary (almost incidental) function: as presented in the judgment, the principle serves, first and foremost, as a way of establishing the *existence* of Community competence.[5]

Later, in another essay forming part of the same volume, Professor Dashwood explains how the principle works:

[4] Virtually all of the commentators in the area have accepted this analysis of *AETR*, para 17, but see, in particular, Hartley, T. *The Foundations of European Community Law* 4th edn (Oxford, OUP, 1998) chapter 6, 171; Dashwood and Heliskoski, above n 3, 5–6 and 18; Dashwood, A. 'The attribution of external relations competence' in Dashwood and Hillion, above n 3, especially 134–36, paras 8.19–20; Cremona, M. 'External Relations and External Competence: The Emergence of an Integrated Policy' in Craig, P. and de Búrca, G. (eds.) *The Evolution of EU Law* (Oxford, OUP, 1999), chapter 4, 140; Snyder, F. on 'Implied Powers' in Monar, J.; Neuwhal, N.; O'Keeffe, D. and Robinson, W. (eds.) *Butterworths Expert Guide to the European Union* (London, Butterworths 1996), 192; Timmermans, C. 'Division of external powers between Community and Member States in the field of the harmonisation of national law—a case study' in Timmermans, C. and Völker, E.L.M. (eds.) *Division of Powers Between the European Communities and their Member States in the Field of External Relations* (Deventer, Kluwer, 1981), 15, 18; Weiler, J. 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in Weiler, J. *The Constitution of Europe, 'Do the New Clothes have an Emperor?' and other essays on European Integration* (Cambridge, CUP, 1999) 130, 171. Only Takis Tridimas and Piet Eeckhout seem to have eschewed it, though they do not provide a clear alternative interpretation for paras 17 and 22, *AETR*; see Tridimas, T. and Eeckhout, P. 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism' (1994) 14 *YEL* 143.

[5] Dashwood and Heliskoski, above n 3 at 5–6.

> Member States must abstain altogether from undertaking international commitments which might affect Community rules, because the usual remedy of disapplying incompatible national legislation would not be available in such cases. That creates a gap, which can only be filled by Community competence.[6]

These are strong claims indeed and surely merit closer examination. Do paragraphs 17–19 and 22 of the *AETR* decision really serve first and foremost as a way of establishing the *existence* of Community competence? Does the Court's subsequent jurisprudence substantiate this interpretation of *AETR*?

In short, I have been unable, despite some considerable effort, to interpret *AETR* in such manner as to assert that it does indeed provide authority for the proposition that competence can be attributed to the Community by reason only of the adoption by the Community institutions of internal rules. It is, I should say, conceded at the outset that the language employed by the Court in all but the most recent of its Article 300 (6) EC opinions has not been conducive to legal certainty; nobody can be criticised for interpreting the authorities as they have traditionally been interpreted. After all, since 1971 the Council and Commission have consistently harnessed their legal arguments before the Court to that interpretation. Council practice, even after Opinion 2/94, continues to be snugly hitched to it.[7] Indeed, although this article attempts to extract the most logical interpretation from the wording of the Court's implied external relations decisions and opinions, the ultimate basis of the thesis advanced here is simply that recourse must be had to first principles when faced with ambiguous wording.

The suggestion that the adoption of autonomous rules might have a competence-conferring effect is fundamentally at odds with the first principles of European Community law. It distorts the constitutional order enunciated by the Court of Justice itself, involving as it does the irresistible conclusion that the primacy principle, rather than the attribution of competencies principle,

[6] Dashwood, above n 4 at 135.

[7] '[I]t is treated as axiomatic in the day-to-day practice of EC external relations that the adoption of a piece of internal legislation has among its automatic consequences . . . the acquisition by the Community of competence to undertake international commitments in all the matters covered by the measure, including ones in respect of which such competence had previously been lacking. . . . Nobody with experience of Council practice in the conclusion of international agreements could be in the slightest doubt that the *AETR* principle is alive and well, in both its aspects [i.e. exclusivity *and* existence of external competence].' Dashwood, above n 4 at 136. Of course, one should remain mindful here of the Court's admonition in Opinion 1/94 *WTO* [1994] ECR I–5267, para 52, rejecting the Commission's argument that the conclusion of the GATS provisions on transport services came within the Community's pre-emptively exclusive external competence under Article 133 EC: '. . . a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis (see Case 68/86 *United Kingdom* v. *Council* [1988] ECR 855, paragraph 24).' In para 61 the Court makes the same point in relation to the conclusion of the TRIPS Agreement on the basis of the same Article.

governs the question of the *existence* of implied competence. The submission being advanced in this paper is that only the attribution principle can govern the existence question, while primacy can only be relevant *after* implied competence has been found to exist and then only to the question of whether that competence is exclusive or concurrent.

A. *The Attribution of Competence*

It has been clear since the earliest days of the Community that its powers, or more accurately its competencies,[8] are limited.[9] The Treaties represent a contract between the Member States on the one hand and the Community *zweckverband*,[10] on the other, under the terms of which the former have transferred sovereignty to the latter in specific fields for the purposes delineated in those Treaties. The Community, as the Court has said, 'has only those powers which have been conferred upon it.'[11]

The principle of attributed competence precludes Community action which trespasses beyond the frontiers of the province staked out for it by the Member States in the Treaties. The Community cannot purport to extend that province in a manner which obviates the necessity to renegotiate and amend the Treaties in accordance with Article 48 TEU, whether through a misuse of Article 308 EC[12] or through the declaration of a system of implied competence which, for example, confers a competence where none existed before. Furthermore, Member State attribution to the Community of an internal competence does not presuppose the existence of a co-extensive external competence in the same field.[13] The doctrine of implied external competence has proven provocative in

[8] That the Community institutions must act within the limits of the powers conferred upon them has always been apparent from Art. 7 EC, as to which see, among many other cases, Case C–327/91 *France* v. *Commission* [1994] ECR I–3641, paras 30–35. That competencies and powers are not synonymous is clear even from the text of the Treaty. Art. 230(2) EC, for example, distinguishes competence from, *inter alia*, powers in delineating the jurisdiction of the Court in annulment actions. For an early consideration of the distinction, see Bleckmann, A. 'The Competence of the EEC' in Timmermans and Völker, above n 4.

[9] Bleckmann, for instance, wrote of the notion in 1977 (in Bleckmann, A. 'Die Bleihilfekompetenz der Europäischen Gemeinschaften' *DÖV* 1977, 615) and has suggested (in 'The Competence of the EEC', above n 8 at 3) that it derives from the French conception of the special functions of international organisations as distinct from the plenipotence of States, citing Rousseau, C. *Droit international public*, t.II (Paris, Sirey, 1974), 469.

[10] A word which Snyder translates as a 'special purpose association' in his note on 'Competence' in the *Butterworths Expert Guide to the European Union*, Monar *et al*., above n 4, at 51. Skubiszewski (above n 1 at 856) paraphrasing Marshall (above n 1) describes international organisations as organisations of 'enumerated powers'.

[11] Opinion 2/94 *Community accession to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I–1759, para 23. At para 24, the Court went on to say that '[t]hat principle of conferred powers must be respected in both the internal action and the international action of the Community.'

[12] *Ibid*, para 30.

[13] Opinion 1/94, above n 7 at paras 74 and 75.

the past precisely because it involves the discovery of previously hidden runnels through which more competence can potentially flow to the Community than is apparent from the great aqueducts of the express Treaty Articles. To continue the analogy, if I may, the purpose of this article is to show, first, that the runnels are formed only when the aquaducts, inadequate for their purposes, overflow and, second, that the overflow must actually be proved, it cannot be presumed simply on the basis that competence has already flowed to the Community; that is to say that the question of whether or not the Community has exercised the internal competence given to it under the Treaty in a specified field provides no answer to the question of whether or not the Community enjoys an implied external competence in the same field.

Only the constitutional principle of the attribution of competencies, this principle which now expressly under the Treaty forms a triptych of tenets together with the principles of subsidiarity and proportionality which guide the exercise of Community powers,[14] can determine whether the Community is externally competent in any field.

That the question of whether in any case the Community is competent to act is one of constitutional magnitude has been acknowledged by the Court of Justice since its earliest pronouncements on external relations competence. Article 300 (6) EC enables the Court to advise only as to whether an envisaged agreement is 'compatible with the provisions of [the] Treaty'. Accordingly, the Court's repeated finding that its jurisdiction under Article 300 (6) EC extends to determining whether the Community has competence to conclude an envisaged agreement[15], amounts to an implied finding that the division of competencies between the Community and its Member States is a question to be resolved by considering the provisions of the Treaty. The existence or otherwise of internal Community legislation cannot deflect attention from the Treaty as the *fons et origo* of external Community competence, express or implied.

B. The Primacy of European Community Law

I do not propose to dwell on a principle of Community law which is now so firmly entrenched other than to make one simple, but important, point. It is the primacy of European Community law, which to a greater extent than any other consideration, determines whether Community competence, which exists not

[14] Under Art. 5 EC. Shades of the principle of attribution are also detectable within the Common Provisions of the TEU, specifically within Arts. 3 (2) and 6 (3) TEU.

[15] Opinion 1/75 *Export Credits* [1975] ECR 1355, 1360; Ruling 1/78 *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151, (applying the same reasoning to Art. 103 Euratom); Opinion 1/78 *Natural Rubber Agreement* [1979] ECR 2871, 2907, para 30; Opinion 2/91 *Convention No 170 of the ILO concerning safety in the use of chemicals at work* [1993] ECR I–1061, 1075, para 3; Opinion 1/94, above n 7 at para 9; Opinion 2/92 *Third revised decision of the OECD on national treatment* [1995] ECR I–521, 554, para 13.

as a result of primacy but as a result of the attribution of competencies, is exclusive or concurrent. The Court's pronouncements on the nature of the Community's external relations competence have been couched in language which crisply echoes its earliest pronouncements on the primacy of Community law over national law. In this regard, the Court's words in *Costa* v. *ENEL*[16] should be recalled:

> the law stemming from the Treaty . . . could not, because of its special and original nature, be overridden by domestic legal provisions, *however framed*, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[17]

I draw especial attention to the words 'however framed' in this passage, because they make it quite manifest that unilateral Member State action, whether in the form of internal laws or of external commitments, cannot prevail over measures of Community law, whether in the form of autonomous rules or of external commitments.[18] The significance of this admonishment will become apparent in the context of *AETR* and the cases which have followed it.

II. The AETR Case

A. Background

The *AETR* case arose out of what Advocate General Dutheillet de Lamothe described as a 'particularly delicate subject'[19]: the working conditions of crews of vehicles engaged in international road transport. Repeated international efforts to extund an agreement on the matter, including a 1962 European Road Transport Agreement negotiated within the framework of the United Nations Economic Commission for Europe, had floundered for failure to secure the requisite quora of ratifications. Later, the Commission began to consider the question and drafted a Regulation, leading to a resumption of negotiations on the

[16] [1964] ECR 585, 594.

[17] Emphasis added.

[18] Within the Community legal order, agreements concluded by the Community form an integral part of Community law: Case 181/73, *Haegeman* v. *Belgium* [1974] ECR 449, para 5; Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg* [1982] ECR 3641, para 12. This is so whether the Community has concluded the agreement in whole or in part: Case 12/86, *Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 7. For a recent consideration of this line of cases, see Cheyne, I. 'Haegeman, Demirel and their progeny' in Dashwood and Hillion, above n 3 at 20.

[19] At 284.

European Road Transport Agreement in Geneva. Article 3 of that Regulation, adopted by the Council while the negotiations proceeded,[20] prescribed that: '[t]he Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation.' Although matters appeared to be going smoothly, the Commission had begun to express reservations, as early as 1968, as to the manner in which the negotiations were proceeding on the Community side. It wished to be more closely involved and, in particular, wanted its own experts to be present.

The Council act which gave rise to the annulment proceedings arose from a meeting on 20 March 1970 to prepare for the final negotiations in Geneva, which were due to get under way in early April. Again the Commission forcefully expressed its reservations and repined against the procedures used to negotiate and conclude the Agreement. The Council decided at that meeting that the Agreement would be concluded by the Member States, albeit 'in close association' with the Community institutions and the Presidency, and it was this decision which was challenged by the Commission under what is now Article 230 EC.

By the time the Advocate General came to deliver his opinion on the matter, at least four of the six Member States had signed the draft Agreement which had emerged from the Geneva negotiations of 2 and 3 April 1970.

B. The Arguments

It is one of the great ironies of the *AETR* litigation that the Commission never argued on the basis of implied Community competence to conclude the Agreement. It argued throughout that competence to conclude stemmed directly from what is now Article 71 (1) (d) EC (then Article 75 (1) (c) EEC), which permitted the laying down of 'any other appropriate provisions'[21] in order to implement the common transport policy. The very general wording of the provision as a whole left room, in the Commission's view, for the exercise by the Community of treaty-making powers.[22]

As regards, the existence of Regulation 543/69, the Commission's argument was that this meant that the competence enjoyed by the Community under the Treaty, as explained above, 'could only be carried out by the Community.'[23]

As for Article 3 of the Regulation, the Commission argued that this simply represented Council recognition, since it was based solely on Article 75, that the Community enjoyed competence under the Treaty. At no time did the Commission argue that the existence of the Regulation actually generated the Community competence for which it contended. It is clear from page 270 of

[20] Council Regulation 543/69, published on 27 March 1969 and taking effect on 1 April 1969, OJ 1969 L 77/49.

[21] The French text appears to grant an even broader licence, reading 'toutes autres dispositions utiles'.

[22] At 269.

[23] *Ibid*.

the Report of the Judgment that the Court recognised and understood the contours of the Commission's approach:

> It is Article 75 which, in the sphere of transport, provides the basis and defines the limits of Community powers in relation to external agreements.
>
> Nor does the Commission claim by virtue of Article 75 of the Treaty exclusive competence on the part of the Community regarding all agreements which might be entered into with third countries in the sphere of transport. . . . Member States retain their powers only so long as the Community has not exercised its own, that is, has not in fact adopted common provisions.

A fortiori, of course, the Council did not argue that the Regulation conferred competence. It countenanced in its submissions the possibility of Community competence on the basis of Article 75 and focused its arguments on exclusivity, pleading that

> [e]ven if it is conceded that Article 75 (1) (c) may confer on the Community authority to enter into international agreements, such authority cannot be general and exclusive, but at the most incidental.[24]

The point to be noted here is that the pleadings revealed some common ground between the Council and the Commission on the question of whether the Community was externally competent in the field of transport. The fulcrum of the case appears to have been the narrower point of whether the Community's external transport competence was exclusive or concurrent with that of the Member States. For this reason, the Commission raised the issue of the nature of the Community's competence *before* the logically antecedent issue of whether the Community had competence *simpliciter*. It is my view that the Court's reasoning in addressing the salient issues reflects the same *hysteron-proteron* and it is to this reasoning that I now turn.

C. *The Judgment*

It is at paragraph 15 of its judgment that the Court began to address the issue of whether the Community could enjoy implied external competencies. It was not enough, in determining whether in a particular case the Community was externally competent, to examine substantive Treaty provisions in isolation. One had to go further, to examine 'the whole scheme of the Treaty.'[25] It went on to say, in paragraph 16, that

[24] At 271.

[25] Para 15. Ganshof Van Der Meersch elegantly described the relevance of this conclusion shortly after it was made. It affirms that *'le traité n'est pas seulement une juxtaposition d'articles, mais représente une construction d'ensemble, un 'système', qui doit être pris en considération comme tel pour déterminer l'étendue des compétences communautaires'*; see 'Les relations extérieures de la CEE dans le domaine des politiques communes et l'arrêt de la Cour de justice du 31 mars 1971' (1972) *CDE* 127, 135.

> [s]uch authority arises not only from an express conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

Then comes what has become known as 'the *AETR* principle'. The principle bubbles to the surface of the Court's reasoning in two places; at paragraphs 17–19, which read as follows:

> In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.
>
> As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.
>
> With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations,

and at paragraph 22, which is in these terms:

> it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

The principle has been almost universally interpreted as meaning that the adoption by the Community of autonomous common rules[26] not only has the effect of disabling Member State competence to the extent that its exercise might conflict with those autonomous rules, but also of transferring to the Community an exclusive competence in the same field. I consider that interpretation to be flawed.

The Court in *AETR* did *not* rule that Community competence to conclude the European Road Transport Agreement derived from the adoption of

[26] Not necessarily in implementation of a common policy though, as para 17 might have suggested. In Opinion 2/91 (above n 15), the German, Irish and Spanish Governments had sought to confine 'the *AETR* effect' to such cases but, for at least two reasons, that argument was always bound to fail. First, if one accepts that the principle informing para 17 of *AETR* is the primacy of Community law over national laws, however framed, then it makes no logical sense to seek to distinguish between different types of Community law and to suggest that one type is superior but another is not. Second, only para 17 of the *AETR* case spoke of a common policy (and clearly this was only because that case involved a common policy—the common transport policy). Para 22, which drives home the same message, speaks more generally of the promulgation of rules 'for the attainment of the objectives of the Treaty'. Unsurprisingly, then, the Court rebuffed the argument in Opinion 2/91 at paras 10 and 11.

Regulation 543/69, but rather, as the Commission had argued, that it derived from Article 75 EEC. The test of *existence* of Community competence is not to be found in paragraphs 17 and 22 of the judgment but in paragraphs 23 to 27 thereof. It is worth considering what these latter paragraphs had to say:

> According to Article 74, the objectives of the Treaty in matters of transport are to be pursued within the framework of a common policy.
>
> With this in view, Article 75 (1) directs the Council to lay down common rules and, in addition, "any other appropriate provisions".
>
> By the terms of subparagraph (a) of the same provision, those common rules are applicable "to international transport to or from the territory of a Member State or passing across the territory of one or more Member States".
>
> This provision is equally concerned with transport from or to third countries, as regards that part of the journey which takes place on Community territory.
>
> It thus assumes that the powers of the Community extend to relationships arising from international law, and hence involve the *need* in the sphere in question for agreements with the third countries concerned.[27]

This represents a full acceptance of the Commission's argument that in order for Article 75 to enjoy full effect,[28] it had to be interpreted as a provision bestowing both internal and external competence on the Community. Indeed, it may be thought that these paragraphs represent a recognition by the Court of *express* competence pursuant to Article 75 (1) EEC to conclude the Agreement and limited authority for this view can be found in the Court's subsequent Article 300 (6) EC opinions.[29] There is certainly a strong argument to be made that the Court may simply have interpreted Article 75 (1) EEC teleologically and found, on the basis of that interpretative approach, that the words of the Article themselves were competence-conferring on the international level.[30]

[27] Emphasis added.

[28] It is generally accepted as a matter of public international law that it is legitimate to interpret the purposes and objectives of international organisations and to interpret their constituent constitutions/treaties in the manner most conducive to the achievement of those objectives: Lauterpacht, E. *The Development of the Law of International Organisations by the Decisions of International Tribunals*, 152 (1976, IV) *Recueil des Cours* 377, 420. Lauterpacht makes it clear in this piece that it is the principle of effectiveness which generates implied competence. Such an interpretation is compatible with the notion of attributed competencies since the implied competence 'follows from what has already been agreed upon by [the Member States] in the constituent treaty. . . . One always remains within the province of that treaty: the purpose of implication is to give efficacy to what has been bestowed on the organization': Skubiszewski, above n 1 at 859–60.

[29] Opinion 1/76 *Draft Agreement establishing a European laying up fund for inland waterway vessels* [1977] ECR 741 at para 5; Opinion 1/94 at paras 76 and 81.

[30] '*Ainsi, un article du traité permettant au Conseil ou à la Commission de prendre les 'dispositions utiles', sans préciser la nature de ces dispositions, contient une habilitation implicite de conclure des accords internationaux concernant la matière visée. Tel est le cas . . . de l'article 75*

Nevertheless, it must be conceded that, at least at the time of the *AETR* case itself, the Court did not espouse the view that Article 75 (1) EEC was capable of bearing an interpretation which expressly extended the competence of the Community to the international plane. Indeed, in paragraph 28, the Court conceded that

> it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements.[31]

The Court's response, then, goes beyond the broad, teleological, interpretation of the words 'any other appropriate provisions', in Article 75(1)(c) EEC, urged by the Commission. Instead, the interpretation was applied which the Court deemed necessary to ensure that the Article could be reasonably and usefully applied. In this regard, the approach adumbrates that taken in one of the Court's earliest decisions, taken under the Coal and Steel Treaty—the *Belgian Coal Federation Case*:

> without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied.[32]

par. 1 litt. (c) du traité CEE relatif à l'élaboration de la politique commune des transports.' Waelbroeck, M. 'L'arrêt A.E.T.R. et les compétences externes de la Communauté économique européenne' (1971) *Intégration* 79, 84. See also, Barav, A. 'The division of external relations power between the European Economic Community and the Member States in the case-law of the Court of Justice' in Timmermans and Völker, above n 4 at 34, and Tridimas and Eeckhout, above n 4 at 150.

[31] The Advocate-General was also of the view that Art. 75(1)(c) EEC could not be used as a legal basis for the conclusion of the Agreement. He felt that the words 'international transport' referred in essence to intra-Community transport, since it was to that alone that the common rules were directly applicable. He also expressed the opinion that it was difficult to concede that so vague an expression as 'any other appropriate provisions' could encompass so precise a power as that of the Community to negotiate and conclude agreements with third countries. Had the authors of the Treaty intended such an outcome, they would have inserted an express provision to that effect, as they had done elsewhere in the Treaty. The Advocate-General's approach clearly did not inform the Court's reasoning on this point, however, as we shall see in a moment. Further, the Court has consistently made it abundantly clear, in its Opinions pursuant to Art. 300 (6) EC no less than in other contexts, that an historical approach to the interpretation of the Treaty will always cede to a teleological one. In para 44 of Opinion 1/78, the Court, in considering whether the common commercial policy could extend beyond the liberalisation of trade to the regulation of world markets, eschewed an historical approach which would have petrified Art. 133 EC:

> Although it may be thought that at the time the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at the regulation of the world market for certain products rather than at a mere liberalization of trade.

[32] Case 8/55 *Fédération Charbonnière de Belgique* v. *High Authority of the European Coal and Steel Community* [1954–56] ECR 292, 299.

If, as I argue, paragraphs 23–27 contain the test for the existence of an implied external Community competence, how is one to rationalise paragraphs 16–19 of the *AETR* judgment?

Looking first at paragraph 16, it is my submission that most of the confusion surrounding *AETR* stems from the words 'and from measures adopted, within the framework of those provisions, by the Community institutions', quoted above. For sure, these words are vulnerable to an interpretation which suggests that, independently of the Treaty, implied external competence can arise from the adoption of internal Community rules. Nevertheless, it can just as legitimately be contended that the sense which the Court sought to convey in this paragraph was not that there are three modes of attribution of competence, *viz*. express, implied from other Treaty provisions and implied from measures adopted but, rather, that there are two, namely

1) Express conferment by the Treaty and
2) Implied conferment by the *conjunction* of the Treaty and such measures as might have been adopted thereunder in the same field.

It is true that the word 'from', quoted above, which is the third 'from' in the paragraph, might be thought to indicate a separate source of competence, since the structure of the sentence, for the purpose of this enquiry is: '. . . arises from . . . but may equally flow from . . . and from. . . .' Consider, however, the Court's reformulation of this paragraph in Opinion 1/92 *on the Creation of a European Economic Area*:[33]

> It follows from the Court's case law (judgment in Case 22/70 *Commission* v. *Council* [1971] ECR 263 ('the ERTA case'), judgment in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279 and Opinion 1/76 [1977] ECR 741, paragraph 3) that the Community's authority to enter into international agreements arises not only from an express attribution by the Treaty, but also from other provisions of the Treaty and measures taken pursuant to those provisions by the Community institutions.[34]

The structure of the sentence has become '. . . arises . . . from . . . but also from . . .' The third troublesome 'from' has vanished.

In Opinion 1/76,[35] where no internal measures had been adopted by the Community which were liable to be affected by the conclusion of the draft Agreement at issue in that case, the same formulation appears in truncated form, without the offending words:

> [T]he Court has already had occasion to state . . . that authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions.[36]

[33] [1992] ECR I–2821.
[34] *Ibid*., para 39, 755.
[35] Opinion 1/76.
[36] Para 3.

There is good reason to believe that in paragraphs 17–19, the Court's general pronouncements on the 'blocking' effect of the adoption by the Community of autonomous rules were intended to contribute only to its analysis of the *nature* of the Community's external competence under Article 75. The Commission had argued throughout that substantive differences between the proposed Agreement and the terms of Regulation 543/69 meant that unless the Community competence which it sought to establish on the basis of Article 75 EEC was exclusive in nature, the useful effect of the Regulation was in danger of being undermined by Member State action.[37] The case had in fact revealed an extraordinarily obvious Member State attempt to undermine the primacy principle; at its meeting on 20 March 1970, the Council had expressly requested the Commission to submit proposals for the modification of the pre-existing Community Regulation of 1969 to ensure its compatibility with the Road Transport Agreement which the Member States proposed to conclude. At a time when the Court of Justice was still engaged in the difficult articulation of the principle of the primacy of European Community law over national laws, it would have been inconceivable to leave this potential conflict unaddressed. Paragraphs 17, 18, 21 and 22, then, represent the Court's assertion of the relevance of the principle of primacy to the external level; the Member States are no more at liberty to adopt measures which are inconsistent with internal Community laws on the international level than they are on the national level. The wording of the paragraphs themselves bears a remarkable resemblance to the words used by the Court in its classic supremacy jurisprudence, even to the extent of recourse to Article 10 EC (ex Article 5 EEC) as a basis for the obligation to obtemper that supremacy.[38] The so-called '*AETR* principle', then, is no more and no less than the principle of the supremacy of Community law over national law, however framed. This, I respectfully submit, is the only rational explanation which can be imposed on these paragraphs, consistent with the principles of supremacy and of attributed competencies. It does seem, however, that the supremacy rules, when projected into the realm of external relations law, resonate with greater plangency than they do in the realm of 'internal' Community law; once the Community has promulgated autonomous rules,

> the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[39]

[37] In particular, it was contended that the Agreement would jeopardise the principle of territoriality enshrined within the Regulation (since the Agreement favoured an approach based on nationality) and that conclusion of the Agreement would involve the abandonment of the uniformity of arrangements already made within the Community.

[38] Compare *Costa* v. *ENEL* (above n 16) at 594, with *AETR* at 275, para 21.

[39] *AETR*, para 18. Weiler suggests that the Court's conception of the nature of the Community's external competence under para 17 of *AETR* lies somewhere between supremacy and pre-emption, see above n 4 at 173.

Can it be said, though, that the exhaustion of Member State external competence in such a situation in some sense 'confers' a corresponding and co-extensive competence on the Community? I think not. It is not enough for the Community to say that it has a competence commensurate with that lost by the Member States. Unless it can point to a legal basis in the Treaty, it simply cannot act.

Is it suggested, to take a hypothetical example, in a field in which the Community is internally competent but is *expressly* excluded pursuant to the Treaty from exercising an external competence,[40] that such an express Treaty prophylaxis could be circumvented by the adoption of internal rules which might be 'affected' in the event of Member State activity in the same area? Such a conclusion could only be seen as preposterously at odds with the constitutional nature of competence,[41] yet so absolute is the demand in paragraphs 17, 18 and 22, *AETR*, as it is generally interpreted, so disjointed from the notions of effectiveness and necessity, that there is no scope for avoiding such a preposterous outcome. As for the suggestion that the disabling of Member State competence creates a lacuna, or 'gap', which must be filled by the exercise of Community competence, I do not think this argument to be convincing. On the internal level, the proscription of the adoption of unilateral acts incompatible with the Community legal order stems from the permanent limitation of the Member States' sovereign rights.[42] This leads to two conclusions. First, there can be no interdiction unless the Member States have limited their sovereign rights in the relevant field, that is, unless the Member States have already transferred competence to the Community in that field. Accordingly, paragraphs 17 and 22, *AETR*, can only be of relevance once it is decided that the Community has external competence. Second, the fact that the Member States, by reason of the permanent limitation of their sovereign rights, cannot adopt subsequent unilateral acts which are incompatible with the Community *acquis* does not mean that the Community itself *can*. The Community can only act within the limits of its competencies and in accordance with the objectives of the Treaty. When the Court says, in paragraph 18, *AETR*, that 'the Community alone is in a position to assume and carry out contractual obligations towards third coun-

[40] The founding States of international organisations are, of course, free to exclude or restrict implied competencies in the constituent acts of the organisations they create: Bindschedler, R. 'La délimitation des compétences des Nations Unies' (1963, I) 108 *Recueil des Cours* 307, 329.

[41] It is equally preposterous to suggest that an *implied* prophylaxis could be obviated, as the Court made clear to the Commission in the contexts of establishment, services and intellectual property harmonisation in Opinion 1/94, at para 86 and at para 100. In its recent decision on tobacco advertising [Case C–376/98 *Germany* v. *Parliament and Council* [2000] ECR I–8419], the Court held at para 79 that Art. 95(1) EC (ex Art. 100a EC) cannot be used as a legal basis in order to obviate an express exclusion of harmonisation found elsewhere in the Treaty, such as Art. 152(4) EC. If Treaty restrictions on competence can operate to truncate an express Treaty conferment of competence then *a fortiori* such a restriction can operate to truncate an implied Treaty conferment of competence.

[42] See *Costa* v. *ENEL* above n 16 at 594.

tries', it is in my submission necessarily implicit that although the Community alone is *potentially eligible* to act in such a situation, it will only actually be *eligible* to act when it is externally competent to do so. Thus, Member State external competence is exhausted upon the adoption of autonomous Community rules (supremacy) and in such a situation, the Community alone can act *provided that it has external competence so to do* (attribution of competence). This explains why, in *AETR*, having detected an autonomous Community rule which would have been 'affected' by Member State action, it was still necessary for the Court to satisfy itself, in paragraphs 23 to 27 of its judgment, that the Community was externally competent to act to the extent of the exhaustion of Member State competence.

The suggestion has also been advanced that paragraphs 17 and 22, *AETR*, might themselves enshrine a test of 'necessity' such as could validly give rise to competence under the Treaty. Professor Dashwood has coined the helpful neologism 'complementarity' to describe the emergence of implied external competence from Treaty provisions ostensibly conferring an internal competence only and has written that:

> the acceptance by Member States of international obligations liable to affect the operation of enacted common rules, may impede the attainment of the objectives for which legislative competence has been given to the Community. The removal of that impediment, through the acquisition by the Community of (exclusive) external relations competence can thus be seen as 'necessary' to enable the legislator to pursue the specified objectives effectively, and hence as a special case of complementarity.[43]

Certainly, the suggestion that paragraphs 17 and 22 could generate implied competence through necessity rather than supremacy is more readily reconcilable both to the traditional constitutional underpinnings of Community law and to the traditional public international law account of implied competence. However, with this account too I must with respect join issue. The internal rules are protected by the supremacy of Community law. Actions are available under Articles 226–28 EC where Member States act inconsistently with those rules, whether internally or externally. How, then, can it ever be 'necessary' for the Community to act internationally to protect them? All that is really *necessary* to ensure that the attainment of the objectives for which legislative competence has been granted to the Community is not impeded is the exhaustion of Member State competence. The conferral of exclusive external relations competence on the Community in such a situation is at one remove from this solution and is not *necessary* but *supererogatory* and, because the basis of implication is therefore divorced from the notion of necessity, it must be suspect; as a matter of public international law, 'necessity or essentiality are fundamental in the process of implication.'[44]

[43] Dashwood, above n 4 at 135.

[44] Skubiszewski, above n 1 at 863; Lauterpacht, above n 28 at 863.

Returning to the outcome of the *AETR* litigation, the Court concluded that the Community had implied external competence to conclude the European Road Transport Agreement, on the basis of Article 75 EEC, and that that competence had become exclusive upon the adoption of Regulation 543/69. The suggestion throughout is that, before the adoption of the Regulation, the Community's competence was not exclusive but concurrent with that of the Member States.

There remained the question as to whether the Council had been correct, at its meeting of 20 March 1970, to decide that the Agreement should be concluded by the Member States alone. It concluded, rather ingeniously, that the negotiations leading to the Agreement had not been commenced with a *tabula rasa*. The 1962 European Road Transport Agreement had been drafted at a time when, because Regulation 543/69 did not exist, the Member States enjoyed concurrent competence with the Community in the field of road transport. The Court took the view that the negotiations which it had been called upon to review had been aimed simply at 'introducing into the version drawn up in 1962 such modifications as were necessary to enable all the contracting parties to ratify it.'[45] Accordingly, the negotiations leading to the ultimate Agreement spanned periods of concurrent Community competence and exclusive Community competence. Additionally, it would have been difficult for the Member States to explain to third country Parties to the Agreement that the distribution of powers on the Community side had shifted—so difficult that it 'might well have jeopardized the successful outcome of the negotiations'[46]. In such a situation, the Court concluded, it was for the institutions whose powers were directly concerned, namely the Council and the Commission, to cooper-

[45] Para 82.

[46] Para 86. It should be emphasised, however, that the Court's conclusion in *AETR* was not based exclusively on the inconvenience to third countries of substituting the Community at a late stage as the sole party to the Geneva negotiations (the view expressed by Dashwood and Heliskoski, above n 3 at 4–5). Rather, it was based on concurrence of competence at the time of the negotiations and the duty of cooperation which arises in such a situation. In *Kramer*, AG Trabucchi, delivering his opinion on 22 June 1976, sought to clarify the Court's reasoning here, lest it be taken as authority for the proposition that the Member States might enjoy competence in all cases where Community participation might prove uncomfortable for third country negotiating Parties. In para 3 of his opinion, he said that third country participants' objections to Community participation in negotiations 'could in no way affect the rule of law which, in the Community legal order, marks the relationship between the Community and its Member States' (Case 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279 at 1317). Third country resistance 'could not avail to deprive the Community of its powers and to transfer them back to the Member States. At most, in the event of these difficulties proving insurmountable, the Community could authorise its Member States to act on its behalf, sticking strictly to the guidelines which it laid down for them' (ibid. at 1318). The Council later invoked this argument in Opinion 1/94, successfully contending that the 'resolution of the issue of allocation of competence cannot depend on problems which may possibly arise in administration of the agreements.' (above n 7 at para 107).

ate with a view to ensuring that the interests of the Community could be effectively defended.[47]

All that remained for the Court was to decide whether the Council had breached that duty in adopting its decision of the 20 March 1970 and, as we know, it concluded that it had not. A Pyrrhic victory for the Council, then; it had successfully defended the disputed decision and, by extension, the conclusion of the Road Transport Agreement. The Commission, however, had won recognition of the concept of implied Community competence—a concept for which it had not even fought!

III. The AETR Framework for External Relations Activity

From the foregoing analysis, the following propositions can be advanced as regards the extent of the Community's external competence:

(1) The extent of the Community's competencies can only be known by examining the Treaty. It has only those competencies which have been attributed to it by the Member States, pursuant to that Treaty.
(2) Competence may be attributed to the Community either expressly or impliedly, pursuant to the Treaty.
(3) Implied competence may arise either through a teleological reading of the words of specific Treaty articles, or through the operation of a test of 'necessity'.
(4) The Community's implied external competence will be exclusive to the extent of such an overlap between autonomous Community rules and unilaterally or multilaterally-adopted Member State external commitments as might affect or undermine the former. In order to ensure the uniformity and integrity of the Community's internal rules and in order to ensure that the principle of supremacy of Community law is not undermined, Member State competence in the area is disabled. This 'disabling' effect is more pre-emptive than the Community's supremacy-protection measures on the internal level, reflecting the increased risk posed by international agreements, which are less-easily set aside than internal laws, to the Community *acquis*.

A. Application of the AETR framework rules

It is proposed now to examine the *Kramer* case and Opinion 1/76 to consider how they fit into this simple legal framework. It will be seen that *AETR* has never been taken as authority for the proposition that the laying down of autonomous common rules can in some sense generate Community external

[47] Para 87.

competence and that while it may be legitimate to speak of an '*AETR* effect' which converts extant concurrent Community competence into exclusive Community competence, it is misleading to speak of an '*AETR* effect' which creates an exclusive Community competence *ex nihilo*.

B. The Kramer Case

The *Kramer* case was the first to come before the Court post-*AETR* in which the implied external competence of the Community was again at issue.[48] Like *AETR*, it did not arise from a request for the Court's opinion pursuant to Article 300(6) EC. Such recourse was unavailable since the agreement in question, the North-East Atlantic Fisheries Convention ('NEAFC'), had already been concluded by the Member States[49] and at this time in any event, as now, individuals did not have the requisite *locus standi* to request an opinion under the Article. Neither, however, did it arise from annulment proceedings pursuant to Article 230 EC. It arose from the invocation by the Arrondissementsrechtsbanken of Zwolle and Alkmaar (District Courts in the Netherlands) of the Court's *renvoi préjudiciel* jurisdiction under what is now Article 234 EC. The reference to the Court of Justice had been made in the course of criminal prosecutions against individual fishermen in their own name and against a partnership of fishermen for breaching Dutch laws which implemented rules governing sole and plaice fishing which had become binding on the Netherlands under the terms of the NEAFC. The fishermen sought to escape liability by attacking the Netherlands' conclusion of the NEAFC in the first place, at once illustrating that there is more than one way of litigating the issue of external competence within the Community and that such litigation need not always be brandished as a sword but may also be used as a shield. If the fishermen could establish that the NEAFC ought to have been concluded by the Community alone on the basis of exclusive Community competence in the field of international fisheries conservation, the Dutch proceedings could be stayed pending a reference of the matter to the Hoge Raad which could then set aside the offending national criminal legislation. Although the immediate issue so far as the reference was concerned was the compatibility with Community law of the Dutch criminal provisions, the 'real' issues were whether the Community had competence in the field of international fisheries conservation and, if so, whether that competence was exclusive in nature.

At paragraphs 12 to 45 of its judgment, the Court dealt with '[t]he external authority of the Community and the Member States respectively'. It began by acknowledging the absence of an express competence under the Treaties to enter into international commitments within the framework of the fixing of

[48] Joined Cases 3, 4 and 6/76, above n 46.

[49] With the exceptions of Luxembourg and Italy. The NEAFC was signed in London on 24 January 1959 and entered into force on 25 June 1963.

catch quotas and repeated with only minor refinements the words of paragraph 12 of its judgment in *AETR*.[50]

Having then telescoped *AETR*, paragraphs 13 and 14, dealing with the Community's capacity to establish contractual links with third countries, into one 'double' paragraph (Paragraphs 17/18), the Court then recalled paragraphs 15 and 16 of the *AETR* case. It amended those paragraphs in three emblematic respects. First, it replaced the word 'determine', in paragraph 15, *AETR*, with the stronger, more definitive, word 'establish'; the application of the external competence rules will 'establish' the distribution of competencies, it will not merely assist in 'determining' that allocation. Secondly, when addressing the notion of competence which is not express competence, it replaced the words 'but may equally flow from other provisions of the Treaty . . .'[51] with the words 'but may equally flow *implicitly* from other provisions of the Treaty . . .'.[52] Thus, the Court endorsed the semantic concept of 'implied Community competence', which has been in use ever since. Finally, it added the Act of Accession of 1972 to the sources of that implied Community competence. Article 102 of that Act was central to the case, providing that

> From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine the conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

Just as significant as what was said in this section of the judgment, however, is what was not. Despite the fact that there were only two possible cases which might have touched upon the Court's reasoning here, one of which[53] was of no relevance, *AETR* was not cited. One suspects that the Court may have been dissatisfied with the structure, if not the content, of the earlier judgment, which inverted the logical sequence of establishment of competence followed by establishment of nature of competence, and may very well have sought to effect a *remaniement* of the rules of attribution here.

So, having tracked the *AETR* structure up to paragraph 16,[54] the Court then conspicuously departed from it,[55] omitting paragraphs 17–19 of *AETR*. It took up the scent at paragraph 20, *AETR*, as it immediately launched into an examination of whether the Community enjoyed external competence in the field of conservation of the biological resources of the sea. In this regard, the Court began with Article 3(d) (now 3(e)) of the EC Treaty, together with Article 38(3) (now Article 32(3)) EC and Annex II (now Annex I) thereof. It then moved to

[50] Para 16.
[51] *AETR*, para 16.
[52] Emphasis added.
[53] Opinion 1/75.
[54] Paras 16–19/20.
[55] Para 21/25 of the judgment.

consider the two internal Community Regulations which had been adopted in the area,[56] making clear that both had been based on Article 43(2) EC and, finally, it considered the wording of Article 102 of the Act of Accession, quoted above.

It followed from those provisions, taken as a whole, that the Community had internal competence in the sphere of fisheries conservation[57], including the fixing of catch quotas and their allocation between the Member States, but did this internal competence bring with it an external competence? The Court put it thus:

> It should be made clear that, although Article 5 of Regulation No 2141/70 is applicable only to a geographically limited fishing area, it none the less follows [from] Article 102 of the Act of Accession, from Article 1 of the said regulation [which empowers the Community to take conservation measures with regard to waters coming within the sovereignty or within the jurisdiction of one or more Member States] and moreover *from the very nature of things* that the rule-making authority of the Community *ratione materiae* also extends—in so far as the Member States have similar authority under public international law—to fishing on the high seas. The only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the States concerned, including non-member countries.[58]

In this single paragraph, then, the Court answers the question 'competence or no?' It also, incidentally, anticipates the question as to the *nature* of that competence, though this does not become entirely clear until later. It can be seen that, like *AETR*, paragraphs 23–27, competence is detected either on the basis of a teleological reading of Article 102 of the Act of Accession or on the basis of a 'necessity' test designed to ensure the *effet utile* of the Treaty provisions, depending on how one wishes to read it. Competence had been conferred upon the Community on the internal plane to conserve the biological resources of the sea. Such an attribution was meaningless in the absence of a corresponding competence on the external plane, since this was the only way that non-Member States could be enjoined to participate in any conservation measure and, without the participation of non-Member States, any Community measure would be bound to fail[59]. In other words, and like the *AETR* case in the context of international road transport, unless the Community's competence was external as well as internal, the objective for which competence had been attributed could never be fulfilled. This followed 'from the very nature of things'; international fishermen could no more be trusted to remain outside protected

[56] Council Reg. 2141/70 laying down a common structural policy for the fishing industry and Council Reg. 2142/70 on the common organisation of the market in fishery products; OJ, English Special Edition 1970 (III), 703 and 707 respectively.

[57] Para 30/33.

[58] Para 29/33. Emphasis added.

[59] See also Opinion 1/94 at para 85.

Community waters than fish could be trusted to remain within them. *Kramer*, indeed, goes one step beyond *AETR* in that it clearly suggests that *any* action taken in the field of fisheries conservation must be external *ratione materiae*. There simply was no such thing as internal competence in that field. It is for this reason that the Court's conclusion as to the existence of the Community's competence prefigures its conclusion as to the nature of that competence. So far as the existence of competence is concerned, though, what is important is that the Court, in *Kramer*, clearly detected the Community's external competence on the same basis as that in *AETR*, that is a test of 'necessity', itself founded upon the notion of effectiveness of Community law. In itself, of course, this does not diminish the strength of the argument that paragraphs 17 and 22, *AETR*, contain a distinct test of attribution, since no such test *could* have been apposed here in the absence of autonomous Community rules. However, we will soon see that when the Court came to consider the nature of the Community's external fisheries competence in *Kramer*, it *did*, in fact, apply *AETR*, paragraphs 17 and 22, not as a test of attribution but as a test to determine whether the Community's competence is exclusive. This should go some way to indicating that even in the earliest of the Court's post-*AETR* decisions there is no evidence of an '*AETR* effect' which confers competence but only of an '*AETR* effect' which applies the rules of primacy to the international sphere.

In *Kramer*, the fact that the Community had promulgated Regulations 2141 and 2142 in 1970 was of some significance. Assuredly, the Regulations did no more than provide a blueprint for future Council conservation measures, which had not yet been adopted, and no internal legislation had been promulgated which was capable of being 'affected' by the NEAFC, within the meaning of *AETR*. Nevertheless, they had been adopted some eleven years after the signing of the NEAFC and some seven years after its coming into effect.[60] This begs the question as to why, in this case, the Court analysed whether the Community had exercised its competence in the area, having established that it had such competence. According to the traditional account of the so-called '*AETR* effect', this would have been done to determine whether the Community enjoyed competence in the field, but the Court had already confirmed the existence of the Community's competence in paragraphs 21–33 of the judgment, as we have seen. For sure, it may simply have wished to construct a firmer foundation for that competence by finding another, distinct, source with which to

[60] It is true that the only articles of the NEAFC which were directly at issue in *Kramer* were Arts. 7(1) (g) and (h) thereof, which empowered the Fisheries Commission to make recommendations relating to the amount of total catch and its proration amongst Contracting States and to the allocation of the overall fishing effort, since these were the provisions of the NEAFC which the Dutch laws under which the fishermen were being prosecuted purported to implement. It is also true that these provisions came into existence pursuant to a decision of the Delegations in May 1970 and did not enter into force until 4 June 1974, i.e. *after* the adoption of the Community regulations. However, the Delegations' decision was taken pursuant to Art. 7 (2) of the NEAFC, which came into force on 25 June 1963.

nourish it, but if the promulgation of autonomous Community rules capable of being affected by Member State external activity *confers* competence (as the traditional account of paragraphs 17 and 22, *AETR*, would have us believe), then surely it does so only *after* the Community adopts the internal rules. The words '*no longer* have the right', in paragraph 17, *AETR*, and the words '*as and when such common rules come into being*', in paragraph 18, corroborate this view. So looking at *subsequent* internal rules could have had no bearing on the matter of whether the Community enjoyed competence in the relevant field at the relevant time. Accordingly, one is drawn to the conclusion that paragraphs 17 and 22, *AETR*, were *not* applied by the Court as instruments with which to detect Community competence in *Kramer*.

On the other hand, even *subsequent* Community rules are relevant to the question of whether a competence which is enjoyed by the Community (under the 'necessity' principle, in this instance) is exclusive or not, since even Member State rules which pre-exist incompatible Community rules fall foul of the primacy laws.[61] Paragraphs 17 and 22 of the *AETR* judgment were applied by the Court, then, to determine whether the Community enjoyed *exclusive* competence in the field of fisheries conservation and, having found that the Community had not exercised its internal competence, it ruled that the competence which arose under the 'necessity' principle was concurrent in nature, at least at the relevant time.[62]

The matter of exclusivity did not end there, however. The Court went on to hold[63] that the concurrence of competence which applied at the relevant time would expire 'from the sixth year after Accession at the latest' since it was incumbent upon the Council by that time to have adopted measures for the conservation of the resources of the sea in accordance with Article 102 of the Act of Accession. At first glance, this might seem rather an odd conclusion. After all, why should the Community's adoption of, say, a single measure of conservation eclipse entirely the Member States' capacity to enter into international conservation agreements which do not 'affect' that measure, within the meaning of paragraphs 17 and 22, *AETR*? This seems to say something more than that paragraphs 17 and 22 merely project the rules of primacy onto the international plane, since surely the Member States should continue to be at liberty to act to the extent that their actions are not incompatible with such rules as have been posited at Community level. The answer to this conundrum brings us back to paragraph 30/33 of the judgment. What the Court appears to be saying in that paragraph is that it is simply *impossible* for the Council to adopt a measure of fisheries conservation which does not 'fully occupy' the fisheries conservation sector. There would appear to be a presumption that *any* adopted measure fully occupies the sector since this follows, in the words of the Court,

[61] Case 106/77 *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* [1978] ECR 629.
[62] Para 39.
[63] Paras 40–45.

'from the very nature of things', as explained above. Thus, as soon as the Council adopted internal rules governing the protection of the biological resources of the sea, the Community's external competence in the field, theretofore concurrent, would pullulate into exclusivity. This would happen within six years, at the latest, of the new Member States' Accession, so the Court accordingly concluded, with unanswerable logic, that the Community's competence in the field of fisheries conservation was concurrent at the relevant time and would remain so until the sixth year after Accession, at the latest, at which time it would become exclusive.[64]

In the meantime, that is, pending the expiry of concurrence, the Court reiterated its conclusion in *AETR* (without citing the case) as to the obligations incumbent upon the Member States in areas of concurrence, which stem in the main from Article 10 EC.[65]

The Court ultimately ruled that the actual measures adopted by the Netherlands neither jeopardised the objectives and functioning of the system established by Regulations 2141 and 2142/70, since they were concinnous with the Community regulations themselves[66], nor amounted to quantitative restrictions on intra-Community trade since although they capped catch quotas in the short-term, they did so only with a view to ensuring that steady, optimum yields would be available in future.[67]

C. *The Inland Waterways Opinion*

Opinion 1/76 *on a Draft Agreement establishing a European Laying-up fund for inland waterway vessels*[68] was the first opinion given by the Court under Article 300(6) EC involving a consideration of the Community's implied external competence.[69] As in *AETR*, the legal basis of the envisaged agreement was Article 75 EEC, but unlike that case, the agreement in question was what would today be described as a 'mixed' agreement, having been negotiated jointly by the Community and by six of the Member States all of whom were parties either to the 1868 Mannheim Convention[70] or to the Convention for the Canalisation of the Moselle of 27 October 1956.[71]

AETR had already clearly established that Article 75 EEC constituted a

[64] Paras 41 and 44/45.

[65] Para 44/45.

[66] Including Reg. 811/76, adopted after the questions had been referred to the Court, which authorises Member States 'to limit the catches of their fishing fleets'—para 47/49.

[67] Para 56/59.

[68] Above n 29.

[69] Opinion 1/75 had also arisen under the old Art. 228(1) EEC but dealt only with the Community's *express* external competence under Art. 133 EC.

[70] The Revised Convention for the Navigation of the Rhine of 17 October 1868.

[71] The six Member States in question were Germany, France, Luxembourg, Belgium, the Netherlands and the United Kingdom.

legitimate legal basis for action in the field of transport by inland waterway,[72] including the conclusion of international agreements. Unlike the *AETR* and *Kramer* cases, then, there was no dispute as to the competence of the Community to undertake international commitments in the field covered by the Draft Agreement. To the extent that the Community was involved in the negotiation and conclusion of the Draft Agreement, Article 75 EEC had been invoked and this had been uncontroversial. The Commission had solicited the opinion of the Court under Article 228(1) EEC, not because of inter-institutional conflict or the need clearly to define the respective competencies of the Community and its Member States, but because of a concern for legal certainty; the draft agreement envisaged a certain delegation of powers of decision and judicial powers to bodies which were independent of the common institutions and although the Commission was of the view that that delegation was compatible with the Treaty, it considered it apposite to consult the Court in view of the innovation represented by the delegation and of the precedent which it was likely to constitute for subsequent agreements.

The objective of the agreement was to introduce a system to eliminate congestion in certain inland waterways of the Rhine and Moselle basins by freight-carrying vessels. The essence of the proposed system was that financial compensation would be paid to carriers who voluntarily withdrew (or 'laid up') their vessels from the market for a certain period, the idea being that this would prevent what was described as 'excessive competition with a consequent slump in freight rates', thereby allowing waterway undertakings to operate 'under normal working conditions and to use their vessels in a manner better adopted to the needs of the consumer.' All of the vessels using the inland waterways in question were to contribute to a fund, to be called the 'laying-up fund for inland waterway vessels', out of which the 'laying-up' compensation was to be disbursed. That fund was classified as an 'international public institution' having legal personality and enjoying the most extensive legal capacity accorded to legal persons.[73]

Incidentally, the inland waterways covered by the agreement were all situated within the territory of the Community: the Rhine and Moselle basins, the Dutch inland waterway network and the German inland waterways linked to the Rhine basin. *Prima facie*, then, the fund could have been established by means of a Community Regulation, based on Article 71 EC (then Article 75 EEC). However, the traditional participation of Swiss vessels in navigation on the principal waterways in question, which were subject to a system of freedom of navigation established by international agreements of long standing made it necessary to bring Switzerland into the scheme by means of an international agreement.[74]

[72] Art. 80(1) (ex Art. 84(1)) EC provides that the provisions of Title V (ex Title IV) on transport are to apply to transport by rail, road and inland waterway.

[73] Art. 1 of the Statute, annexed to the Draft Agreement of which it formed an integral part.

[74] Para 2; see also Opinion 1/94 at para 85.

It is only to the few paragraphs of the Court's opinion going to the Community's competence to conclude the draft Agreement and to the nature of that competence that we need bend our minds in considering how Opinion 1/76 fits into the *AETR* framework.

The Court began by recognising that the Community did not have express competence to conclude an agreement such as that envisaged.[75] It continued:

> authority to enter into international agreements may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions.[76]

This succinct statement avoids the confusion, to which reference has already been made, caused by the words 'and from measures adopted, within the framework of those provisions, by the Community institutions',[77] albeit in a case which did not involve autonomous Community rules. The statement, taken on its face, does strongly suggest that competence does not stem from measures adopted by the Community institutions but only from the provisions of the Treaty.

I hope I can be forgiven for setting out paragraphs 3 and 4 (in relevant part) of the Court's opinion here, since they form the centrepiece of the Court's opinion on implied Community competence:

> The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.
>
> This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. . . . [T]he power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is . . . necessary for the attainment of one of the objectives of the Community.

These paragraphs illustrate that the laying down of internal rules is *not* enough to confer an external competence on the Community. Even where internal rules are laid down, there is no external competence unless

(a) it is detectable from the Treaty provision(s) creating the internal power, and
(b) the implication of external power is necessary for the attainment of one of the objectives of the Community.

The test of attribution of external competence is found in paragraph 3 initially and we have already seen how the same necessity-based test was applied to

[75] Para 3.
[76] *Ibid*.
[77] *AETR*, para 16 and *Kramer*, para 19/20.

establish the existence of competence in both *AETR* and *Kramer*. Interestingly, the same necessity/teleology test is discernible in the Court's later ruling under Article 103 Euratom in Ruling 1/78,[78] where the Court, having found that, like the EEC Treaty, the Euratom Treaty sought to establish with regard to the matters covered by it, 'a homogeneous economic area', concluded that a Convention which aimed to restrict supplies of nuclear materials in the interests of safety could not reasonably to dissociated from a Treaty (Euratom) which seeks to regulate supplies generally, in the interests of the creation of that homogeneous economic area. Of course, it is always at this point of intersection between the Community Treaties and a Convention envisaged, for example, by the Member States, that the teleology/necessity test flourishes and, unsurprisingly, it is at this point that the test makes its appearance in Ruling 1/78:

> It thus appears that it would not be possible for the Community to define a supply policy and to manage the nuclear common market properly if it could not also, as a party to the Convention, decide itself on the obligations to be entered into with regard to the physical protection of nuclear materials in so far as its functions in the fields of supply and the nuclear market were affected.[79]

Equally noteworthy in Ruling 1/78 was the fact that although the Court considered that the Draft Convention might hinder certain implementing measures which had already been adopted under Chapter VII Euratom, *AETR* was not cited.[80] Exclusive competence had been found on the basis, not of the measures, but of the Euratom Treaty alone.

Returning to Opinion 1/76, the Court follows its articulation of the necessity/teleology test for the existence of Community competence by saying in paragraph 4 that '[*t*]*his* is particularly so'[81] where internal rules are posited. The word 'this' here can only mean that the Court is referring to the above test—the one and only test of implied competence—suggesting that the so-called '*AETR* test', far from amounting to a distinct test of attribution, is *ancillary* to the teleology/necessity test of attribution. The words 'particularly so' indicate that what follows confers greater specificity on what has gone before and this is precisely what *AETR*, paragraphs 17 and 22, do; they *describe* external compe-

[78] Above n 15.

[79] Para 15; the Court detected Euratom exclusive competence in the field of supplies of ores, source materials and special fissile materials coming from outside the Community on the basis of the Euratom Treaty, Chapters VI and IX (para 14). The *AETR* necessity/teleology test operated to supplement that competence so as to enable the Community to satisfy itself that such materials are not diverted from their intended use and that safeguard obligations under international agreements are observed.

[80] Para 22; the Court did cite *AETR* at para 36 of its Ruling, but only as authority for the proposition that there is a 'necessity for harmony between international action by the Community and the distribution of jurisdiction and powers with the Community', so far as the implementation of mixed agreements under Art. 102 Euratom is concerned.

[81] Emphasis added.

tence which has already arisen under the Treaty. Even where internal rules *are* posited, says the Court, the Community's treaty-making power, as noted above,

> nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is . . . necessary for the attainment of one of the objectives of the Community.

Some confusion may arise from the Court's later recollection of paragraph 3 in Opinion 2/91,[82] paragraph 7, where it had occasion to state that:

> The Court concluded, in particular, that whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.

The words, 'in particular' here might be taken as meaning that there are other ways in which Community implied competence can flow from the provisions of the Treaty, but it is my submission that the better view is that these words should be taken as meaning that the Court, in Opinion 1/76, made a series of conclusions, to just one of which it is now drawing our attention. Alternatively, it might be said that the words could be replaced with the word 'specifically', in order to designate precisely the finding in Opinion 1/76 which was relevant to this case.[83] Were it otherwise, one would expect the words 'in particular' to follow, rather than to precede, the word 'that'.[84]

The words '*inter alia*', as they appear just before the test of attribution of competence set out by the Court in paragraph 3 of Opinion 1/76, merit some attention. Dashwood and Heliskoski have urged that these words 'show that the Court is not foreclosing on other possibilities (e.g. acquisition of external competence pursuant to the *AETR* principle).'[85] I prefer to think that the words

[82] Above n 15.

[83] Limited authority for this construction is to be found in Case C–431/92 *Commission* v. *Germany* [1995] ECR I–2189. There, Germany raised a preliminary plea that the Commission's Art. 226 EC action was inadmissible on the ground that the form of order sought in the application was too imprecise. The Commission had sought a declaration that Dir. 85/377/EEC (requiring environmental impact assessments for certain developments) 'and "in particular" Arts. 2, 3 and 8 thereof' had been infringed. Germany argued that this formulation left open the possibility that the Commission was also alleging the infringement of other, unspecified, articles of the Directive. The Court rejected that argument, stating that '[i]n its context, the adverbial phrase "in particular" was used in the sense of "specifically" in order to designate precisely those articles of the directive which had been infringed. It could not therefore have led Germany to believe that the application also concerned infringements of other unspecified provisions of the directive and thus have given rise to uncertainty as to the scope of the proceedings'; *ibid*. at para 15.

[84] Cf. Dashwood, above n 4 at 134, para 8.19: '. . . the phrase must be intended to indicate that the Court is not excluding the possibility that implied external competence may arise in other ways.'

[85] Dashwood and Heliskoski, above n 3 at 13, para 1.14.

'*inter alia*' as they appear here are not referable to instances of Community competence at all. In the sentence which immediately precedes the sentence containing the words, the Court cites *Kramer* as authority for the proposition that competence may either be express or implied. The Court merely uses these words, then, to indicate that what follows in paragraph 3 is not the only thing that the Court held in *AETR* and in *Kramer*: 'The Court *has* conclud*ed inter alia* that. . . .'

Turning, then, to the nature of the Community's competence, the issue of Member State participation in the negotiation and conclusion of the Draft Agreement was described in Opinion 1/76 as a 'special problem'[86] and it is not difficult to see why this was so. In *AETR*, the Court had found that the Community's competence to conclude agreements relating to the working conditions of crews of vehicles engaged in international road transport was exclusive in nature, by reason of the adoption by the Community institutions of Regulation 543/69 which had dealt with that very issue. The Community's external competence under the Treaty had become exclusive upon the adoption of internal Community rules susceptible to being 'affected' by Member State external activity in the same area. However, it could not be assumed in Opinion 1/76 that the Community's external competence in the field of inland waterway transport was exclusive solely on the ground that *AETR* had found such a competence in the field of 'social' rights for international hauliers. No autonomous Community rules had been promulgated which governed the same subject-matter and which were, consequently, capable of being 'affected' by Member State external activity in the same field. In such circumstances, how was the nature of the Community's competence to be gauged?

One's assumption in such a case is that the Community's competence must be concurrent and not exclusive,[87] yet it would appear at first sight that this was not the Court's conclusion. In paragraphs 6 and 7 of the Opinion, the Court appeared plainly to proceed on the basis of Community exclusivity, regarding Member State participation as something of a concession, granted only because the six Member States in question were all party either to the Mannheim Convention, 1868, or to the Luxembourg Convention on the Canalisation of the Moselle, 1956, and because those States had undertaken, under Article 3 of the Draft Agreement, to amend those conventions so as so align them to the Statute annexed to the Agreement.[88] Again, in paragraph 77

[86] Para 6.

[87] Lenaerts, K. 'Les répercussions des compétences externes des Etats membres et la question de 'préemption'', in Demaret, P. (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Bruges, Collège d'Europe, 1986) n° 45, 38, 42. Vigneron, P. and Smith, A. 'Le fondement de la compétence communautaire en matière de commerce international de services' (1992) *CDE* 515, 523. Tridimas and Eeckhout, above n 4 at 154.

[88] Those undertakings had been given pursuant to Art. 307 EC (ex Art. 234 EEC), 2nd sub-paragraph.

of Opinion 1/94, the Court re-emphasised that Community competence in the field of transport was exclusive. Puzzlingly, though, it continued in the same paragraph by saying, as one would expect, that

> [a]s the Court pointed out in the *AETR* judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules.[89]

Patently, one of the transport matters which had not yet been 'covered by common rules' was that of international waterway traffic congestion. Why, then, was the Community's competence exclusive? The answer, it is submitted, is as follows. If it is accepted that *AETR*, paragraphs 17 and 22, is concerned to safeguard the principle of the primacy of Community law over national laws, however framed, then it follows as a logical corollary that it must apply not only to *internal* rules adopted by the Community but also to *external* rules adopted thereby. Agreements concluded by the Community form an integral part of Community law.[90] This law therefore precedes national law, even international agreements concluded by Member States, in the hierarchy of norms created by European Community law[91]. Consequently, just as the Member States are barred from contracting internationally in a manner which interferes with Community internal measures, so they are barred from doing so in a manner which interferes with Community international measures which are also *ex hypothesi* 'internal' once concluded. The Court's conclusion was that Member State participation would indeed have interfered unacceptably *but for* the Member State undertakings, given pursuant to Article 3 of the Draft Agreement. This is not, it should be emphasised, tantamount to a conclusion that Community external competence is always exclusive. The case must be seen as rather exceptional, in that the Community had competence over the whole subject-matter of the agreement and was exercising its competence to conclude that agreement. Generally, when the Community and the Member States seek to exercise their respective competencies simultaneously it is found that the Member States enjoy exclusive competence over at least a part of the agreement.

[89] *Ibid*.
[90] Above n 18.
[91] Weiler, above n 4 at 172; Dashwood and Heliskoski, above n 3 at 13–14, para 1.15.

IV. Conclusion

The purpose of this review of the Court's early implied external competence jurisprudence has been to highlight its consistency with the fundamental norms of European Community law. In particular, I have sought to show that that jurisprudence links directly into the foundational Community precepts of primacy and of attributed competencies. Refracted through the lens of the Community's external relations law, these precepts generate the foundational distinction between the 'existence' of a Community external competence and the 'nature' of that competence. The Court's later opinions on competence to conclude ILO Convention 170,[92] on the Agreement Establishing the World Trade Organisation[93] (though this opinion arguably obfuscates more than it elucidates), on the Third Revised Decision of the OECD on National Treatment[94] and, in particular, on Community accession to the Convention for the Protection of Human Rights and Fundamental Freedoms[95] and on the Cartagena Protocol on Biosafety,[96] far from undermining the thesis put forward in this paper, buttress it in even clearer language than that used in the authorities considered. However, a detailed consideration of those authorities will have to wait for another day and another paper.

It is regretted that the Court's early pronouncements on implied competence have created uncertainty in the field. Opinions 2/94 and 2/00 nevertheless presage a new approach which may well result in the alignment of the Court's 'internal' legal basis jurisprudence with that of its external competence jurisprudence, an approach which would have the welcome effect of substituting clarity and reasoning from first principles for inconsistency and confusion. This writer, at least, ventures to hope that the Court's next Article 300(6) opinion on the implied competence of the EC will not be followed by thirty years of academic and institutional attempts to clarify it.

[92] Opinion 2/91, above n 15.
[93] Opinion 1/94, above n 7.
[94] Opinion 2/92, above n 15.
[95] Opinion 2/94, above n 11.
[96] Opinion 2/00 of December 2001, not yet reported.

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THE DEVELOPING EC PRIVATE INTERNATIONAL LAW ON FAMILY MATTERS

*Peter Stone**

I. Introduction

The entry into force on 1st March 2001 of Regulation 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses ('the Matrimonial Regulation')[1] amounts to a landmark in the harmonisation of private international law at European Community level. It deals with direct judicial jurisdiction, and the mutual recognition and enforcement of judgments, but not choice of law, in respect of divorce, separation and annulment of marriage, and of custody (in a broad sense) of children of both spouses when determined on the occasion of matrimonial proceedings. It is the first EC measure to enter into force dealing with private international law in family matters, and is likely to be followed up by further such measures, especially in relation to child custody when dealt with independently of any matrimonial proceedings.

Earlier EC measures in the sphere of private international law had focused on commercial and consumer rather than family matters. Thus the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels I Convention'),[2] and Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the Brussels I Regulation'),[3] which has now replaced that Convention, exclude from their scope proceedings and decisions concerning individual status or matrimonial property,[4] though

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[1] For its text, OJ 2000 L 160/19.

[2] For the final version of its text, OJ 1998 C27/1. The Convention was based on the then Art. 220 (now Art. 293) of the EC Treaty.

[3] For its text, OJ 2001 L12/1. The Brussels I Regulation entered into force for the 14 Member States other than Denmark on 1st March 2002.

[4] Art. 1(2); Case 143/78 *De Cavel* v. *De Cavel (No 1)* [1979] ECR 1055; and Case 25/81 *CHW* v. *GJH* [1982] ECR 1189.

they do apply to proceedings and orders relating to familial maintenance.[5] Similarly the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations[6] excludes from its scope questions of individual status and contractual obligations relating to matrimonial property or rights and duties arising out of a family relationship, including maintenance obligations.[7]

The Matrimonial Regulation was adopted by the EC Council under the provisions of Title IV of the EC Treaty, as amended by the Treaty of Amsterdam, which deal with judicial co-operation in civil matters. It does not apply to Denmark, but entered into force in the other 14 Member States on 1 March 2001.[8] The Matrimonial Regulation replaces the Convention of 28 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters ('the Matrimonial Convention'),[9] which had been negotiated under Article K.3(2)(c) of the Treaty on European Union, but had not entered into force. As paragraph (6) of its Preamble indicates, the content of the Matrimonial Regulation is substantially taken over from the Matrimonial Convention, but the Regulation also contains a number of new provisions designed to secure consistency with the proposal which has subsequently become the Brussels I Regulation. Thus assistance in the interpretation of the Matrimonial Regulation can be obtained by the Borrás Report on the Matrimonial Convention.[10]

The matrimonial project arose from German concerns arising from the lack of mutual recognition of divorces, especially between France and Germany, neither of which had become party to the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.[11] Negotiations within a working group were opened in June 1994, and in June 1995 the EU Council

[5] Art. 5(2); Case 120/79 *De Cavel* v. *De Cavel (No 2)* [1980] ECR 731; Case C–295/95 *Farrell* v. *Long* [1997] ECR I–1683; Case C–220/95 *Van den Boogaard* v. *Laumen* [1997] ECR I–1147; and *Fournier* v. *Fournier* [1998] 2 FLR 990 (CA).

[6] For its text, see OJ 1980 L266. The Rome Convention entered into force on 1 April 1991. It is now in force in all 15 EC Member States. It is not based directly on any provision of the EC Treaty, but on a voluntary decision of the Member States to go beyond the requirements of Art. 220.

[7] Art. 1(2)(a)–(b).

[8] Paras (24)–(25) of the Preamble, and Arts. 1(3) and 46. For this purpose the United Kingdom includes Gibraltar; see Annexes I and II. Provisions ancillary to the Regulation have been made in England by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001 (SI 2001/310), which amends the Domicile and Matrimonial Proceedings Act 1973, the Child Abduction and Custody Act 1985, and the Family Law Act 1986; and in Scotland by the European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001 (SSI 2001/36).

[9] For its text, OJ 1998 C221/1.

[10] For the Borrás Report, see OJ 1998 C221/27.

[11] The Hague Convention 1970 is in force in eight of the EC Member States (the United Kingdom, Italy, the Netherlands, Luxembourg, Portugal, Denmark, Finland and Sweden) and nine other countries (Norway, Switzerland, Poland, the Czech Republic, the Slovak Republic, Cyprus, Australia, Hong Kong, and Egypt).

agreed that child custody, when dealt with ancillarily in divorce proceedings, should be included in the Convention. In the United Kingdom the matter was the subject of the Fifth Report of the House of Lords Select Committee on the European Communities, issued on 22 July 1997, which was very critical of the limited inclusion of custody matters. But in the result the Matrimonial Convention and Regulation deal with divorce, separation and annulment of marriage, and also with the custody of children of both spouses when determined on the occasion of matrimonial proceedings. Other custody proceedings (for example, those not linked with matrimonial proceedings; or those relating to children of the family, but not of both spouses, even though dealt with ancillarily in matrimonial proceedings) remain outside the scope of the Matrimonial Regulation.

Since the adoption of the Matrimonial Regulation, further proposals have been made for EC measures in the sphere of private international law in family matters, especially with regard to children. In August 2000 France introduced an Initiative for a Regulation on the Mutual Enforcement of Judgments on Rights of Access to Children ('the Access Initiative').[12] This sought to improve the enforceability of access orders made in connection with matrimonial proceedings under the Matrimonial Regulation. On 30 November 2000, the EC Council on Justice and Home Affairs adopted a draft Programme of Further Measures for the Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters.[13] The first of the three stages envisaged includes the Access Initiative, as well as measures on non-marital families, on subsequent orders modifying custody orders made in connection with matrimonial proceedings, on matrimonial and cohabitational property, and on wills and succession.

After issuing issued a Working Document in March 2001,[14] the EC Commission proceeded in September 2001 to present a proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matters of Parental Responsibility ('the Child Proposal').[15] This was designed to supplement and amend the Matrimonial Regulation. It would apply to all civil or administrative proceedings relating to parental responsibility, regardless of whether a marriage or divorce were involved. The principal basis of jurisdiction would be the habitual residence of the child at the commencement of the proceedings. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Abduction Convention') would be respected and even strengthened. If a child had no habitual residence, his presence would create jurisdiction. Recognition and enforcement would be referred to Chapter III of the Matrimonial Regulation.

[12] For its text, OJ 2000 C234/7.
[13] OJ 2001 C12/1.
[14] Doc JAI A3 / EK - 787, version 5.
[15] For its text, OJ 2001 C332E/269.

In addition, in November 2001 the Commission presented a proposal ('the Hague Accession Proposal')[16] for a Council Decision authorizing the Member States to sign, in the interest of the European Community, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ('the Hague Convention 1996').[17] When signing that Convention, the EC Member States would have to make declarations that, in conformity with Article 52 of the Convention, the Convention would take precedence over Community rules in respect of children who were not habitually resident in a Member State but were habitually resident in another Contracting State; and that, as soon as possible, the necessary steps would be taken to open negotiations for a protocol to the Convention allowing for the accession of the Community and safeguarding the application of Community rules for the recognition and enforcement of a decision taken in one Member State in another Member State.

At the end of 2001 the Belgian Presidency reported that a substantial measure of consensus on the way forward had emerged within the Council's Committee on Civil Law Matters.[18] Eventually in May 2002 the Commission presented a revised proposal for a Council Regulation concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation 1347/2000 and amending Regulation 44/2001 in matters relating to maintenance ('the Combined Proposal').[19] This combines the Matrimonial Regulation, the Child Proposal and the Access Initiative. As regards matrimonial proceedings, it consolidates the provisions of the Matrimonial Regulation without substantial alteration. As regards parental responsibility, it integrates into a complete system of rules the provisions of the Matrimonial Regulation, the Child Proposal, and the Access Initiative. It extends the principle of mutual recognition to all decisions on parental responsibility, and abolishes the need for an enforcement order in respect of orders for access. It also elaborates a new solution for the return of the child in cases of child abduction between Member States, limiting the courts of the State to which the child has been abducted to the taking of provisional protective measures. These would be superseded by a custody decision issued by the courts of the child's habitual residence, and such a decision requiring the return of the child would not require an enforcement order. The measure is intended to take effect from 1 July 2004.[20]

[16] For its text, COM(2001) 680 final.

[17] For the text of the Convention, (1996) 35 *ILM* 1391. It entered into force on 1 January 2002 between the Czech Republic, Slovakia and Monaco.

[18] EC Council doc 14461/01, JUSTCIV 151, of 30 December 2001.

[19] Doc COM(2002) 222 final, of 3 May 2002.

[20] Art. 71. For transitional provisions, see Art. 63.

II. Matrimonial Proceedings and Decrees

A. Scope

Like the Brussels I Convention and Regulation, the Matrimonial Regulation lays down rules on direct jurisdiction and on the recognition and enforcement of judgments, but not on choice of law. By Article 1(1)(a), it applies to petitions for and decrees of divorce, legal separation of spouses, and annulment of marriage. But it does not apply to annulment proceedings brought after the death of a spouse.[21] By Article 1(1)(b), it also applies to applications and orders relating to parental responsibility for the children of both spouses, but only when this is determined on the occasion of proceedings for divorce, separation or annulment. It does not apply to familial maintenance, which remains governed by the Brussels I Regulation; nor to matrimonial property, which remains uncovered by any Community measure. Moreover the recognition of a divorce does not require recognition of findings of fault, nor of ancillary personal effects (such as on the right to a name).[22]

As Article 1(2) makes clear, the Matrimonial Regulation extends beyond ordinary judicial proceedings before civil courts, so as to include administrative proceedings officially recognised in a Member State (such as, but for the exclusion of Denmark, the Danish divorce procedure before a district council), but not purely religious proceedings.[23] By Article 37, the Regulation takes precedence, as between the Member States, over certain international conventions.[24] Interpretation of the Regulation by the European Court is governed by Article 68 of the EC Treaty as amended. This provides for preliminary rulings at the request of national courts of last resort, and such references are mandatory. It also enables an abstract request to be made by the Council, the Commission or a Member State.

The Matrimonial Regulation contains transitional provisions similar to those of the Brussels I Convention. By Articles 42(1) and 46, it applies only to legal proceedings instituted, to documents formally drawn up or registered as

[21] See the Borrás Report, above n 10 at para 27. In that case in England reg 3(5) of SI 2001/310 amends s 5(3) of the Domicile and Matrimonial Proceedings Act 1973 so that English jurisdiction exists if the surviving spouse is domiciled in England at the commencement of the proceedings, or the deceased spouse either was at death domiciled in England or had been habitually resident in England throughout the one year up to his death, but puzzlingly the habitual residence of the surviving spouse is ignored. See similarly, for Scotland, reg 2(2) of SSI 2001/36, amending s 7 of the 1973 Act.

[22] Para 10 of the Preamble; and the Borrás Report above n 10, at para 22.

[23] Para 9 of the Preamble; and the Borrás Report *ibid*, at para 20.

[24] Namely: the Hague Conventions of 1961 on the protection of minors, of 1970 on the recognition of divorces and separations, and of 1996 on parental responsibility and child protection, and the European Convention of 1980 on recognition and enforcement of custody decisions. See also in England SI 2001/310, regs 5 and 9, amending British legislation implementing the Hague Convention 1970 and the European Convention 1980; and in Scotland SSI 2001/36, regs 3 and 4.

authentic instruments, and to settlements which have been approved by a court in the course of proceedings, after its entry into force on 1 March 2001. But, by Article 42(2), judgments given after the commencement date in proceedings instituted before that date must be recognised and enforced in accordance with Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II, or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

The Combined Proposal consolidates the provisions of the Matrimonial Regulation relating to matrimonial proceedings and decrees. Thus, by Article 1(1)(a), it applies to civil proceedings relating to divorce, legal separation or marriage annulment, and matters relating to maintenance are expressly excluded by Article 1(2)(a). By Article 1(3) and 2(1), it extends beyond judicial proceedings to other proceedings officially recognised in a Member State, and 'court' includes an authority. As regards the relation between the Combined Proposal and earlier treaties, Articles 60–62 echo Articles 36–37 and 40 of the Matrimonial Regulation.

Complicated transitional provisions are contained in Article 63 of the Combined Proposal. As regards direct jurisdiction to entertain matrimonial proceedings, Article 63(1) makes Chapter II of the Combined Proposal applicable to proceedings instituted after its commencement date (envisaged as 1 July 2004). Chapter II of the Matrimonial Regulation will continue to apply to matrimonial proceedings instituted between March 2001 and June 2004. Jurisdiction over matrimonial proceedings instituted before March 2001 will remain governed by national law and international treaties.

As regards the recognition of matrimonial decrees, Article 63(1) and (3) makes Chapter IV of the Combined Proposal apply fully to decrees granted in proceedings instituted after June 2004, and also to decrees granted before July 2004 in proceedings instituted after February 2001. Where the decree was granted after June 2004 in proceedings instituted between March 2001 and June 2004, or it was granted between March 2001 and June 2004 in proceedings instituted before March 2001, Article 63(2) and (4) require it to be recognised in accordance with Chapter IV if jurisdiction was founded on rules according with those provided for either in Chapter II of the Combined Proposal, or in Chapter II of the Matrimonial Regulation, or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. The effect of Article 63(2) is, puzzlingly, to reintroduce in the case of proceedings instituted after the commencement of the Matrimonial Regulation on 1st March 2001, leading to a decree granted after the commencement of the Combined Proposal on 1 July 2004, a jurisdictional review which had been suppressed by the Matrimonial Regulation. If the decree was granted after June 2004 in proceedings instituted before March 2001, it seems that the transitional provision contained in Article 42(2) of the Matrimonial Regulation will continue to apply.

If the decree was granted before March 2001, recognition remains governed by national law and international treaties.

It seems clear that Article 63(2)–(4) of the Combined Proposal have received insufficient thought. It is submitted that Article 63 should be recast, so as to deal quite separately with (on the one hand) matrimonial decrees and ancillary custody orders which currently fall within the material scope of the Matrimonial Regulation, and (on the other hand) with other custody orders not currently within the material scope of an EC regulation. For the former category, only the commencement date of the Matrimonial Regulation, and not that of the new measure, should be material. In this way it could be ensured that decrees and orders which would be recognisable or enforceable under the Matrimonial Regulation are not subjected to less favourable treatment after the new measure has entered into force.

B. Direct Jurisdiction Over Matrimonial Proceedings

Chapter II (Articles 2–14) of the Matrimonial Regulation deals with direct jurisdiction to entertain petitions for divorce, separation or annulment. Articles 2 and 5–6 create unified rules on the existence of jurisdiction. These are based mainly on the habitual residence of one or both of the spouses at the date of the application, but a lesser role is played by nationality or, in the United Kingdom and Ireland, domicile. Articles 7 and 8 deal with the exclusive nature of the unified jurisdiction, and provide also for residual jurisdiction where the unified rules do not confer jurisdiction on any Member State. Articles 9–12 deal with a court's obligation to decline jurisdiction of its own motion, notification of the respondent, proceedings concurrently pending in different Member States, and provisional or protective measures. These provisions will be consolidated in the Combined Proposal.[25]

1. The Unified Grounds

Article 2 of the Matrimonial Regulation creates unified rules on direct jurisdiction to entertain petitions for divorce, separation or annulment, based mainly on the habitual residence of one or both of the spouses at the date of the application. A lesser role is played by nationality; and in relation to the United Kingdom and Ireland the concept of domicile, as understood in British and Irish laws, is substituted for nationality.[26] Several jurisdictional bases are offered, and there is no prioritisation, except in favour of the court first seized.

[25] Chapter II, Section 1 (Arts. 5–9) of the Combined Proposal echoes Arts. 2 and 5–8 of the Matrimonial Regulation; and Chapter II, Section 3 (Arts. 16–20) contains provisions echoing Arts. 9–12.

[26] Arts. 2(1)(a)(vi), 2(1)(b) and 2(2).

Thus Article 2(1)(a) confers jurisdiction on the courts of the Member State in which the respondent is, or both spouses are, habitually resident at the date of the application.[27] In the case of a joint application, it suffices that either of the spouses is habitually resident in the forum State.[28] In three cases the habitual residence in the forum State of the petitioner alone suffices, even though the respondent is not habitually resident there: (i) if the forum State is also the last common habitual residence of the couple;[29] or (ii) if the petitioner has habitually resided there for at least a year immediately before the application;[30] or (iii) if the petitioner has habitually resided there for at least six months immediately before the application, and the petitioner is also a national of the forum State (it being one of the twelve Member States on the European mainland to which the Regulation applies) or is domiciled in the forum State (it being the United Kingdom or Ireland).[31]

In addition, Article 2(1)(b) confers jurisdiction on the courts of a Member State (other than the United Kingdom or Ireland) of which, at the date of the application, both spouses are nationals. As regards dual nationality, the Borrás Report explains that each State will apply its own rules, within the framework of general Community rules on the matter.[32] In the case of the United Kingdom and Ireland, Article 2(1)(b) and (2) require instead that both spouses are domiciled in the forum State under its law. This recognises that the traditional Anglo-Irish concept of domicile, with its emphasis on origin and its insistence on permanent residence, intended to last for the rest of one's lifetime, amounts to nationality in disguise.[33] It is noteworthy that the requirement of joint domicile is narrower than the previous English rule laid down by s 5 of the Domicile and Matrimonial Proceedings Act 1973, under which the domicile of either spouse at the institution of the proceedings sufficed. The jurisdiction of a court which has been properly seized under Article 2 is extended by Articles 5 and 6, which enable it to entertain a matrimonial counterclaim, or to convert a legal separation which it has granted into a divorce, even if the connection required by Article 2 has meanwhile disappeared.

By Article 41(a)–(b), with regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by the Regulation apply in different territorial units, any reference to habitual residence in that Member State refers to habitual residence in a territorial unit, and any reference to nationality, or in the case of the United Kingdom, domicile, refers to the territorial unit designated by the law of that State.[34] The effect of this seems to

[27] Art. 2(1)(a)(i) and (iii).
[28] Art. 2(1)(a)(iv).
[29] Art. 2(1)(a)(ii).
[30] Art. 2(1)(a)(v).
[31] Art. 2(1)(a)(vi).
[32] Above n 10 at para 33.
[33] Stone, P. *The Conflict of Laws* (London, Longman, 1995) ch. 2.
[34] Art. 41 is echoed by Art. 64 of the Combined Proposal.

be that, for the purpose of the unified grounds, each territory of the United Kingdom to which the Regulation applies (that is: England and Wales; Scotland; Northern Ireland; and Gibraltar) must be treated as a separate Member State, and the jurisdiction of the courts of each such territory must be based on habitual residence and/or domicile located in that territory, rather than in the United Kingdom as a whole. If so, an unfortunate effect, which the ancillary British legislation[35] fails, apparently by oversight, to rectify, is that no court in the United Kingdom will have jurisdiction under Article 2(1)(a)(vi) where the petitioner has been habitually resident in England for over six but under twelve months and is domiciled in Scotland; or under Article 2(1)(b) where the petitioner is domiciled in England and the respondent is domiciled in Scotland. Although in the former case the Scottish, and in the latter case both the English and the Scottish, courts may in some circumstances have residual jurisdiction under Article 8, this would not exist if, for example, the respondent spouse were habitually resident in France.

2. *Residual Grounds*

Articles 7 and 8[36] deal with the exclusive nature of the unified grounds of jurisdiction, and provide also for residual jurisdiction where no court of any Member State is competent on the unified grounds. They are modelled, rather unwisely, on Articles 3 and 4 of the Brussels I Convention and Regulation. But they depart confusingly from that model in that there is some overlap between Article 7 and Article 8, which makes their effect far from clear. Their effect is probably as follows.

Firstly, where the unified rules (laid down by Articles 2, 5 and 6) confer jurisdiction on the courts of at least one Member State, the jurisdiction so conferred on the courts of that or those Member States is exclusive. The Regulation

[35] SI 2001/310 and SSI 2001/36.

[36] They provide as follows:

'Article 7—Exclusive nature of jurisdiction under Articles 2 to 6

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 2 to 6.

Article 8—Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 2 to 6, jurisdiction shall be determined, in each Member State, by the laws of that State.
2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.'

mandatorily deprives the courts of the other Member States of jurisdiction, and it is not open to an excluded State to confer jurisdiction on its courts on other grounds. This will be the case, for example, whenever the respondent is habitually resident in a Member State.

Secondly, where the unified rules do not confer jurisdiction on the courts of any Member State, but the respondent is a national of a Member State which uses nationality, or is domiciled in a Member State which uses domicile, then the State of nationality or domicile is free, but not bound, to confer jurisdiction on its courts. Further, whether the State of nationality or domicile accepts jurisdiction or not, the Regulation deprives the other Member States of jurisdiction. This would, for example, apply where both spouses are habitually resident in Argentina, and the petitioner is an Argentinian national domiciled in Argentina, but the respondent is a German national domiciled in England. In those circumstances the Regulation would permit both Germany and England to confer jurisdiction on their own courts, but whether or not either did so, the Regulation would deprive the French courts of jurisdiction. Moreover, the result would be the same if the petitioner had habitually resided in France for a short period, not satisfying the requirements of Article 2.

Thirdly, where the unified rules do not confer jurisdiction on the courts of any Member State, and the respondent is a not national of a Member State which uses nationality, nor domiciled in a Member State which uses domicile, then it is open to the law of any Member State to confer jurisdiction on its courts on any ground, such as the petitioner's habitual residence merely at the moment when the proceedings are commenced, or the petitioner's domicile or nationality. But a State which confers such jurisdiction on the basis of the petitioner's nationality must also do so in favour of a petitioner who is a national of another Member State and is habitually resident in the forum State. Thus, for example, where the respondent is an Argentinian national domiciled and habitually resident in Argentina, the United Kingdom is permitted to retain its pre-existing rule creating English jurisdiction on the basis of the petitioner's English domicile, or to introduce a rule creating English jurisdiction on the basis of the petitioner's English habitual residence at the moment of the application alone. Similarly, in the case of such a respondent, France is permitted to maintain its rule basing jurisdiction on the petitioner's French nationality, but is then required to accept as an alternative that the petitioner is a Dutch national but habitually resident in France.

It seems very regrettable that the Regulation leaves such options to each Member State,[37] rather than establishing a fully harmonised set of jurisdictional bases. However that may be, in the United Kingdom para 3 of SI 2001/310 ensures that the English courts will have matrimonial jurisdiction, insofar as Articles 7 and 8 of the Regulation permit, where either of the spouses is

[37] On existing bases in various Member States, which may be retained under Arts. 7 and 8, see the Borrás Report above n 10 at para 47.

domiciled in England at the commencement of the proceedings; and para 2 of SSI 2001/36 makes corresponding provision where either spouse is domiciled in Scotland. These provisions make the minimum changes necessary to accommodate the Regulation, and decline the opportunity offered to create English or Scottish jurisdiction based on the petitioner's habitual residence merely at the commencement of the proceedings.

3. Exercise of Jurisdiction

Like the Brussels I Convention and Regulation, Chapter II of the Matrimonial Regulation contains (in Articles 9–12) provisions on a court's obligation to decline jurisdiction of its own motion, on notification of the respondent, on proceedings concurrently pending in different Member States, and on provisional or protective measures. On these issues there are a number of departures from Articles 20–24 of the Brussels I Convention and Articles 25–30 of the Brussels I Regulation.

By Article 9 of the Matrimonial Regulation, where a court of a Member State is seized of a case over which it has no jurisdiction under the Regulation and over which a court of another Member State has jurisdiction by virtue of the Regulation, it must declare of its own motion that it has no jurisdiction. Unlike under Article 26(1) of the Brussels I Regulation, this applies even if the respondent has entered an appearance.

By Article 10 of the Matrimonial Regulation, where a respondent habitually resident in a State other than the forum State does not enter an appearance, the court must stay its proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end. This resembles Article 26(2) of the Brussels I Regulation, but applies even if the respondent is habitually resident in a non-member State.

Article 11 of the Matrimonial Regulation deals with proceedings simultaneously pending in different Member States between the same parties. It follows the provisions of the Brussels I Convention and Regulation on similar (rather than merely related) proceedings in mandatorily requiring the court subsequently seized to stay its proceedings of its own motion until such time as the jurisdiction of the court first seized is established, and then to decline jurisdiction in favour of the first court. But it applies this obligation to matrimonial proceedings even where they do not involve the same cause of action (for example, where the first proceeding is for divorce, and the second is for annulment), and makes no separate provision for dissimilar but related proceedings. It also specifies, in Article 11(3), that where the court subsequently seized declines jurisdiction in favour of the first court, the party who brought the subsequent proceeding may bring that claim before the court first seized. Article 11(4) follows Article 30 of the Brussels I Regulation in specifying that a court is seized at the issue, rather than the service, of the petition.

The rule laid down by Article 11(3), that where the second court declines jurisdiction, the first court becomes competent to entertain the claim which had been made in the second court, seems certain to produce major problems, especially in cases where the second court declines jurisdiction to entertain annulment proceedings, and annulment is unknown to the law of the first country (as in Sweden and Finland). The Borrás Report suggests that in such a case the Swedish court would grant a divorce on the ground in question, but a court of the second country could eventually declare that the decree took effect there as an annulment.[38] But it is difficult to see any warrant in the wording of the Regulation, or indeed in common sense or legal principle, for that solution. Another problematic case which may, perhaps more commonly, arise is where the law of the first country (such as Ireland) provides for much narrower grounds for divorce than that of the second country (such as England). Apparently the Irish court would be bound to grant a divorce on a foreign ground which its own legislature had deliberately refused to introduce, since no exception in favour of the stringent public policy of the forum State is specified.

By Article 12, the Matrimonial Regulation does not prevent the courts of a Member State from taking in urgent cases such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that State, even if under the Regulation the courts of another Member State have jurisdiction as to the substance of the matter. Unlike Article 24 of the Brussels I Convention and Article 31 of the Brussels I Regulation, Article 12 is specifically limited to urgent cases, and to persons and assets located in the forum State.[39] The Borrás Report[40] suggests that Article 12 applies even if the measures affect matters outside the scope of the Regulation, but this contradicts the European Court's rulings under the Brussels I Convention[41] and seems difficult to accept. In the Combined Proposal, Article 20(1) echoes Article 12 of the Matrimonial Regulation, but Article 20(2) adds that such provisional measures shall cease to apply when the courts of the Member State having substantive jurisdiction have issued a judgment.

C. Recognition of Matrimonial Decrees

Chapter III (Articles 13–35) of the Matrimonial Regulation provides for the recognition and enforcement in each Member State of decrees of divorce,

[38] Above n 10 at paras 52–57.

[39] Under the Brussels I Convention the European Court has confined Art. 24 to measures relating to specific assets of the defendant located or to be located within the territory of the forum State. See Case C–391/95 *Van Uden* v. *Deco-Line* [1998] ECR I–7091, and Case C–99/96 *Mietz* v. *Intership Yachting Sneek* [1999] ECR I–2277.

[40] Above n 10 at para 59.

[41] Case 143/78 *De Cavel* v. *De Cavel (No 1)* [1979] ECR 1055; Case 120/79 *De Cavel* v. *De Cavel (No 2)* [1980] ECR 731; and Case 25/81 *CHW* v. *GJH* [1982] ECR 1189.

separation or annulment granted in the other Member States,[42] and for the recognition and enforcement of orders relating to the costs of such proceedings.[43] But it does not apply to negative decisions, refusing to grant a divorce, separation or annulment;[44] nor to findings of fault made in divorce proceedings.[45] Chapter III of the Matrimonial Regulation will be consolidated in Chapter IV (Articles 26–54) of the Combined Proposal.

By Article 14(1) and (4), recognition under Chapter III of the Matrimonial Regulation is automatic and incidental, no special procedure being required.[46] More specifically, Article 14(2) insists that no special procedure may be required for updating the civil-status records of a Member State on the basis of a decree of divorce, separation or annulment given in another Member State, against which no further appeal lies under the law of State of origin.

A detailed procedure for obtaining an enforcement order is established by Articles 21–35 of the Regulation. By Article 14(3), an interested party may use this procedure to apply for a decision that the judgment is or is not recognised. Thus under the Matrimonial Regulation (unlike the Brussels I Convention and Regulation) the enforcement procedure can be invoked with a view to obtaining a declaration of non-recognition. The enforcement procedure closely resembles that provided for in the Brussels I Regulation, especially as regards the issue of certificates by the original court.

The exceptions to the general rule in favour of recognition are defined by Articles 15–20. Article 19 emphasises that under no circumstances may a decree be reviewed as to its substance, and Article 17 excludes jurisdictional review, subject to very limited exceptions.[47] These are confined to transitional cases;[48] situations involving the Nordic Convention 1931, to which Denmark, Sweden, Finland and other Scandinavian countries are party;[49] and (under Article16) agreements with external countries, analogous to those envisaged by Article 59 of the Brussels I Convention, precluding the recognition of judgments based on residual grounds of jurisdiction. Unlike the Brussels I Regulation, the Matrimonial Regulation permits Member States to conclude such external

[42] Arts. 1(1)(a) and 13(1).

[43] Art. 13(2). Chapter III also provides for the recognition and enforcement of orders relating to the parental responsibility for the children of both spouses, given on the occasion of matrimonial proceedings; see Arts. 1(1)(b) and 13(1).

[44] Borrás Report above n 10, at para 60.

[45] Para 10 of the Preamble; and the Borrás Report above n 10, at para 64.

[46] See also Art. 19, which echoes Art. 30 of the Brussels I Convention, on staying proceedings in which recognition is sought if an ordinary appeal against the judgment has been lodged in the State of origin

[47] The Matrimonial Regulation omits any provision corresponding to Art. 46(2) of the Matrimonial Convention, which allowed Ireland to make a special reservation against the recognition of divorces obtained in other Member States as a result of one or both of the spouses deliberately misleading the original court in relation to jurisdictional requirements.

[48] Art. 42(2).

[49] Art. 36(2).

agreements after its commencement. But the Combined Proposal omits any provision corresponding to Article 16 of the Matrimonial Regulation, reflecting the Commission's view that pre-existing agreements are already protected in accordance with Article 307 of the EC Treaty, and future agreements affecting the regulation can only be concluded by the Community.[50]

The substantive grounds for refusal of recognition of matrimonial decrees are specified by Article 15(1). By Article 15(1)(a), recognition is to be refused if it would be 'manifestly contrary to the public policy' of the State addressed.[51] But the scope of the public policy proviso is limited by Articles 18 and 19: not only is the court addressed precluded from reviewing the substance of the decree, but recognition must not be refused because the law of the State addressed would not allow divorce, separation or annulment on the same facts. The Borrás Report adds that this refers to both the internal and the private international law of the State addressed.[52]

By Article 15(1)(b), recognition of a decree must be refused where it was given in default of appearance, and the respondent was not served with the instituting or an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence, unless it is determined that the respondent has accepted the judgment unequivocally. This accords with Article 34(2) of the Brussels I Regulation in insisting on a Community standard for both the time and the manner of service, but, unlike the Brussels I Regulation, does not require the respondent to seek redress in the State of origin where possible. Unequivocal acceptance could take the form of remarrying in reliance on the divorce granted.[53]

Article 15(1)(c) and (d) require that a matrimonial decree be refused recognition in certain cases where it is irreconcilable with another judgment given in proceedings between the same parties. The other judgment may have been given in the State addressed, in which case the order in time is immaterial. Alternatively the other judgment may have been given elsewhere, whether in another Member State or in a non-member country, and in this case it must have been given earlier than the decree in question, and it must fulfil the conditions necessary for its recognition in the State addressed. As the Borrás Report explains,[54] there is no conflict between an earlier separation decree and a subsequent divorce decree, since the separation is replaced by the divorce. On the other hand, an earlier divorce is irreconcilable with a later separation.

The Matrimonial Regulation contains no provision corresponding to Article 11 of the Hague Convention of 1st June 1970, whereby a State which is obliged

[50] See the Explanatory Memorandum to the Combined Proposal, above n 19 at 14.

[51] The Matrimonial Regulation, like the Brussels I Regulation, contains no specific provision concerning incidental questions, corresponding to Art. 27(4) of the Brussels I Convention.

[52] Above n 10 at para 76.

[53] Borrás Report above n 10, at para 70.

[54] *Ibid*. at para 71.

to recognise a divorce may not preclude either spouse from remarrying on the ground that the law of another State does not recognise that divorce.[55] Such a provision had been proposed by the European Parliament when consulted on the proposed Matrimonial Convention[56] and Regulation, and subsequently by the EC Commission in a late version of its proposal for the Regulation.[57] Its omission from the Regulation as adopted is presumably founded on the supposition that its express inclusion was unnecessary, since recognition of a divorce necessarily implies recognition of the resulting capacity of the former spouses to remarry. But this supposition has not always been judicially accepted,[58] and the omission can hardly be viewed as other than irresponsible.

D. Habitual Residence

Neither the Matrimonial Regulation nor the Combined Proposal attempts to define habitual residence. The Borrás Report[59] refers to the definition given in other contexts by the European Court:[60] 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence'. In the Explanatory Memorandum accompanying the Combined Proposal,[61] the EC Commission notes, perhaps disingenuously, that 'in line with customary practice within the Hague Conference where the concept of "habitual residence" has been developed, the term is not defined, but is instead a question of fact to be appreciated by the judge in each case.' The absence of an explicit definition seems regrettable, since it tends to undermine the harmonising effect of the measures. Moreover a clear definition adopted at Community level could facilitate rather than undermine the work of the Hague Conference.

It is clear that for the purpose of the Matrimonial Regulation and the Combined Proposal the concept of habitual residence must be defined by Community law, rather than referred to the law of the forum State. As with most of the concepts used in the Brussels I Convention and Regulation,[62] the European Court must devise an independent meaning, taking account of the

[55] This provision is reflected in the United Kingdom by s 50 of the Family Law Act 1986.

[56] See the EP Resolution of 30th April 1998; doc A4–131/98.

[57] Art. 17(2) of the March 2000 version of the Commission proposal; doc COM(2000)151final.

[58] Contrast *R* v. *Brentwood Registrar ex parte Arias* [1968] 2 QB 956, and *Padolecchia* v. *Padolecchia*, [1968] P 314, with *Perrini* v. *Perrini* [1979] 2 All ER 323, and *Lawrence* v. *Lawrence* [1985] Fam 106.

[59] Above n 10 at para 32.

[60] Case 76/76 *Di Paolo* v. *Office National de l'Emploi* [1977] ECR 315; Case C–102/91 *Knoch* v. *Bundesanstalt für Arbeit* [1992] ECR I–4341; and now Case C–90/97 *Swaddling* v. *Adjudication Officer* [1999] ECR I–1075.

[61] Above n 19 at 9.

[62] Stone, P. *Civil Jurisdiction and Judgments in Europe* (London, Longman, 1998) almost *passim*.

wording and purposes of the Regulation and the general principles which emerge from a comparative overview of the laws of all the Member States. With a view to facilitating this process, it seems useful to summarise the rules which have emerged from the substantial English (and related) case-law on the concept.[63]

On this basis, there is no difference between the habitual residence and the ordinary residence of an individual.[64] It is possible for an individual to have no habitual residence anywhere at a given time.[65] Whether an individual may have more than one habitual residence at the same time depends on the purpose in question. There is much to be said for the view that for the purposes of private international law an individual cannot have more than one habitual residence at the same time, unless the legislative wording or the context requires the acceptance of such multiplicity.[66] But a recent decision of the Court of Appeal[67] takes the contrary view that, for all purposes of family law except the Abduction Convention, an adult can have two habitual residences simultaneously, as where a spouse has two marital homes at each of which he or she spends substantial periods. An existing habitual residence is presumed to continue unless the contrary is shown, and the burden of establishing a change in a person's habitual residence rests on the party who asserts such change.[68]

More substantively, an adult becomes habitually resident in a country by actually residing there for an appreciable period of time (measured in weeks),[69] voluntarily[70] and with a settled purpose of continuing to reside there, either indefinitely or a substantial period of time (measured in years).[71] An adult

[63] For fuller discussion, Stone, P. 'The Concept of Habitual Residence in Private International Law' [2000] *Anglo-American Law Review* 342. For a different approach to the concept, see Rogerson, P. 'Habitual Residence: The New Domicile?' (2000) 49 *ICLQ* 86.

[64] See *Shah* v. *Barnet LBC* [1983] 2 AC 309; *Kapur* v. *Kapur* [1984] FLR 920; *Re F* [1992] 1 FLR 548 (CA); *Re M* [1993] 1 FLR 495 (CA); *Re M* [1996] 1 FLR 887 (CA); *M* v. *M* [1997] 2 FLR 263 (CA); *Nessa* v. *Chief Adjudication Officer* [1999] 1 WLR 1937 (HL); and *Ikimi* v. *Ikimi* [2001] 2 FCR 385 (CA).

[65] *Re J* [1990] 2 AC 562. Cf. *Nessa* v. *Chief Adjudication Officer* [1999] 1 WLR 1937 (HL).

[66] *Re A* [1988] 1 FLR 365 (CA); *Z* v. *Z* [1992] 2 FLR 291; *Dickson* v. *Dickson* 1990 SCLR 692 (Inner House); *Friedrich* v. *Friedrich* 983 F2d 1396 (C6, 1993); *Cameron* v. *Cameron* 1996 SLT 306; *Re V* [1995] 2 FLR 992; and *Hanbury-Brown* (1996) 20 Fam LR 334 (Family Court of Australia). Cf *Shah* v. *Barnet LBC* [1983] 2 AC 309; and *Britto* v. *Home Secretary* [1984] ImmAR 93.

[67] *Ikimi* v. *Ikimi* [2001] 2 FCR 385.

[68] See *F* v. *S* [1993] 2 FLR 686 (CA); *Re R* [1992] 2 FLR 481 (CA); and *Re M* 10 August 1995 (CA). See also *P* v. *A-N* [2000] WL 33148939.

[69] *Re J* [1990] 2 AC 562; and *Nessa* v. *Chief Adjudication Officer* [1999] 1 WLR 1937 (HL). Cf. Case C–90/97 *Swaddling* v. *Adjudication Officer* [1999] ECR I–1075; *Macrae* v. *Macrae* [1949] P 397 (CA); and *Molson* v. *Molson* (1998) ACWSJ LEXIS 47658 (Alberta).

[70] *Shah* v. *Barnet LBC* [1983] 2 AC 309; *Re N*, [1993] 2 FLR 124 (CA); *Ex parte Grant* 31st July 1997; *Ponath* v. *Ponath* 829 FSupp 363 (1993); *D* v. *D* [1996] 1 FLR 574; and *Re A* [1996] 1 WLR 25.

[71] *Shah* v. *Barnet LBC* [1983] 2 AC 309; *Re J* [1990] 2 AC 562; *M* v. *M* [1997] 2 FLR 263 (CA); *Dickson* v. *Dickson* [1990] SCLR 692 (Inner House); *D* v. *D* [1996] 1 FLR 574; *Re S* [1994] Fam 70; *Re A* [1996] 1 WLR 25; and *Re M* 10 August 1995 (CA). See also *Hamilton* [1989] Ont CJ LEXIS

abandons his existing habitual residence in a country by leaving the country or remaining absent therefrom, with a settled purpose of not returning with a view to resuming residence indefinitely or for a substantial period of time.[72] For these purposes, one month (but no shorter period) constitutes an appreciable period of time;[73] and three years (but no shorter period) constitutes a substantial period of time.[74]

In general the habitual residence of a child follows that of the person or persons who have parental responsibility for him and with whom he has his home.[75] For this purpose a person remains a child until he attains the age of 16, and then becomes an adult.[76] More precisely, the factual element in the habitual residence of a child is determined by reference to the child's own actual residence, absence or departure,[77] but the volitional element is determined by reference to the intentions as to the child's residence of the person or persons who have parental responsibility for the child, and not to the intention of the child himself.[78] Where more than one person has parental responsibility for a child, the child's habitual residence can only be changed by or with the consent or acquiescence of all the persons who have parental responsibility for the child[79]

416; *Feder* v. *Evans-Feder* 63 F3d 217 (C3, 1995); and *Re PK and CK* [1994] 1 IR 250. Cf *Rydder* v. *Rydder*, 49 F3d 369 (C8, 1995); *Mozes* v. *Mozes* 19 FSupp2d 1108 (1998); and *Al H* v. *F* [2001] 1 FCR 385 (CA).

[72] See *Re J* [1990] 2 AC 562; *Friedrich* v. *Friedrich* 983 F2d 1396 (C6, 1993); *Re M* [1996] 1 FLR 887 (CA); *F* v. *S* [1993] 2 FLR 686 (CA); *Re R* [1992] 2 FLR 481 (CA); and *Re M* 10 August 1995 (CA).

[73] *Re F* [1992] 1 FLR 548 (CA); *Nessa* v. *Chief Adjudication Officer* [1999] 1 WLR 1937 (HL); *Re B*, 24th July 1995 (CA); and *Al H* v. *F* [2001] 1 FCR 385 (CA). See also V. v. *B* [1991] 1 FLR 266; *Re B*, [1993] 1 FLR 993; *A* v. *A* [1993] 2 FLR 225; *Cameron* v. *Cameron* [1996] SLT 306 (Inner House); *D* v. *D*, [1996] 1 FLR 574; *M* v. *M* [1997] 2 FLR 263 (CA); and *Re S* [1998] AC 750. And see, in the Family Court of Australia, *Cooper* v. *Casey* (1995) 18 Fam LR 433, and *Casse* (1995) 19 Fam LR 474; in the United States, *Feder* v. *Evans-Feder* 63 F3d 217 (C3, 1995); and in Canada, *Kinnersley-Turner* (1996) 140 DLR 4th 678 (Ontario CA).

[74] Above n 71.

[75] *Re P(GE)* [1965] 1 Ch 568 (CA); *Re J* [1990] 2 AC 562; *Re F* [1992] 1 FLR 548 (CA); *Re K*, 24th June 1991 (CA). See also *Friedrich* v. *Friedrich* 983 F2d 1396 (C6, 1993); *Prevot* v. *Prevot* 855 FSupp 915 (1994); *Rydder* v. *Rydder* 49 F3d 369 (C8, 1995); *Nunez-Escudero* v. *Tice-Menley* 58 F3d 374 (C8, 1995); *Feder* v. *Evans-Feder* 63 F3d 217 (C3, 1995); *Walton* v. *Walton* 925 FSupp 453 (1996); and *Lops* v. *Lops* 140 F3d 927 (C11, 1998).

[76] *Re P(GE)* [1965] 1 Ch 568 at 585 (CA); the Domicile and Matrimonial Proceedings Act 1973, s 3; the Family Law Act 1986, s 41; the Children Act 1989, s 9; and the Abduction Convention, Art. 4. Cf. the Family Law Reform Act 1969, s 1; the Hague Convention 1996, Art. 2; and Hague Convention on Intercountry Adoption (1993), Arts. 3 and 17(c).

[77] *Re M* [1993] 1 FLR 495 (CA); *Re B* 24 July 1995 (CA); *Re M* [1996] 1 FLR 887 (CA); *Gateshead MBC* v. *L* [1996] Fam 55; and *Al H* v. *F* [2001] 1 FCR 385 (CA).

[78] *Re J* [1990] 2 AC 562; *Re M* [1993] 1 FLR 495 (CA); *Rellis* v. *Hart* 1993 SLT 738; and *Re M*, [1996] 1 FLR 887 (CA).

[79] *Re P(GE)* [1965] 1 Ch 568 (CA); *Re F* [1992] 1 FLR 548 (CA); *Re S* [1994] Fam 70; *D* v. *D* [1996] 1 FLR 574; *Re M* [1996] 1 FLR 887 (CA); and s 41 of the Family Law Act 1986. See also *Laing*, (1996) 21 Fam LR 24 (Family Court of Australia).

or with the authority of an order made by a competent court.[80] Where a person who has parental responsibility for a child consents to the child living apart from him in the care of another person at the other person's habitual residence (whether or not the other person also has parental responsibility for the child), such consent may affect the habitual residence of the child if it is to the child so living for a period not less than a school-year.[81] In a situation where no-one has parental responsibility for a child, the child's habitual residence remains the same as immediately before such situation arose, at least until the child has established a stable home with a relative without opposition from other relatives (or until the child attains the age of 16).[82]

E. Maintenance and Matrimonial Property

As we have seen, the Matrimonial Regulation does not apply to maintenance or matrimonial property, even when dealt with ancillary in proceedings for divorce, separation or annulment. But maintenance falls within the scope of the Brussels I Regulation, even when dealt with ancillarily in matrimonial proceedings,[83] while matrimonial property is not yet regulated by any Community measure.[84] It is difficult to see why the tiresome necessity of distinguishing between matrimonial property and maintenance could not be eliminated by a simple amendment to the Brussels I Regulation, deleting matrimonial property from the matters excluded by Article 1(2)(a) from its scope and extending Article 5(2) to cover matrimonial property as well as maintenance.

In any event the European Court has construed maintenance widely and matrimonial property narrowly. Thus in *De Cavel* v. *De Cavel (No 2)*[85] it ruled that maintenance includes periodical payments between former spouses after divorce, where such payments are designed to compensate for the disparity in their living standards arising from the breakdown of the marriage, and are fixed on the basis of their respective needs and resources. Further, in *Van den*

[80] *Re R (No 2)* [1993] 1 FLR 249; *Re G* [1993] 1 WLR 824 (CA); *Re S* [1995] 1 FLR 314; and *Emmett* v. *Perry* (1996) FLC 92–645 (Family Court of Australia).

[81] See (on consent for a sufficient period) *Re K* [1995] 2 FLR 211 (CA); *Cameron* v. *Cameron* 1996 SLT 306; *Slagenweit* v. *Slagenweit* 841 FSupp 264 (1993); *Re S* [1991] 2 FLR 1 (CA); *Re M* [1996] 1 FLR 887 (CA); and *Mozes* v. *Mozes* 19 FSupp2d 1108 (1998); and (on consent for an insufficient period): *Re P(GE)* [1965] 1 Ch 568 (CA); *Re A* [1988] 1 FLR 365 (CA); *Evans* v. *Evans* [1989] 1 FLR 135 (CA); *Re A* [1991] 2 FLR 241 (CA); *P* v. *A-N* [2000] WL 33148939; *Hanbury-Brown* (1996) 20 Fam LR 334 (Family Court of Australia); *Medhurst* 1995 Ont CJ LEXIS 3142 (Ontario); and *Snetzko* 1996 Ont CJ LEXIS 3039 (Ontario).

[82] *Re S* [1998] AC 750; and see *Re ES*, 20 November 1997 (Irish High Court).

[83] Art. 5(2), and Case 120/79 *De Cavel* v. *De Cavel (No 2)* [1980] ECR 731.

[84] Matrimonial property is among the matters listed for action in the first stage of the draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters, OJ 2000 C12/1.

[85] Case 120/79 [1980] ECR 731.

Boogaard v. *Laumen*,[86] faced with an English 'clean-break' divorce settlement, it ruled that maintenance includes the payment of a lump sum and the transfer of ownership in certain property by one former spouse to the other, under an order made in divorce proceedings, if its purpose is to ensure the recipient's maintenance, as is the case where the award is designed to enable the recipient former wife to provide for herself, or the needs and resources of each of the spouses are taken into consideration in the determination of its amount. This must be taken as limiting or superseding the earlier ruling in *De Cavel* v. *De Cavel (No 1)*[87] that matrimonial property extends to any proprietary legal relationships between spouses resulting directly from the matrimonial relationship or its dissolution.

Under Chapter II of the Brussels I Regulation, a maintenance claim against a defendant domiciled in a Member State may brought, under Article 2, in the courts of the State in which the defendant is domiciled,[88] or, at the applicant's option, under Article 5(2), in another Member State, in the courts for the place where the applicant[89] is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties. Jurisdiction can also be created by agreement between the parties under Article 23, or by the defendant's appearance without contesting jurisdiction under Article 24. The Combined Proposal, by Article 70, proposes to amend Article 5(2) of the Brussels I Regulation, by adding a clause conferring maintenance jurisdiction, where the matter is ancillary to proceedings concerning parental responsibility, on the court which under the Combined Proposal has jurisdiction to entertain the custody proceedings.

The Brussels I Regulation does not cope well with judgments which are variable by reason of subsequent changes of circumstance, as is typically the case for orders for periodical payments of maintenance. According to the Schlosser Report,[90] power to vary a maintenance order belongs neither to the court which originally made the order, nor to a court in which enforcement of a foreign order is sought under Chapter III of the Regulation. For the purpose

[86] Case C–220/95 [1997] ECR I–1147. See also *Fournier* v. *Fournier* [1998] 2 FLR 990 (CA).

[87] Case 143/78 [1979] ECR 1055. See also Case 25/81 *CHW* v. *GJH* [1982] ECR 1189.

[88] For this purpose domicile is not used in the traditional English sense, but in a sense fairly similar to habitual residence. See the Brussels I Regulation, Art. 59; the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), Sch 1, para 9; *Dubai Bank* v. *Abbas*, 17th July 1996 (CA); *Daniel* v. *Foster* [1989] SCLR 378; *Grupo Torras* v. *Al-Sabah* [1995] 1 Lloyd's Rep 374; and *Petrotrade* v. *Smith* [1998] 2 All ER 346.

[89] Case C–295/95 *Farrell* v. *Long*, [1997] ECR I–1683, where the European Court ruled that the reference in Art. 5(2) to the maintenance creditor covers anyone applying for maintenance, including a person making a maintenance application for the first time.

[90] OJ 1979 C 59/71. See also Gaudemet-Tallon, H. *Les Conventions de Bruxelles et de Lugano* 2nd edn, (Paris, LGDJ, 1996) at para 182.

of jurisdiction an application for variation must be treated as a separate proceeding, and the necessary connecting-factor under Chapter II must exist at the institution of the application for variation.[91] But, since recognition under Chapter III implies that the order must be given the same effects in the State addressed as it has in the State of origin,[92] it seems clear that a court of a Member State which is competently seized of an application to vary or supplement a maintenance order made in another Member State is precluded from doing so in a manner inconsistent with the law of the country in which the original order was made; for example, where the law of the country of origin does not permit an order to be varied by way of remitting accrued arrears.[93]

Under Chapter III of the Brussels I Regulation, Article 34(3)-(4) prevent the recognition and enforcement of a judgment if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, or with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed. In *Hoffmann* v. *Krieg*[94] the European Court explained that judgments are irreconcilable with each other for this purpose where they entail mutually exclusive legal consequences, and that there was irreconcilability between a German maintenance order and a subsequent Dutch divorce, as regards the period following the divorce, on the questionable assumption that the maintenance order necessarily presupposed the continued existence of a matrimonial relationship. The ruling has been followed, loyally rather than enthusiastically, by English courts in the context of Irish maintenance orders followed by English divorces.[95]

Since the Matrimonial Regulation does not include maintenance within its scope, it might at first sight have been assumed that it has no effect at all on maintenance claims, but such an assumption would be unjustified, especially from an English viewpoint. For in England maintenance is frequently dealt with ancillarily in matrimonial proceedings, and the effect of the Regulation is sometimes to deprive the English courts of matrimonial jurisdiction in favour of a court of another Member State. For example, where a wife of English origin has recently returned to England and revived her English domicile but has not habitually resided in England for six months, and the husband, who is a French

[91] Also *Thurston* v. *Thurston* 28th October 1997 (CA).

[92] Case 145/86: *Hoffmann* v. *Krieg* [1988] ECR 645; the Jenard Report, OJ 1979 C 59/1 at 43; *Re the Enforcement of a Swiss Maintenance Agreement* [1988] ECC 181 at 187 (German Supreme Court); and 28 US Code (1964), s 1738. Cf. the Schlosser Report, above n 90 at 127–28; and *Hart* v. *American Airlines*, 304 NYS2d 810 (1969).

[93] *Heron* v. *Heron* 703 NE2d 712 (1998), where a Massachusetts court held that the full-faith-and-credit clause of the US Constitution prevented it from modifying a Nevada maintenance order insofar as it was unmodifiable (as regards arrears) under Nevada law.

[94] Case 145/86 [1988] ECR 645.

[95] *Macaulay* v. *Macaulay* [1991] 1 WLR 179; and *Ex parte Emmett* [1993] 2 FLR 663.

national and has for many years been habitually resident in France, commences divorce proceedings there. Moreover, even if in principle the English court has matrimonial jurisdiction, as where the wife has habitually resided here for a sufficient period after her return, such jurisdiction will be defeated if matrimonial proceedings are first begun in a competent court of another Member State. The inability of the English court as a result of the Matrimonial Regulation to entertain divorce proceedings will entail a consequent inability to entertain ancillary proceedings for maintenance, and independent English proceedings for maintenance will meet other obstacles. If the foreign divorce court is also requested to deal with maintenance, the pending maintenance application there will prevent a concurrent English application for maintenance (for example, under s 27 of the Matrimonial Causes Act 1973 on the ground of wilful neglect to maintain), since Article 27 of the Brussels I Regulation will compel the English court to decline jurisdiction in favour of the court first seized of a maintenance application. After the foreign court has granted a divorce and ruled on the maintenance application, an application could in some cases be made to the English court for maintenance after foreign divorce under Part III of the Matrimonial and Family Proceedings Act 1984. But on such an application the English court would have to recognise the foreign maintenance order under Chapter III of the Brussels I Regulation, and, as we have seen, this would probably prevent the English court from making a maintenance order of a type or on grounds other than ones on which the foreign court could have varied or supplemented its maintenance order.

III. Children

A. Scope

The Matrimonial Regulation, as well as dealing with matrimonial petitions and decrees, extends to applications and orders relating to parental responsibility for the children of both spouses, but only when this is determined 'on the occasion of' proceedings for divorce, separation or annulment.[96] This means that the issues concerning parental responsibility must be closely linked to the matrimonial proceedings, though they need not be before the same court.[97] In referring to 'parental responsibility' the Regulation appears to cover all types of application or order which are contemplated by s 8 of the (English) Children Act 1989: residence orders, contact orders, prohibited steps orders, and specific issue orders. Thus it is convenient to speak of 'custody orders' in a generic sense referring to all orders relating to children which fall within the Matrimonial Regulation and s 8 of the 1989 Act. The Regulation gives no indication as to the

[96] Arts. 1(1)(b) and 13(1).

[97] Para 11 of the Preamble; and the Borrás Report, above n 10 at paras 23 and 37.

age at which a person ceases to be a child, so the issue is probably remitted to the law of the forum State.

The inclusion of child custody in the Matrimonial Regulation was not uncontroversial, especially in view of the Hague Convention 1996.[98] As the House of Lords Select Committee pointed out, the Hague Convention is a far more comprehensive instrument dealing with child custody matters (including orders made on divorce) and is highly regarded. In particular, it deals with all child custody orders, not only those made on divorce; and with orders in respect of all children, not only those of the parties to a divorce involved. The Select Committee would therefore have preferred the Matrimonial Convention not to have dealt with child custody at all. Failing that, the Committee proposed that the provisions of the Matrimonial Convention should mirror those in the Hague Convention, so as to avoid the possibility of conflict in respect of orders made in relation to the same children in different proceedings, or to different children of the same family in the same proceedings. Ultimately the principle of mirroring was largely accepted in the Matrimonial Convention and Regulation, but they remained confined to the (biological and adopted) children of both parties to a matrimonial proceeding. A British proposal to include other 'children of the family' as understood in English law, such as a child of one of the spouses from a previous marriage, was rejected, apparently from fear of prejudicing the rights of the child's other natural parent. While it is open to the United Kingdom to extend the provisions of the Matrimonial Regulation on direct jurisdiction to such children, the resulting custody orders will not qualify for recognition and enforcement under the Regulation.[99]

It was in order to rectify the narrow scope of the provisions of the Matrimonial Regulation relating to parental responsibility that on 6 September 2001 the EC Commission presented a proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matters of Parental Responsibility ('the Child Proposal').[100] This was designed to apply to all civil and other officially recognised proceedings relating to parental responsibility, regardless of whether the parents were or had been married to each other, and whether the custody proceedings were connected to matrimonial proceedings, and even if the parties to the dispute were not parents or even relatives of the child. It was to take precedence over the Matrimonial Regulation.

Eventually on 3 May 2002 the EC Commission presented a revised proposal for a Council Regulation concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation 1347/2000 and amending Regulation 44/2001 in Matters relating to Maintenance ('the Combined Proposal').[101] This

[98] Above n 17.
[99] Borrás Report, above n 10 at para 25.
[100] For its text, OJ 2001 C 332E/269.
[101] COM(2002) 222 final.

combines the Matrimonial Regulation, the Child Proposal and the Access Initiative.[102] As regards matrimonial proceedings, it consolidates the provisions of the Matrimonial Regulation without substantial alteration. As regards parental responsibility, it integrates into a complete system of rules the provisions of the Matrimonial Regulation, the Child Proposal, and the Access Initiative. It regulates jurisdiction over all proceedings concerning parental responsibility, and extends the principle of mutual recognition to all decisions thereon, regardless of whether a marriage or divorce is involved, and abolishes the need for an enforcement order in respect of orders for access. It also elaborates a new solution for the return of the child in cases of child abduction between Member States, limiting the courts of the State to which the child has been abducted to the taking of provisional protective measures. These would be superseded by a custody decision issued by the courts of the child's habitual residence, and such a decision requiring the return of the child would not require an enforcement order. The measure is intended to take effect from 1 July 2004.[103]

By Article 1, the Combined Proposal applies to civil and other officially recognized proceedings relating to the attribution, exercise, delegation, restriction or termination of parental responsibility, but not to matters relating to maintenance, nor to measures taken as a result of penal offences committed by children.[104] Article 2(6) defines 'parental responsibility' as rights and duties given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect and relating to the person or the property of a child, and as including rights of custody and rights of access. By Article 2(7), a 'holder of parental responsibility' means any person having parental responsibility over a child. By Articles 2(8)–(9), 'rights of custody' include rights and duties relating to the care of the person of a child, and in particular the right to have a say in determining the child's place of residence, and 'rights of access' include the right to take a child to a place other than his or her habitual residence for a limited period of time. These definitions have clearly been to a large extent borrowed from the Abduction Convention. But the Proposal fails to specify the age at which a person ceases to be a child, and thus probably remits the issue to the law of the forum State. It also fails (except in abduction cases) to specify the law which determines whether a person holds parental responsibility, so that on this point the existing conflict rules of the forum State probably remain applicable.

On the other hand, the Combined Proposal confers certain substantive and procedural rights on children, derived from Article 24 of the Charter of

[102] On the Access Initiative, see above n 12.

[103] Art. 71. For transitional provisions, Art. 63.

[104] The intention is to exclude both criminal proceedings and subsequent civil measures of protection, such as the placement of the child in an institution. See the Explanatory Memorandum, above n 19 at 6.

Fundamental Rights of the European Union. By Articles 3 and 4, a child has the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless this is contrary to his or her interests, and to be heard on matters relating to parental responsibility over him or her in accordance with his or her age and maturity. The imposition of these obligations, primarily on the court hearing the original application, is designed to promote mutual confidence between the courts of different Member States and thus facilitate the mutual recognition and enforcement of custody orders.

The Combined Proposal also provides, in Chapter V (Articles 55–59), for co-operation between Member States through central authorities. Each Member State must designate a central authority to assist with the application of the regulation. The central authorities are to take general measures for improving the application of the regulation and strengthening their co-operation. They are also to co-operate on specific cases, in particular for the purpose of ensuring the effective exercise of parental responsibility over a child. This involves exchanging information on the situation of the child, on any procedures under way, and on decisions taken concerning the child; making recommendations, in particular with a view to co-ordinating a protective measure taken in the Member State where the child is present with a decision taken in the Member State having substantive jurisdiction; taking all necessary measures for locating and returning the child, including instituting proceedings to this end in abduction cases; providing information and assistance to holders of parental responsibility seeking to recognise and enforce decisions on their territory, in particular concerning rights of access and the return of the child; supporting communications between courts, in particular for the purpose of transferring a case between courts or of making decisions in abduction cases; and promoting agreement between holders of parental responsibility through mediation or other means. Accordingly, a holder of parental responsibility will be able to submit a request for assistance to the central authority of the Member State of his or her habitual residence, or to that of the Member State where the child is habitually resident or present. Moreover the assistance provided by the central authorities will be free of charge, each central authority bearing its own costs.

By Article 61, the Combined Proposal will take precedence in relations between Member States over various international conventions,[105] including both the Abduction Convention and the Hague Convention 1996. However, if

[105] Specifically: the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors; the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages; the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

the Community were to accede to the Hague Convention 1996, Article 52 of that Convention would result in limitations on the operation of the regulation resulting from the Combined Proposal in relation to children who are not habitually resident in a Member State but are habitually resident in another Contracting Party to the Convention.[106]

B. Direct Jurisdiction (in cases not involving Abduction)

1. The Matrimonial Regulation

In Chapter II of the Matrimonial Regulation, only Article 3 deals specifically with direct jurisdiction to entertain custody applications, and this provision is limited to cases where matrimonial proceedings are pending in a Member State in accordance with the unified rules laid down by Articles 2 and 5–6, and where in addition the child is habitually resident in the same or another Member State. In such a case, Article 3(1) confers ancillary custody jurisdiction on the courts of a Member State in which matrimonial proceedings are pending in accordance with the unified rules and in which also the child is habitually resident.

If the child is habitually resident in another Member State, a complicated provision, laid down by Article 3(2), which largely reflects Article 10 of the Hague Convention 1996, applies. This confers ancillary custody jurisdiction on the courts of a Member State in which matrimonial proceedings are pending in accordance with the unified rules, but subject to two conditions: (a) that at least one of the spouses has parental responsibility in relation to the child; and (b) that such jurisdiction has been accepted by the spouses and is in the best interests of the child. It is difficult to see much value in so limited a jurisdiction.

In any event, the ancillary jurisdiction conferred by Article 3 is limited in duration by Article 3(3). It terminates once decisions on the matrimonial application, and on any custody application made during the pendency of the matrimonial proceedings, have become final (in the sense that no further appeal or review of any kind is possible),[107] or the matrimonial and custody proceedings have otherwise terminated (for example, by withdrawal or the death of a spouse).[108] A further restriction, laid down by Article 4, insists that a court exercising ancillary jurisdiction under Article 3 shall respect the Abduction Convention, which requires the summary return of an abducted child to the country of his habitual residence unless an exceptional ground is established.[109]

No provision of Chapter II deals specifically with existence of ancillary custody jurisdiction where the child is not habitually resident in any Member

[106] Explanatory Memorandum to the Combined Proposal, above n 19 at 8.
[107] Borrás Report, above n 10 at para 39.
[108] *Ibid*. at para 39.
[109] Abduction cases are discussed below text nn 116 to 129.

State;[110] nor even where the child is habitually resident in a Member State but matrimonial jurisdiction is based on a residual ground permitted by Articles 7 and 8. In such cases it seems that Article 8 remits the existence of ancillary custody jurisdiction to the law of the forum State.

As regards simultaneous proceedings, it seems that where in accordance with Article 11 the court subsequently seized of matrimonial proceedings stays or declines jurisdiction over them in favour of the court first seized, the stay or dismissal extends to ancillary custody proceedings in the same country. On the other hand, it seems that Article 11 does not apply where the custody proceedings in one of the countries are not ancillary to any matrimonial proceedings there. In any event Article 12 ensures that a court is never prevented by the Regulation from taking urgent and provisional measures to protect a child present in its territory.

2. The Combined Proposal

Sections 2 and 3 (Articles 10–15 and 16–20) of Chapter II of the Combined Proposal are designed to establish an elaborate set of rules on the existence and exercise of jurisdiction on the part of the courts of the Member States to determine custody applications, except in abduction cases, to which section 4 (Articles 21–25) applies. Under sections 2 and 3, the primary connecting factor is the habitual residence of the child at the date of the application, but there are exceptions in favour of the child's habitual residence at an earlier time when a custody order was made or of a court whose jurisdiction is agreed on by the parties. The courts of the State in which the child is present have jurisdiction if his habitual residence cannot be established, and in any event may take provisional measures to protect the child in urgent cases. There is also provision for residual jurisdiction in accordance with the *lex fori* if no Member State has jurisdiction under the unified provisions. In the case of concurrent proceedings, the court first seized normally prevails, but there is also provision for the transfer of a case between the courts of different Member States in exceptional cases where it is in the best interests of the child. In general the Proposal seeks to ensure that there is only one Member State whose courts have custody jurisdiction in respect of a child.

As regards the existence of jurisdiction, Article 10 lays down the general rule that the courts of a Member State have jurisdiction in matters of parental responsibility over a child who is habitually resident in the forum State at the time when the court is seized. Exceptions are made by Articles 11, 12 and 21, which exclude in certain circumstances the jurisdiction of the courts of the child's current habitual residence in favour of those of an earlier habitual residence, or those accepted by the holders of parental responsibility, or those of the country from which the child has been abducted.

[110] Cf. Art. 37, giving the Regulation precedence over the Hague Convention 1996 'provided that the child concerned is habitually resident in a Member State.'

Article 11 applies in certain cases where the child's habitual residence has recently changed from a Member State. It appears to apply whether the change in habitual residence is to another Member State, or to a non-member country, or to an absence of any habitual residence anywhere. It provides for the continued jurisdiction of the courts of the Member State where the child was previously habitually resident, to the exclusion of those of any Member State where he is currently habitually resident, if the following conditions are satisfied: (a) there is a custody order issued by the courts of the former habitual residence in accordance with Article 10; (b) the child has resided in the State of his new residence for less than six months at the time when the court is seized; (c) one of the holders of parental responsibility continues to reside in the Member State of the former habitual residence of the child; and (d) the said holder of parental responsibility has not accepted the jurisdiction of the courts of the Member State of child's new habitual residence. For this purpose appearance before a court does not in itself constitute acceptance of the court's jurisdiction.

The need for Article 11 is open to doubt, at least where the child has become habitually resident in another Member State. In its Explanatory Memorandum accompanying the Child Proposal,[111] the EC Commission gave the following example of its intended operation:

> A decision issued in Member State X gives custody of Child to Mother and access rights to Father every other weekend, all three residing in X. Mother decides to relocate with Child to Member State Y, and the decision will have to be modified as it is no longer practical for Father to see Child every other weekend. Even if, under the terms of the existing decision, it is not necessary to do this before relocating, Article [11] still allows Father to seize the courts in X for this purpose. The courts in Y must decline jurisdiction for six months after relocation, unless Father accepts their jurisdiction.

But in the case described, Father would probably have been entitled under the law of State X to object to the child's removal without his consent, and the removal would then amount to abduction, and thus fall within Article 21 and not Article 11, unless Father had agreed to or acquiesced in the child's removal, or a court in State X had authorised such removal. Moreover it seems inconceivable that in such circumstances Mother's unilateral act of removal could have altered the child's habitual residence, however obvious and resolute her intention to do so may have been. On the other hand, Article 11 would seem to apply even where the last custody order had expressly authorised the carer to move the child permanently to another country. It is submitted that a far better provision would have stated simply:

> The habitual residence of a child cannot be changed otherwise than with the voluntary consent of all holders of parental responsibility under the law of the country in

[111] Above n 15 at 7.

which the child is habitually resident immediately before such change, or with the authorisation of a court of that country.

Article 12 provides for jurisdiction by agreement. Article 12(1) and (3) consolidates the ancillary custody jurisdiction provided for by Article 3(2)–(3) of the Matrimonial Regulation. Article 12(2) adds a more general provision conferring custody jurisdiction on the courts of a Member State where: (a) all holders of parental responsibility have accepted such jurisdiction at the time when the court is seized; (b) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and (c) such jurisdiction is in the best interests of the child. For this purpose appearance before a court does not in itself constitute acceptance of the court's jurisdiction.

By Article 13(1), the courts of the Member State where the child is present have custody jurisdiction in respect of a child whose habitual residence cannot be established, unless a court of a Member State has jurisdiction on the basis of an earlier habitual residence or an agreement. This is extended by Article 13(2) to refugee children or children internationally displaced because of disturbances occurring in their country, even if they remain habitually resident in the country which they have left. According to the EC Commission's Explanatory Memorandum to the Child Proposal,[112] Article 13(1) may apply where the courts of one Member State consider that the child has lost his habitual residence while the courts of another Member State consider that the conditions for acquiring a new habitual residence are not yet fulfilled. No doubt it applies generally in situations where the forum concludes that the child has no habitual residence anywhere. But, except in the case of refugee or displaced children, Article 13 does not apply where the child is regarded as habitually resident in a non-member country.

By Article 14, where no court of a Member State has jurisdiction on the bases of habitual residence, agreement, presence or abduction, jurisdiction is determined, in each Member State, by the laws of that State. As is recognised in the EC Commission's Explanatory Memorandum to the Child Proposal,[113] the accession of the European Community to the Hague Convention 1996, as envisaged in the Commission's Proposal of 20 November 2001,[114] would preclude the exercise of jurisdiction over children habitually resident in a non-member country which is a Contracting State to the Convention, except in conformity with the Convention.

[112] Above n 15 at 9.
[113] *Ibid*.
[114] COM(2001) 680 final.

Article 15 departs from the usual approach adopted by Community law, whereby a competent court, properly seized, is bound to determine the dispute, by providing for the transfer of a case to a court of another Member State which is regarded by both courts as better placed to hear it in the best interests of the child. The power is expected to be exercised in exceptional circumstances only, and an application for transfer by a holder of parental responsibility is necessary. The transfer will be from a court of a Member State having substantive jurisdiction to a court of another Member State which either (a) was the former habitual residence of the child, or (b) is that of the child's nationality, or (c) is the habitual residence of a holder of parental responsibility, or (d) is the place where property of the child is located. The transferring court stays its proceedings and prescribes a period during which the other court must be seized. If the receiving court does not accept jurisdiction one month of being seized, the transferring court must exercise jurisdiction. The courts involved are expected to co-operate for these purposes, either directly or through the central authorities.

Articles 16–19, on the time of seizing, examination as to jurisdiction of the court's own motion, notification of the respondent, and simultaneous proceedings, echo Articles 9–11 of the Matrimonial Regulation. Under Article 19, where there are simultaneous custody proceedings in respect of the same child in different Member States, the court subsequently seized is required of its own motion to stay its proceedings until such time as the jurisdiction of the court first seized is established, and then to decline jurisdiction in favour of the first court. Upon such declension the party who applied for a custody order in the second court may bring his claim before the first court. As the Commission's Explanatory Memorandum to the Combined Proposal points out,[115] it is expected that this mechanism will rarely be used, as in general the jurisdictional regime for parental responsibility does not provide for alternative grounds of jurisdiction. But concurrent jurisdiction is not totally excluded, and Article 19 may operate where, for example, the courts of two Member States each consider that the child is habitually resident in their own territory, as may happen where the child divides his time between two homes; or where the residual provision applies because the child is not habitually resident in any of the Member States.

Article 20 deals with provisional measures. It permits the courts of a Member State to take in urgent cases such provisional measures to protect a child who is present or has assets in its territory as may be available under its law, even if the court of another Member State has jurisdiction as to the substance of the matter. The provisional measures cease to apply when a court with substantive jurisdiction makes a custody order.

[115] Above n 19 at 11.

C. Abduction Cases

1. The Abduction Convention

All the EC Member States, and a very large number of other countries, are party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Abduction Convention'),[116] which requires the summary return of an internationally abducted child to the country of his habitual residence unless an exceptional ground is established. The Convention is confined by Article 4 to children under the age of 16. By Articles 3–5, an international abduction is defined as a wrongful removal of a child from, or a wrongful retention of a child outside, the territory of the Contracting State in which he was habitually resident immediately before the removal or retention. A removal or retention is regarded as wrongful if it infringed rights of custody which existed under the law of the State in which the child was habitually resident immediately before the removal or retention,[117] and which at the time of the removal or retention were actually exercised, or would have been exercised but for the removal or retention. Rights of custody include rights relating to the care of the child's person, and in particular the right to determine his place of residence; and it is immaterial whether the rights are attributed to an individual, or to an institution or other body, whether they are attributed to one person or to several persons jointly, and whether they arise by operation of law, by reason of a judicial or administrative decision, by reason of a legally effective agreement, or otherwise.

Removal occurs when a child who has previously been in the State of his habitual residence is taken away across the frontier of that State, while retention occurs where a child who has previously been for a limited period of time outside the State of his habitual residence is not returned to that State on the expiry of such limited period.[118] But where a parent who had no rights of custody when a child was lawfully removed and initially retained subsequently acquires such rights (under the law of the child's then existing habitual residence) and demands the return of the child, the retention may become wrongful.[119]

An individual has sufficient rights of custody if the relevant law prohibits the removal of the child from the territory without his consent or a court order.[120] Thus where English law applies as that of the child's habitual residence

[116] In the United Kingdom the Abduction Convention is given effect by Part I of the Child Abduction and Custody Act 1985 .

[117] The reference to the law of the child's habitual residence extends to its conflict rules, rather than being limited to its internal law. See the Perez-Vera Report, in 3 *Actes et Documents de la Quatorzième Session* 426 at 445–46 (1982); and *Feder* v. *Evans-Feder* 63 F3d 217 (C3, 1995).

[118] *Re H* [1991] 2 AC 476.

[119] *Re S* [1998] AC 750.

[120] *Re C* [1989] 1 FLR 403.

immediately before the removal or retention, the normal effect of ss 2–4 of the Children Act 1989 is that the mother always has sufficient rights of custody, as does a marital father, but a non-marital father does not have such rights unless he has obtained parental responsibility by order or agreement.[121] However a court seized of a custody dispute itself constitutes an institution or body having rights of custody, and these rights can be invoked by the person who applied for the order.[122] In two very dubious decisions,[123] merely inchoate rights of an actual carer which it was thought virtually certain that a court would have protected on application have been considered sufficient. For a person who has rights of custody to be defeated by his failure to exercise them, there must be acts which constitute clear and unequivocal abandonment of the child.[124]

The key provision of the Convention is Article 12(1), which requires that, where a child has been internationally abducted and, at the date of the commencement of proceedings before a court of the Contracting State where the child is, a period of less than a year has elapsed from the date of the abduction, the court must order the return of the child forthwith. This mandatory obligation to order return is subject only to the limited exceptions specified by Article 13. These operate where it is established or found that: (i) the person or body having the care of the child's person was not actually exercising the custody rights at the time of the removal or retention; or (ii) that such person or body had consented to[125] or subsequently acquiesced in the removal or retention;[126] or (iii) that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable

[121] *S* v. *H* [1998] Fam 49.

[122] *Re H* [2000] 2 AC 291, and *B* v. *B* [1993] Fam 32 (CA).

[123] *Re B* [1994] 2 FLR 249 (CA), involving an unmarried father; and *Re O* [1997] 2 FLR 702, involving grandparents. Cf. *Re S* [1998] AC 750.

[124] *Friedrich* v. *Friedrich (No 2)* 78 F3d 1060 (C6, 1996).

[125] *Re W* [1995] 1 FLR 878, where Wall J held that prior consent cannot be passive; there must be clear and compelling evidence of a positive consent to the removal of the child from the country of his habitual residence. And *Re B* [1994] 2 FLR 249 (CA), holding that a consent obtained by deliberate deception will be ignored.

[126] *Re H* [1998] AC 72, where Lord Browne-Wilkinson emphasised that subsequence acquiescence normally requires a real subjective consent by the wronged parent to the removal of the child, and an intention to acquiesce should not normally be inferred from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child. By way of exception, there is acquiescence where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are wholly inconsistent with such return. For example, where the wronged parent signs a formal agreement that the child is to remain in the country to which he has been abducted; or takes an active part in proceedings in the country to which the child has been abducted to determine the long-term future of the child. See also *Re AZ* [1993] 1 FLR 682 (CA); *Re S* [1994] 1 FLR 819 (CA); *Re R* [1995] 1 FLR 716 (CA); and *Friedrich* v. *Friedrich (No 2)* 78 F3d 1060 (C6, 1996).

situation;[127] or (iv) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.[128] Moreover, even where the proceedings were commenced after the expiration of the one-year period, Article 12(2) requires that the court should still order the return of the child, unless one of the exceptions specified in Article 13 applies, or it is demonstrated that the child has become settled in his new environment. Further, Article 16 precludes the courts of the State to which the child has been abducted, after receiving notice of a wrongful removal or retention, from deciding on the merits of rights of custody until it has been determined that the child is not to be returned under the Convention, or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.[129] Finally Article 19 makes clear that a decision under the Convention concerning the return of a child must not be regarded as a determination on the merits of any custody issue.

2. The Matrimonial Regulation

The Matrimonial Regulation, by Article 4, requires a court exercising ancillary custody jurisdiction under Article 3 to respect the Abduction Convention.

3. The Combined Proposal

Chapter III (Articles 21–25) of the Combined Proposal provides a more radical solution than the Abduction Convention in cases of child abduction between Member States. This involves limiting the courts of the Member State to which the child has been abducted to the taking of provisional protective measures. These will be superseded by a custody decision issued by the courts of the child's habitual residence, and such a decision requiring the return of the child will not require an enforcement order. The procedure involves close co-operation between the central authorities of the States involved, which (by Article 25) will provide their assistance free of charge, though the courts may award the costs of locating or returning a child against the abductor.

Article 21(1) specifies that in cases of child abduction the courts of the Member State in which the child was habitually resident immediately before the removal or retention continue to have jurisdiction. This applies whether the abduction was to another Member State or to an external country; and where the abduction was to another Member State, it excludes the jurisdiction of

[127] For refusal based on grave risk, *Re F* [1995] 3 All ER 641 (CA), where the risk arose from the applicant father's violence; and *Re G* [1995] 1 FLR 64, where the children were very young and it was feared that the mother's return with them might push her existing depression into psychosis. See also *Friedrich* v. *Friedrich (No 2)* 78 F3d 1060 (C6, 1996).

[128] *S* v. *S* [1993] 2 WLR 775 (CA), and *Re R* [1995] 1 FLR 716 (CA).

[129] *R* v. *R* [1995] Fam 209 (CA).

the courts of that State. But Article 21(2) lays down two exceptions, in which a case of abduction between Member States is taken out of this Chapter and remitted to the normal rules laid down by the Proposal. The first exception is where the child has acquired a habitual residence in another Member State than that from which he was abducted, and every holder of rights of custody has acquiesced in the removal or retention. The second is where the child has acquired a habitual residence in another Member State than that from which he was abducted, and has resided there for at least one year after the holder of rights of custody had or should have had knowledge of the whereabouts of the child, and is settled in his new environment. In this second case it is further required either that no application for return has been lodged in accordance with Article 22 within the one-year period with the central authority of the Member State to which the child has been abducted, or that a custody order not entailing return has been issued under Article 24(3) by the courts of the Member State from which the child was abducted, or that no custody order has been issued by such a court one year after it has been seized under Article 24(2).

By Articles 22 and 23, a holder of rights of custody may apply for the return of an abducted child to the central authority of the Member State to which the child has been abducted, either directly or through another central authority. Upon receipt of such an application, the central authority of the Member State to which the child has been abducted must take the necessary measures for locating the child, and then ensure that the child has been returned within one month from locating him, unless proceedings seeking a protective measure are pending before a court of that State. The return of the child may be refused only by applying to the courts of the Member State to which the child has been abducted for a protective measure within one month after the child has been located by the central authority. The courts of the Member State to which the child has been abducted must decide on such an application without delay, and must hear the child unless this appears inappropriate having regard to his age or degree of maturity. They may take a protective measure not to return the child only if: (a) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place him in an intolerable situation; or (b) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views. Such a measure will be provisional. It may at any time be revoked by the issuing court, and it will in any event be superseded by a decision on custody issued by the courts of the Member State of the child's habitual residence immediately before the removal or retention under Article 24.

By Article 24, where a protective measure has been taken under Article 23, the central authority of the Member State to which the child has been abducted must inform the central authority of the Member State of the child's habitual residence immediately before the abduction of the protective measure, along with other useful information, within two weeks from its adoption. The central authority of the Member State of the child's habitual residence immediately

before the abduction must seize the courts of that Member State, seeking a decision on custody, within one month from receiving the information; and any holder of parental responsibility may also make such an application. The court so seized must issue a decision on custody without delay. But it must meanwhile co-operate with the court which took the protective measure, directly or through the central authorities, for purposes of monitoring the child's situation. It must hear the child, unless this appears inappropriate having regard to his age or degree of maturity, and take into account the information forwarded, and where appropriate use the provisions on co-operation in the taking of evidence laid down by EC Regulation 1206/2001. The custody decision will be notified by the central authority of the child's habitual residence immediately before the abduction to the central authority of the Member State to which the child has been abducted, along with useful information and appropriate recommendations. If the custody decision entails the return of the child and it has been certified in accordance with Chapter IV, Section 3, it must be recognized and enforced without an enforcement order for the limited purpose of returning the child, even if it is still subject to appeal.

The imaginative, progressive and careful character of these provisions is admirable. But one major issue appears to have been overlooked. It seems to have been assumed that it is always clear whether the removal of a child amounts to an abduction. In reality the alleged abductor may dispute this, and there may be a serious issue warranting careful judicial examination. The alleged abductor may, for example, deny that the child was ever habitually resident in the Member State from which he was removed; or he may claim that he himself is the only holder of rights of custody over the child, or that the other holders consented in advance to or subsequently acquiesced in the removal. In many cases these issues may be open to serious dispute. But the provisions fail to specify clearly which court is competent to determine such issues.

Let us a take a more concrete example. Suppose that the only facts which are clear beyond serious argument are that Father (F), Mother (M) and Child (C) were in London; that M removed C by Eurostar to Paris; that F was not present at Waterloo station when M and C boarded the train; and that no relevant custody order exists. F complains to the French central authority that M has abducted C. The authority locates C and informs M that it will return C to England unless she applies within a month to the French court for a provisional measure preventing return. M immediately consults an experienced French lawyer, and on the basis of the information which she supplies, the lawyer forms the view that M has a seriously arguable case that the removal does not amount to an abduction, for one of the following reasons:

— The child was never habitually resident in England. The family were there on a short visit to C's grandparents.
— F and M were not married, and only M had rights of custody over C, as a non-marital child.

— Although F and M were married, F is not the biological father of C, who was conceived in an extra-marital liaison.
— The family had moved from France to England on a long-term basis for employment reasons, but C had not been happy at an English school, and F therefore had agreed that M should take C back to France. F is now objecting only because M, after returning with C to France, has informed F that she wants a divorce.
— Although the removal was initially wrongful, F has since acquiesced, by paying the very substantial fees necessary to enable C to attend for the next three years the very reputable French school with which M had placed C.

The Proposal is unclear as to the forum in which M may contest the existence of an abduction on any of these grounds. Is it intended that such issues should be left to the central authorities, free from judicial control, or subject only to such limited judicial review as may apply to administrative decisions? Such a solution seems scarcely compatible with the right to a hearing under Article 6 of the European Human Rights Convention. If not, what procedure should M follow if the French central authority, despite letters from her lawyer, persists in treating the case as one of abduction? Should she, for example, attempt to combine an ordinary application to a French court for a custody order under Articles 10 or 13, on the basis that C is habitually resident or at least present in France, with an application in the alternative for a protective order under Articles 22 and 23, in case the French court agrees with the central authority that the case is indeed one of abduction? Conversely, what steps should F take if the French central authority, in response to M's arguments, informs F that it no longer regards the case as one of abduction?

The lack of clarity on such issues may be regarded as the weakest feature of the Combined Proposal. A solution of minimum adequacy would be to add an Article 21(3) stating:

> Where there is a serious dispute as to whether a child has been abducted, nothing in this Chapter (and in particular, nothing in Article 22(3)) prevents any court of a Member State which would have been competent to entertain an application in respect of the child under Section 2 of Chapter II if the child had not been abducted from determining whether the child has indeed been abducted, and if it determines that the child has not been abducted, from assuming substantive jurisdiction accordingly.

D. Recognition and Enforcement of Custody Orders

1. The Matrimonial Regulation

As well as providing for the recognition of matrimonial decrees, Chapter III of the Matrimonial Regulation provides for the recognition and enforcement in each Member State of orders relating to the parental responsibility for the

children of both spouses, given in the other Member States on the occasion of matrimonial proceedings,[130] and of orders relating to the costs of such proceedings.[131] It seems to apply even if the matrimonial jurisdiction of the original country was not based on the unified rules specified by the Title II of the Convention, and even if the child was not habitually resident in any of the Member States. In addition it assimilates to a court order an authentic instrument or court settlement which is enforceable in the Member State of origin, deals with parental responsibility in respect of children of both spouses, and is agreed to on the occasion of matrimonial proceedings.[132]

As in the case of matrimonial decrees, Article 14 makes the recognition under Chapter III of a custody order automatic and incidental, no special procedure being required. A detailed procedure for obtaining an enforcement order is established by Articles 21–35 of the Regulation. The enforcement procedure closely resembles that provided for in the Brussels I Regulation, especially as regards the issue of certificates by the original court.

The exceptions to a general rule in favour of the recognition and enforcement of custody orders are specified in Articles 15–20. In addition, Article 21 requires that, to be enforceable in the State addressed, a custody order must be enforceable in the State of origin and have been served. Articles 19 and 24(3) emphasise that under no circumstances may a custody order be reviewed as to its substance; but, as the Borrás Report recognises,[133] this does not prevent the modification of a custody order by reason of a subsequent change in circumstances. Article 17 excludes jurisdictional review, subject to very limited exceptions. These are confined to transitional cases;[134] situations involving the Nordic Convention 1931, to which Denmark, Sweden, Finland and other Scandinavian countries are party;[135] and agreements with external countries, analogous to those envisaged by Article 59 of the Brussels I Convention, precluding the recognition of judgments based on residual grounds of jurisdiction.[136] Unlike the Brussels I Regulation, the Matrimonial Regulation permits Member States to conclude such external agreements after its commencement.

The substantive grounds for refusal of recognition of custody orders are specified by Article 15(2). By Article 15(2)(a), recognition is to be refused if it would be 'manifestly contrary to the public policy' of the State addressed. But the scope of the public policy proviso is limited by Article 19, which prohibits review of the substance of the order. On the other hand, Article 15(2)(a) specifies

[130] Arts. 1(1)(b) and 13(1).
[131] Art. 13(2).
[132] Art. 13(3); and the Borrás Report, above n 10 at para 61.
[133] *Ibid*. at para 78.
[134] Art. 42(2).
[135] Art. 36(2).
[136] Art. 16.

(rather obscurely) that public policy involves taking into account the best interests of the child.

By Article 15(2)(c), recognition of an order must be refused where it was given in default of appearance, and the respondent was not served with the instituting or an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence, unless it is determined that the respondent has accepted the judgment unequivocally. In insisting on a Community standard for both the time and the manner of service, this accords with Article 34(2) of the Brussels I Regulation. But, unlike in the Brussels I Regulation, there is no requirement to seek redress in the State of origin where possible.

Additional grounds for refusal of recognition of custody orders on account of procedural defects are specified by Article 15(2)(b) and (d), which reflect Article 23(2)(b) and (c) of the Hague Convention 1996. By Article 15(2)(b), recognition must be refused if the order was made, except in case of urgency, without the child in question having been given an opportunity to be heard, in violation of fundamental principles of procedure of the State addressed. By Article 15(2)(d), it must also be refused, at the request of a person complaining of interference with his or her parental responsibility, if it was given without such person having been given an opportunity to be heard.

As regards irreconcilability between judgments, Article 15(2)(e) and (f) require that a custody order be refused recognition and enforcement in certain cases where it is irreconcilable with a *later* judgment relating to parental responsibility. The later judgment may be given in the Member State addressed. Alternatively it may be given in another Member State, or in the non-member country of the habitual residence of the child, but in these cases it must fulfil the conditions necessary for its recognition in the State addressed. Thus, as the Borrás Report recognises,[137] the Regulation accepts the inherent nature of custody orders, as being open to modification by reason of a subsequent change in circumstances. But there could be irreconcilability between a custody order made in connection with a divorce and a subsequent decision denying the former husband's paternity.[138]

2. *The Combined Proposal*

As we have seen, the Combined Proposal goes beyond the Matrimonial Regulation in extending to all child custody orders, regardless of whether the custody proceedings were connected with matrimonial proceedings. Recognition and enforcement is dealt with in Chapter IV (Articles 26–54). Sections 1, 2 and 4 (Articles 26–44 and 50–54) of Chapter IV echo Chapter III

[137] Above n 10 at para 78. See also Art. 23(2)(e) of the Hague Convention 1996, and the views of the House of Lords Select Committee on the European Communities, 5th Report at paras 41–44.

[138] Borrás Report (1997), above n 10 at para 73.

of the Matrimonial Regulation, except for two fairly minor additions contained in Article 50, on enforcement procedure, and Article 51, on practical arrangements for the exercise of rights of access.

Article 50 specifies that the enforcement procedure is governed by the law of the Member State of enforcement. This refers to the measures of actual enforcement, to be taken after any necessary enforcement order has been obtained. Article 51 enables the courts of the Member State of enforcement to make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not been made in the original order, and provided that the essential elements of that order are respected. Moreover such practical arrangements will cease to apply pursuant to a later order made by the courts of the Member State having substantive jurisdiction.

A radical departure from earlier Community legislation is made by Section 3 (Articles 45–49) of Chapter IV, which provides for the enforcement (as well as the recognition) of certain orders without the need for an enforcement order made by a court of the Member State addressed. It applies to an order granting rights of access to one of the parents of a child; and also to an order for the return of an abducted child, made under Article 24 by a court of the Member State from which he was abducted. It remains permissible, however, for a holder of parental responsibility to seek and obtain an enforcement order in such cases.[139]

Article 46 applies to access orders. The order must have been certified in the Member State of origin, using the standard form in Annex VI, and the court of origin should issue the certificate only if: (a) the judgment was not given in default of appearance; and (b) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his age or degree of maturity. The certificate is issued at the request of a holder of rights of access. By Article 48, no appeal lies against the issuing of the certificate. By Article 49, the party seeking enforcement must produce an authentic copy of the order, the certificate, and where necessary a certified translation of the term of the certificate relating to the arrangements for exercising the rights of access.

Article 47 applies to orders for the return of an abducted child. The order must have been certified in the Member State of origin, using the standard form in Annex VII, and the court of origin should issue the certificate only if the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his age or degree of maturity. The court of origin should issue the certificate at its own initiative. By Article 48, no appeal lies against the issuing of the certificate. By Article 49, the party seeking enforcement must produce an authentic copy of the order, and the certificate.

Section 3 is, at least at first sight, open to the objection, almost universally accepted in private international law (even as between constituent territories of

[139] Art. 45(2).

a composite State), that it is normally impracticable to expect enforcement authorities to act on a foreign judgment which has not been in some formal manner confirmed as effective by their own court. Thus the proper operation of section 3 is effectively dependent on the expertise and wisdom of the central authorities to be established by the regulation. It is therefore unfortunate that there is no provision in section 3 instructing all other officials involved to seek advice from their central authority.

IV. Some Concluding Thoughts

The Combined Proposal deserves a warm welcome, as a serious and largely well-considered attempt to harmonise important areas of private international law at European level. Without harmonisation private international law is necessarily hampered in achieving its purpose of facilitating private relationships between person from different countries, and experience has shown that effective harmonisation can much more readily be achieved by the use of EC legislation than by means of potentially worldwide agreements, such as are attempted at the Hague Conference. Moreover the Proposal demonstrates that European Community law is no longer concerned almost exclusively with economic activities.

Some suggestions for the improvement of the Proposal may however be useful:

(1) It would be useful to define a child by reference to age. Perhaps Article 2 could specify that 'child' refers to a person under 18, except in provisions on abduction, where it refers to a person under 16.
(2) It would also be useful to define habitual residence, in respect of both adults and children. Such a definition could later be extended to other EC legislation in the sphere of private international law (such as the Rome Convention of 1980 on the Law Applicable to Contractual Obligations, and any future measure on choice of law in respect of torts). The definition could be inserted after Article 2.
(3) The second clause of Article 19(3), which consolidates Article 11(3) of the Matrimonial Regulation, seems to compel a court to entertain a counterclaim of a kind which is unknown to, or contrary to a strong policy of, its own law. That clause should be deleted.
(4) There should be explicit provision as to which courts are competent to determine whether a child has been abducted. As a minimum, it should be specified, perhaps at the end of Article 25, that where there is a serious dispute as to whether a child has been abducted, nothing in Chapter III prevents any court of a Member State which would have been competent to entertain an application in respect of the child under Section 2 of Chapter II if the child had not been abducted from determining whether

the child has indeed been abducted, and if it determines that the child has not been abducted, from assuming substantive jurisdiction accordingly.

(5) Since a provision is included amending the Brussels I Regulation in relation to maintenance, the opportunity should be taken to include matrimonial property within the Brussels I Regulation, thus removing a pointless lacuna in the scope of EC law. Thus the phrase in Article 1(2)(a) of the Brussels I Regulation which excludes matrimonial property from the scope of that Regulation should be deleted, and Article 5(2) thereof should be extended to cover matrimonial property as well as maintenance. This amendment could be added to the Article 70 of the Proposal.

(6) The transitional provisions contained in Article 63 of the Proposal should be recast, so as to deal quite separately with judgments which currently fall within the material scope of the Matrimonial Regulation and those which do not, and to ensure that judgments which would be recognisable or enforceable under the Matrimonial Regulation are not subjected to less favourable treatment after the new measure has entered into force.

18

JUDICIAL ARCHITECTURE AT THE CROSS-ROADS: PRIVATE PARTIES AND CHALLENGE TO EC MEASURES POST- JÉGO QUÉRÉ

*Angela Ward**

I Introduction

This article maps out the channels at the disposal of private parties for challenging the legality of EC measures, and attempts some predictions of the future shape and content of this plank of the EU's judicial architecture. This area of the law is in a state of flux, particularly in the light of rulings such as *UEAPME* v. *Council*[1], *Masterfoods Limited* v. *HB Ice Cream*,[2] *Fresh Marine Company AS* v. *Commission*,[3] *Laboratoires Pharmaceutiques Bergaderm SA*, in liquidation, *and Jean-Jacques Goupil* v. *Commission*[4], *Bocchi Food Trade International GmbH* v. *Commission*,[5] and most recently, and significantly, *Jégo Quéré and Cie SA* v. *Commission*.[6] In this latter ruling the Court of First Instance prescribed a major change to the rules on *locus standi* under Article 230(4) of the EC Treaty, a hitherto much maligned aspect of the case law, by relaxing the requirement of 'individual concern' laid down in that article.

* Reader in Law, University of Essex, Barrister. Many thanks to Judge Nicholas Forwood for helpful comments on earlier draft. Responsibility for the article remains with the author. This article reflects the law as at 1 July 2002. For a detailed discussion of the issues here discussed see e.g. A. Albors–Llorens *Private Parties in European Community Law* (Oxford, OUP 1996); M. Brealey and M. Hoskins *Remedies in European Law* (London1998); A. Ward *Judicial Review and the Rights of Private Parties in EC Law* (Oxford, OUP 2000) P. Cassia *L'accès des personnes physiques ou morales au juge de la lègalité des actes communautaires* (2002).

[1] Case T–135/96 [1998] ECR II–2335.

[2] Case C–344/98, Judgment of 14 December 2000.

[3] Case T–178/98 Judgment of 24 October 2000.

[4] Case C–352/98 P [2000] ECR I–5291.

[5] Case T–30/99, Judgment of 20 March 2001; Case T–18/99 *Cordis Obst und Gemüse Großhandel GmbH* v. *Commission*, Judgment of 20 March 2001;Case T–52/99 *T Port GmbH* v. *Commission*, judgment of 20 March 2001.

[6] Case T– 177/01, Judgment of 3 May 2002.

At time of writing, the Court of Justice was yet to rule on the issues traversed in *Jégo*. However, departure from some of the traditional restrictions imposed by 'individual concern' had been supported by AG Jacobs in *Unión de Pequeños Agricultores (UPA)* v. *Council*.[7] Both the Advocate General and the *Jégo Quéré* court expressed reservations as to whether the test hitherto employed with respect to 'individual concern', under Article 230(4), complied with the fundamental right of access to judicial review, as reflected in Articles 6 and 13 of the ECHR, and Article 47 of the EU Charter of Fundamental Rights.[8]

It will be argued here that perceived 'access to justice' problems with respect to challenge to the legality of EC measures root deeply in gaps in the EU's constitutional structure. More particularly, they are intimately bound up with the continuing absence of a clear hierarchy of norms within the somewhat sketchy distinction between Regulations, Decisions and Directives, as prescribed by Article 249 of the EC Treaty. Confusion is compounded by absence of a willingness on the part of political actors to refer to one type of instrument when elaborating broad policy rules (or normative measures as they are sometimes termed) and other instruments with respect to policy implementation. The Community judicature are thus vested with the unenviable task of crafting a coherent system of administrative and constitutional review, against the landscape of a scheme of legislative measures which are, in some respects, highly incoherent. Therefore, any changes made by the Community judicature with respect to challenge to the legality of EC rules warrant back-up from the Member States via amendment to salient parts of the EU Treaty.

II The Traditional Architecture for Challenging the Legality of EC Rules

Those aggrieved by EC measures alleged to be unlawful have access to three avenues of redress to ventilate their claims. First, provided they can prove that they are either an addressee of a Decision, or that, even if not addressed, they are 'directly and individually' concerned by the measure in question, they are entitled to seek its annulment before the Court of First Instance under the procedure supplied by Article 230(4) of the EC Treaty. This avenue remains, however, subject to a strict two month time-limit for bringing proceedings.

Secondly, if a private party is unable to satisfy the *locus standi* test operative under Article 230(4), it remains entitled to seek compensation before the Court of First Instance for any loss suffered pursuant to Article 288 (2) of the EC Treaty.[9]

[7] Case C–50/2000 Opinion of 21 March 2002.

[8] *Jégo–Quéré* above n 6 at paras 41 and 42; The Opinion of AG Jacobs in *UPA* above n 7 at para 39.

[9] E.g. Case C–63/89 *Assurances du crédit and Compagnie belge d'assurance crédit* v. *Council* [1991] ECR I–1799; Case C–55/90 *Cato* v. *Commission* [1992] ECR I–2533; *Bergaderm* above n 4.

This obviates the need to prove 'direct and individual concern', given that this test is inapplicable in Article 288(2) damages claims. The Article 288(2) procedure carries the further advantage of a five-year limitation period, as opposed to the short two month period supplied by Article 230(4). However, the utility of recourse to Article 288(2) is limited in that it is strictly a means of obtaining *compensation*. It in no way entitles the Community judicature to annul the measure.

Further, while in principle there is an obligation on litigants first to seek redress before Member State courts via the Article 234 validity procedure (see further below) before turning to Article 288(2) damages,[10] this requirement only applies if such national proceedings would have afforded the applicant with an effective remedy.[11] Further, the Court of Justice has, on occasion, entertained Article 288(2) damages claims, in the absence of any prior litigation launched at national level, but at the same time has provided little or no discussion of whether or not compliance with this 'exhaustion of domestic remedies' rule had been secured.[12] While the Court of First Instance has recently shed light on the circumstances in which litigants will not be bound to exhaust Member State remedies before instituting Article 288(2) review,[13] the precise content of the rule has long been subject to contention.[14]

Thirdly, challenge to the legality of EC laws can also be launched before the national courts of the Member States. Unless the party invoking the alleged illegality 'without any doubt' had standing to bring Article 230(4) nullity proceedings,[15] then that party may ask a national court to make a reference under Article 234 of the EC Treaty to the Court of Justice in Luxembourg, contesting the validity of the impugned measure. The national court need only do so if it has serious doubts as to the validity of the measure in question, and it has no power itself to declare any EC rule invalid. The most it can do is issue an interim order suspending the application in the instant case of the EC measure in question, pending the ruling of the Court of Justice.[16] There is a restriction

[10] Case 281/82 *Unifrex* v. *Commission and Council* [1984] ECR 1969.

[11] *Ibid*.

[12] Case 63/89 *Les Assurances du crédit* v. *Council and Commission* [1991] ECR 1799; *Bergaderm* above n 4.

[13] Case T–30/99, judgment of 20 March 2001; Case T–18/99 *Cordis Obst und Gemüse Großhandel GmbH* v. *Commission*, judgment of 20 March 2001;case T–52/99 *T Port GmbH* v. *Commission*, judgment of 20 March 2001

[14] For detailed discussion see eg Wils 'Concurrent Liability of the Community and a Member State' 17 (1992) *ELRev* 191; Oliver 'Joint Liability of the Community and the Member States' in T. Heukels and A. McDonnell (eds) *The Action for Damages in Community Law* (Deventer, Kluwer 1997)

[15] Case C–188//92 *TWD Textilwerke Deggendorf* v. *Germany* [1994] ECR I–833, para 24.

[16] Case 314/85 *Foto–Frost* v. *Hauptzollamt Lübeck–Ost* [1987] ECR 4199. For the criteria to be applied in awarding interim relief see Joined Cases C–143/88 and C–92/89 *Zuckerfabrik Süderdithmarschen AG* v. *Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH* v. *Hauptzollamt Paderborn* [1991] ECR I–415; Case C–465/93 *Atlanta Fruchthandelsgesellschaft* v. *Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I–3761.

on the power of national courts to refer Article 234 validity questions when the measure attacked is promulgated under Title IV EC on visa, asylum and immigration policy. Under Article 68(1) of the EC Treaty, questions on both interpretation and validity of these laws can only be sent to the Court of Justice by national courts from whose decision there is no judicial remedy. This may mean that the hands of lower national courts are completely tied; even if they have serious doubts as to the validity of a Title IV measure, they may neither refer questions to the Court of Justice, or issue an interim order temporarily suspending it. Given the delays entailed in appeal to courts against whose decision there is no judicial remedy, coupled with the long wait that can result for judgement in Article 234 references, doubts may therefore be raised as to whether Article 68(1) complies with the fundamental right to effective judicial review, as reflected in Article 47 of the EU Charter of Fundamental Rights, and Articles 6 and 13 of the ECHR.[17]

The rules on *locus standi* which require compliance in Article 234 validity proceedings are limited to those supplied by national law. However the latter would not be expected to be operative if they rendered validity proceedings impossible in practice or excessively difficult to enforce (the principle of effectiveness) or if standing rules are applied to validity proceedings in a discriminatory fashion, when compared with analogous claims of a purely domestic nature (the principle of non-discrimination).[18] Indeed, all national principles of law concerning sanctions and procedural matters must comply with these two principles.

The rules on 'effective' national remedies and 'non-discrimination' have never been expressly applied by the Court of Justice to national proceedings exclusively concerned with challenge to the validity of EC measures. However, indications to this effect have emerged,[19] and so the relevance of these rules to this context can be assumed until a contrary ruling is formulated. The Court of Justice has consistently held, with respect to challenge to the compatibility of *national* rules with *lawful* EC measures, that national sanctions and procedural rules must meet the standards imposed by the principles of effectiveness and non-discrimination; if they do not meet them, they are to be disapplied. The next logical step is to extend these rules to Member State sanctions and procedural rules, as they apply to validity proceedings.

[17] Note also that pursuant to Article 68(2) EC measures or decisions relating to the maintenance of law and order and the safeguarding of internal security are wholly excluded from Court of Justice review. This may mean that even national courts against whose decision there is no judicial remedy are precluded from reviewing questions pertaining to the validity of these measures. For a detailed discussion see Ward "The Limits of the Uniform Application of Community Law and Effective Judicial Review: A Look Post-Amsterdam" in C. Kilpatrick et al (eds) *The Future of Remedies in Europe* (2000) 213.

[18] Case 199/82 *Amministrazione delle Finanze dello Stato* v. *SpA San Giorgio* [1983] ECR I–3595, the principles of which were extended to validity proceedings in Case C–212/94 *FMC* v. *IBAP, Ministry of Agriculture, Fisheries and Food* [1996] ECR I–389.

[19] *FMC ibid*.

The interesting question arises as to whether national courts are mandated, or even bound, to award compensation for any loss suffered if the Court of Justice ultimately rules, upon deliberating on Article 234 questions, that the impugned measure is invalid. This is likely to be subject to further development in the case law. Thus far the practice has been for national courts to award compensation for loss attributable to the relevant Member State, provided that *national* rules governing this issue have been satisfied. Losses that could not be recovered before the domestic court are then pursued against the relevant Community institution under Article 288 (2) of the EC Treaty. However, no rule has emerged obliging the Community to make good any loss that was not recoverable under Member State law.[20] The Court of First Instance will simply apply the substantive rules it and the Court of Justice have developed pursuant to Article 288(2), to determine whether, in all the circumstances, compensation is payable.[21]

III Criticisms of the Judicial Architecture

In the last two years or so both the Court of Justice and the Court of First Instance have elaborated important rulings which address some of the perceived shortcomings of this judicial architecture. Before these cases are canvassed in Part IV below, the alleged problem areas merit detailed attention.

A. 'Individual Concern' Under Article 230 (4)

Restrictions on direct access to the Court of First Instance under Article 230(4) have been subject to somewhat unrelenting criticism in academic commentaries.[22] On the one hand, the case law establishes an 'in principle' right for private parties who have been subject to an administrative decision to seek redress before the Court of First Instance under Article 230(4). This is so because the wording of Article 230(4) automatically vests standing to the addressees of

[20] Case C–282/90 Industrie- en Handel Sonderneming *Vreugdenhil* v. *Commission* [1992] ECR I–1937; this case followed Case 22/88 *Vreugdenhil* v. *Minister van Landouw en Visserij* [1989] ECR 2049;Case T–167/94 *Nölle* v. *Council* [1995] ECR II–2589, which followed Case C–16/90 *Nölle v.Hauptzollamt Bremen–Friehafen* [1991] ECR I–5163.

[21] Compare the Opinion of AG Darmon in V*reugdenhil* v. *Commission ibid* at paras 33–34, where he expressed the view that the Community must 'stand surety' for any loss that was not recoverable before a national forum.

[22] See among others A. Arnull 'Private applicants and the action for annulment under Article 173 of the EC Treaty' 32 (1995) *CMLRev* 7 and 'Private Applicants and the Action for Annulment Since *Codorniu*' 38 (2001) CMLRev 7; D. Waelbroeck and A–M Verheyden 'les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparéet de la Convention des droits de l'homme' (1995) *CDE* 399; Greaves 'Locus Standi Under Article 173 when Seeking Annulment of a Regulation' *11* (1986) *ELRev* 119.

Decisions. This means, for example, that undertakings on whom penalties are imposed for breach of EC Competition law have an automatic entitlement to have their claim heard before the Court of First Instance.

Further, Court of Justice and Court of First Instance case law has liberalised 'individual concern' with respect to private parties who have an entitlement to participate in procedures leading to the adoption of an EC measure. This means that entities that have activated a right prescribed by law to involvement in state aid,[23] anti-dumping,[24] and competition investigations (even if they are not the addressee of the decision ultimately adopted)[25] may equally satisfy the 'individual concern' element of the Article 230 (4) *locus standi* test.

On the other hand, other measures which might have been viewed as 'administrative' have been excluded from the purview of Article 230(4) review. This has occurred due to the formulation by the Court of Justice of the *Plaumann* test,[26] which shackled the parameters of 'individual concern' to narrower circumstances than might have been expected. As is well known, *Plaumann* established that litigants must prove, in order to satisfy 'individual concern', that the measure impugned affects them in a way that differentiates them from all others. The text of the *Plaumann* formulation is worth recalling:

> . . . persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reasons of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[27]

The Community judicature has also held that this requirement will not be satisfied 'by the mere fact that it is possible to determine the number or even the identity of the producers' affected by the measure.[28] Some examples of litigants who have been denied standing under Article 230(4) include producers of William pears who were individually known to the Commission, or identifiable, at the time of passing measures which altered payment of aid to this industry;[29] tourism businesses affected by a Commission decision to fund the building of power stations in the Canary Islands;[30] and residents of Tahiti, (some of whom were alleged to have suffered nuclear poisoning) who wished to challenge a Commission decision confirming the safety of nuclear tests imminently to take place in French Polynesia.[31] With regard to the latter, it was held as follows:

[23] Case 169/84 *Compagnie Francaise de l'Azote (COFAZ) SA* v. *Commission* [1986] ECR 391.
[24] Case 264/82 *Timex* v. *Council and Commission* [1985] ECR 849.
[25] Case 75/84 *Metro No 2* [1986] ECR 3021.
[26] Case 25/62 *Plaumann* v. *Commission* [1963] ECR 95.
[27] Case 25/62 *Plaumann* v. *Commission* [1963] ECR 95 at 107.
[28] Joined Cases 789 and 790 *Calpak* v. *Commission* [1980] ECR 1949, para 9.
[29] *Ibid*.
[30] Case C–321/95P *Stichting Greenpeace* v. *Commission* [1998] ECR I–1651.
[31] Case T–219/95R *Danielsson and Other* v. *Commission* [1995] ECR II–3051.

> . . . the contested decision concerns the applicants only in their objective capacity as residents of Tahiti, in the same way as any other person residing in Polynesia.
>
> Even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed . . . since damage of the kind they cite would affect, in the same way, any person residing in the area in question.[32]

Prior to the *Jégo Quéré* case, three principles were developed by the Community judicature ameliorating the requirements of 'individual concern'. Yet none of them amount to a radical departure from the rigours of the *Plaumann* test.

First, it has been held that legislation changing, within a defined and limited period, the conditions under which goods are exported,[33] or imported,[34] although not addressed to individual traders, could be challenged by those affected using the Article 230(4) nullity procedure. In cases of this kind, the court was influenced by the fixed number of undertakings affected, coupled with the fact that they were identifiable 'by reason of the individual course of action which they pursued or are regarded as having pursued during a particular period'.[35] Secondly, if the defendant Community institution were bound, due to a higher ranking principle of EC law, to take the interests of the applicant into account when formulating the measure impugned, satisfaction of 'individual concern' will result in the event of failure to do so.[36] And thirdly, the landmark rulings of the Court of Justice in *Extramet Industrie SA* v. *Council*,[37] and *Codorniu* v. *Council*[38] established that the distinguishing effects required by *Plaumann* were satisfied if the economic impact on the applicant of the measure in question were particularly severe (although this principle is more clearly distillable from the former case than the latter).[39] After initial speculation that *Extramet* and *Codorniu* paved the way for opening up Article 230(4) standing in some significant way, it was subject to highly conservative interpretation by

[32] *Ibid* at para 70. Compare the Opinion of AG Cosmas in *Stichting Greenpeace* above n 30, who formulated a standing test which arguably vested litigants in the position of those in *Danielsson* with standing under Article 230(4).

[33] E.g. Case 100/74 *CAM* v. *Commission* [1975] ECR 1393.

[34] E.g. Joined Cases 41–44/70 *NV International Fruit Company* v. *Commission* [1971] ECR 411.

[35] *CAM* v. *Commission* above n 33 at 1403.

[36] Case 11/82 *Piraiki–Patraiki* v. *Commission* [1985] ECR 207; Case C–152/88 *Sofrimport* v. *Commission* [1990] ECR I–2477.

[37] Case C–358/89 [1991] ECR I–2501.

[38] Case C–309/89 [1994] ECR I–1853.

[39] In *Cordoniu* the Court of Justice confined its observations to the fact that the Trade Mark, use of which the applicant was deprived of the impugned Regulation had been registered by the applicant in 1924. However, Arnull, above n 22 at 39 argues that the case supports the view that 'particularly serious impact on the applicant's business' can satisfy individual concern.

the Court of First Instance. That Court is yet to rule in favour of an applicant who has argued that the economic effects of a measure are so harsh that 'individual concern' is satisfied on this ground alone.[40]

The upshot then, of the Plaumann restrictions, is that both legislative measures laying out general policy principles, and certain types of measures promulgated by EC institutions that might equally have been classified as 'administrative' or 'executive', cannot be directly challenged by affected private parties before the Court of First Instance. Rather, those wishing to attack them have been required to question their validity before Member State courts, and then request an Article 234 reference to the Court of Justice in Luxembourg. At this juncture then there are two criticisms. One relates to the *classification* of impugned measures made by the Community judicature in deciding whether it is of individual concern to the applicant. The second pertains more broadly to alleged shortcomings in the Article 234 validity procedure. It is these latter concerns to which I will now turn.

B. Article 234 Validity Review

Reservations that have been raised by commentators about the adequacy of Article 234 validity review were both reflected and summarised in the Opinion of Advocate General Jacobs in *UPA*.[41] There, an association of farmers is seeking the annulment of a Regulation changing the system of aid payable to the olive oil industry. It is a measure of general application.

In *UPA* the Advocate General argued that Article 234 proceedings 'before national courts do not ... always provide effective judicial protection of individual applicants and may, in some cases, provide no legal protection whatsoever.'[42] He observed as follows:

> ... it may be difficult, and in some cases perhaps impossible, for individual applicants to challenge Community measures which-as appears to be the case for the contested regulation-do not require any acts of implementation by national authorities. In that situation, there may be no measure which is capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure might, in some circumstances, be able to bring the validity of the Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice.[43]

[40] The tone was set soon after the Court of First Instance took over jurisdiction with respect to Article 230(4) claims, in Case T–489/93 *Unifruit Hellas EPE* v. *Commission* [1994] ECR II–1201.

[41] Above n 7.

[42] *Ibid* at para 37.

[43] *Ibid* at para 43.

Further reservations pertaining to Article 234 validity review expressed by the Advocate General included the fact that national courts cannot make a ruling on the validity of a Community measure, but are instead obliged to refer questions to the Court of Justice if they have serious doubts on this issue.[44] National courts are entitled to refuse to refer (and this might be done in error), and even if they do refer, long delays can ensue. Advocate General Jacobs was concerned by the fact that it is, in principle, for the national court to write questions to be sent to the Court of Justice, leaving individuals vulnerable to redefinition of their claims.[45]

In addition to this, the Advocate General queried whether the facility in the hands of national judges to issue interim orders secured adequate judicial protection. Any order made was inevitably confined to an individual Member State, placing an undesirable onus on litigants to bring suit in more than one Member State. Given that the decision as to whether such an order might be made was left to some extent to the discretion of individual national courts, prejudice to the uniform application of Community law could result. Different national judges might reach different conclusions, and with respect to the same measure, as to whether issue of an interim order was warranted.[46]

C. *Fundamental Rights*

Concerns have long been voiced over the failure of the Court of First Instance or the Court of Justice to develop an exception to the *Plaumann* element of 'individual concern' when the applicant has argued that EC measures breach fundamental rights. These are discerned by reference to the legal traditions common to the Member States,[47] and international human rights instruments on which the Member States have collaborated.[48] The EU Charter of Fundamental Rights of December 2000, although not legally binding, might be viewed as a catalogue of the substantive content of these rules, given that it has been described as 'the most reliable and definitive confirmation' of the existence of individual fundamental rights meriting protection by the Community judicature.[49]

Given that these rights are 'fundamental' to the EU legal system, it has been contended that Article 230(4) *locus standi* rules should accommodate their review before the Court of First Instance at the behest of those who are allegedly victims of their breach. As the late Judge GF Mancini observed:

[44] *Ibid* at para 41.

[45] *Ibid* at para 42.

[46] *Ibid* at para 44.

[47] Case 11/70 *Internationale Handelsgesselschaft mbH* v. *Einfahr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[48] Case 4/73 *Nold* v. *Commission* [1974] ECR 491.

[49] Opinion of AG Tizzano of 8 February 2001 *BECTU* v. *Sec. of State for Trade and Industry*, para 28. See similarly AG Leger in Case C–353/99 P *Council* v. *Hautala*, especially at paras 80 to 83; AG Mischo Joined Cases C–20/00 and C–64/00 *Booker Aquaculture* v. *The Scottish Ministers* para 126.

> A regulation may, as a matter of substance, be patently and outrageously unlawful; it may breach the principles of non-discrimination and proportionality, violate fundamental rights and inflict huge financial loss on a large number of persons; but unless one of those persons can show that he is somehow singled out by the regulation an injured more severely than the category to which he belongs, he will be unable to challenge it directly before the European Court. All that he can do is to defy the regulation and wait till an attempt is made to enforce it against him in the national courts, where he may of course contest the validity of the regulation and succeed in having the issue referred to the European Court under Article 177 [now Article 234].[50]

The Court of Justice has expressed its concerns over this state of affairs. In its Report on Certain Aspects of the Application of the Treaty on European Union of May 1995, it questioned whether

> the right to bring an action for annulment under Article 173 [now Article 230] of the EC Treaty (and the) corresponding provisions of other Treaties, which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions.

A change to the wording of Article 230(4), as perhaps intimated by the Court of Justice in this Report, has yet to be instituted by the EU Member States.

D. 'Direct Concern'.

Article 230(4) also obliges private parties to prove that the measures that they are challenging are of 'direct concern' to them. One consequence of this is that the addressee of the measure in question, such as a Member State, must enjoy no measure of discretion in its implementation. The existence of such a discretion will mean that the rule is not of 'direct' concern to the applicant, even though it may be of 'individual' concern to it.[51] The measure impugned must directly affect the applicant's *legal* as opposed to factual situation, with measures of implementation being purely automatic, and resulting from Community rules only, and in the entire absence of intermediate rules.[52] So, for example, if the allocation of authority to implement import quotas set by the Community has been left to Member States, the measure housing such an authority will not be of 'direct concern' to importers, given the implementation discretion allowed by such a measure.[53]

This test creates particular problems with respect to challenges to Directives under the Article 230(4) mechanism. By virtue of the wording of Article 249, they inherently vest Member States with a discretion as to the 'form and

[50] Mancini and Keeling 'Democracy and the European Court of Justice' 57 (1994) *MLR* 175, 188.
[51] Case 69/69 *Alcan* v. *Commission* [1970] ECR 385.
[52] CaseC–386/96 P *Dreyfus* v. *Commission* [1998] ECR I–2309, para 43.
[53] *Ibid*.

methods' of their implementation. One Advocate General has argued that, given the rigours of the 'individual concern' test, a Directive is 'a measure which could not conceivably be challenged' under Article 230 (4).[54] The barrier to this channel imposed by the requirement of 'direct concern' is perhaps even more formidable.

E. The Substantive Test for Damages Under Articles 288(2)

Doubts have also arisen over the 'classification' of norms by the Community judicature in the context of damages claims. Traditionally two different rules have been applied. With respect to legislative measures involving choice of economic policy, the applicant must prove, in addition to loss and causation, that the institution concerned has committed a sufficiently serious breach of a superior rule of law for the protection of the individual.[55] In legislative fields characterised by 'wide discretion', the applicant must show that the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (the so-called *Schöppenstedt* formula).[56] With respect to other types of EC measures, however, a different test applies. It is enough to show breach of a principle of EC administrative or constitutional law, causation, and loss.[57]

At least three of the Court's Advocates General have been critical of the assessment of the Court of First Instance and the Court of Justice of the types of measures attracting the first, and more taxing of these two tests.[58] *Schöppenstedt* has been applied, for example, to instruments which *implement* the Common Agricultural Policy and the Community's anti-dumping regime, even though it is difficult to see how rules of this kind could be viewed as legislative rules involving choice of economic policy. As Advocate General Tesauro has observed:

> The limits of Community liability are relied upon and applied not only in relation to broad legislative measures which presuppose the existence of a broad discretion on the part of the relevant institution, but also in relation to measures which fall within the ambit of implementing legislation (typically Commission implementing Regulations). Essentially, the Court has applied the restrictive criteria formulated in assessing the Community's liability on account of legislative measures of a general nature even when the damage arose out of an individual measure not in fact involving

[54] Advocate General Tesauro in Case C–63/89 *Les assurances du credit* above n 9 at para 6 of his Opinion.

[55] Joined Cases 83, 94/76, 4, 15, 40/77 *HNL* v. *Council and Commission* [1978] ECR 1209.

[56] Case 5/71 *Schöppenstedt* [1971] ECR 975.

[57] E.g. Case C–146/91 *KYDEP* v. *Council and Commission* [1994] ECR I–4199.

[58] AG Darmon in Case C–55/90 *Cato* v. *Commission* [1992] ECR I–2533; AG Léger in Case C–5/94 *The Queen* v. *Ministry for Agriculture Fisheries and Food ex parte Hedley Lomas Ireland Limited* [1996] ECR I–2553; AG Tesauro in Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I–1029.

> economic policy choices of such scope as to necessitate the fullest possible protection of the institutions' discretionary powers.[59]

Further, even if the applicants have been able to prove that they were individually concerned by a measure, for the purposes of Article 230(4), this does not mean that any compensation they may claim pursuant to Article 288(2) will be assessed by reference to the (less rigorous) test applicable to non-legislative instruments. For example, even though the applicant in *Sofrimport* v. *Commission*[60] was able to prove that they were individually concerned, for the purposes of Article 230(4) nullity review, by a Commission Regulation suspending the import into the Community of dessert apples originating from Chile, the Regulation was viewed differently by the Court of Justice for the purposes of assessing damages liability. It was classified as a legislative measure involving choice of economic policy. The applicant was thus bound to prove much more than a simple breach of EC administrative or constitutional law in order to obtain damages. It is submitted, therefore, that this propensity to classify EC measures as 'legislative' as opposed to 'administrative' or 'executive' has substantially contributed to the difficulties litigants have experiences in obtaining compensation from EC institutions under Article 288(2) of the EC Treaty.

F. Legal Certainty and Inordinate Complexity

The traditional legal architecture carries three principal problems in terms of legal certainty. First, since the ruling of the Court of Justice in *Textilwerke Deggendorf* v. *Germany*[61] litigants have been precluded from bringing Article 234 validity proceedings before national courts if they 'without any doubt' would have been entitled to bring Article 230(4) nullity review within the two month time-limit supplied by that provision. However, as has been elaborated in Part III A above, the test for 'individual concern' has, over time, been subject to change. This means that it may not always be a simple matter for private parties to determine if they are among the class of litigants bound to act expeditiously and seek an Article 230(4) remedy.

Secondly, the exhaustion of domestic remedies principle, mentioned in Part II above, has created a great deal of confusion with respect to the correct avenue of redress for those seeking compensation for damage suffered as a result of unlawful EC measures.[62] This problem has been exacerbated most acutely in cases in which the Community judicature have heard damages claims under Article 288(2), without supplying a detailed discussion of why such claims are

[59] Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I–1029, para 65 of the AG's Opinion.

[60] Case C–152/88[1990] ECR I–2477.

[61] Above n 15.

[62] Above nn 9 to 15.

admissible in the absence of prior instigation of Article 234 validity review via the national courts.[63]

Thirdly, for very many years the position remained unclear with respect to seizure by both the Court of First Instance and a national judicial tribunal of the same legal problem. If the legality of an EC measure were challenged before the Court of First Instance, and parallel validity proceedings were brought in domestic legal tribunals, which of the two should be stayed pending the outcome of the other? The potential need for case law on this point is self-evident, given the 'collision' that would result if the national court were to send a question on validity to the Court of Justice, prior to the elaboration of a judgment by the Court of First Instance. The broad contours of this question have long been governed by Article 47(3) of the Statute of the Court of Justice; it empowers the Court of First Instance to stay proceedings if the Court of Justice has been seised of the same matter. Article 47(3) also vests the Court of Justice with a discretion to issue a stay if the Court of First Instance is dealing with the same dispute. Yet the interplay of these two provisions was destined to be decided via rulings of the community judicature.

In addition to this, the scheme for challenging the legality of EC rules is sometimes berated for inordinate complexity, comparing unfavourably with the scheme of judicial review in place for challenge to the compatibility of national laws with EC rules. As Advocate General Jacobs observed in his *UPA* opinion,[64] in cases of the latter kind 'the national courts may . . . be described as the ordinary courts of Community law', especially given their broad powers to correct infringement of EC rules, sometimes without need for reference to the Court of Justice. However this description cannot be extended to validity review.[65] Not only are national courts precluded from declaring EC measures invalid,[66] any loss that cannot be recovered before national courts will have to be recouped via the Article 288(2) mechanism. In practical terms, this means that those affected can be locked in litigation for many years.

G. The Scope of the Remedies which the Community Judicature are Entitled to Award

A final perceived flaw of the scheme for challenging the legality of EC measures lies in restrictions on the types of sanction which the Court of First Instance and the Court of Justice are entitled to issue, once it has been shown that an EC measures is in fact unlawful. In Article 230(4) nullity proceedings, the powers of the Court of First Instance, and the Court of Justice on appeal, are limited by Article 231 of the EC Treaty to declaring the impugned measure void. They

[63] See cases cited above n 12.
[64] Above n 7.
[65] *Ibid* at para 41.
[66] *Foto–Frost* above n 16.

have no power to make a particularised order to correct an EC institution's unlawful conduct, although, pursuant to Article 288(2) they can award compensation for loss already sustained. While Article 233 obliges the institution whose act has been declared void to take the necessary measures to comply with any judgment given, it is the wrong-doing institution itself which decides what that action will be. This can result in a *pyrrhic* victory for successful applicants, if inadequate corrective measures are taken.[67] Moreover, doubt might be cast as to whether vesting the wrongdoer itself with the authority to craft the appropriate remedy complies with the standards imposed by Articles 6 and 13 of the European Convention of Human Rights, and indeed those reflected in Article 47 of the EU Charter of fundamental rights.

From this perspective those wishing to challenge the legality of EC measure are better off seeking a remedy before the national courts, coupled with Article 234 validity reference to the Court of Justice. As noted above, in litigation of this kind, national courts are likely to be bound to supply an effective remedy to correct any wrong-doing found to exist.[68] They are also obliged to extend the full range of sanctions to cases concerning the validity of EC measures, as are applicable to analogous claims of a purely domestic nature.[69]

H. Summary

The key difficulties with the traditional architecture for challenging the legality of EC measures could be cast as follows. The tests for both 'individual concern' and 'direct' concern under Article 230(4) of the EC Treaty have been viewed as inordinately stringent, unnecessarily impeding direct access to judicial review before the Court of First Instance. The Article 234 mechanism, which allows national courts to refer questions to the Court of Justice questioning the validity of EC measures, is alleged to be insufficient in comparison with review by the Court of First Instance under the procedure prescribed by Article 230. The Community judicature has also been criticised for being too quick to classify EC measures as 'legislative' as opposed to 'administrative' or 'executive'. This has created difficulties with respect to both satisfaction of the 'individual concern' test under Article 230(4), and satisfaction of the substantive test for payment of damages under Article 288(2) of the EC Treaty.

Legal certainty has suffered, in that it is not clear whether validity review in a national court must first be sought before compensation is claimed from EC institutions under Article 288(2). Nor may it always be simple to determine if a litigant can 'without any doubt'[70] bring suit under Article 230(4), which wholly

[67] For an example see the tortuous Case C–304/89 *Oliveira* v. *Commission* [1991] ECR I–2283; Case T–73/95 *Oliveira* v. *Commission* [1997] ECR II–381.

[68] Above text nn 16 to 19.

[69] *Ibid*.

[70] *TWD* above n 15.

precludes it from institution of Article 234 validity proceedings. The entire system is viewed as inordinately complex, especially in comparison with the scheme of judicial review for calling Member States to account for failing to comply with (lawful) EC measures. Failure of the Court of First Instance and the Court of Justice to relax *locus standi* rules when a litigant has alleged breach by an EC institution of fundamental rights has been queried for perhaps preventing adequate judicial protection of these fundamental rules. And finally, the limited range of remedies which the Court of First Instance and the Court of Justice are empowered to award in Article 230(4) proceedings is also considered unsatisfactory. It may not comply with the fundamental right to access to an effective judicial remedy,[71] as recognised in Articles 6 and 13 of the European Convention of Human Rights, and Article 47 of the EU Charter of Fundamental Rights.

IV The Response of the Community Judicature

A. Individual Concern and Article 234 Validity Review: the Ruling in Jégo Quéré and the Opinion of AG Jacobs in UPA

(i) Jégo Quéré

The Court of First Instance in its recent *Jégo-Quéré* ruling[72] extrapolated the 'severe economic effects' principle that was established in *Extramet*[73] and *Cordoniu*.[74] In *Jégo-Quéré* the applicant was a commercial fishing enterprise that operated regularly in the waters of the South of Ireland. It sought the annulment of Articles 3(d) and 5(1) of Commission Regulation 1162/2001,[75] the combined effects of which were to prevent *Jégo-Quéré* from using nets of less than a given mesh size in these waters. *Jégo-Quéré* argued that the enlargement of the fishing mesh sizes they were entitled to deploy would result in a significant decrease in its catches of small whiting. This, they contended, penalised them outside of the scope of Regulation 1162/2002, which was designed to replenish stocks of hake in Community fishing zones in which they had become diminished. Articles 3(d) and 5(1) were alleged by *Jégo-Quéré* to be adopted in breach of the principles of proportionality and equality, and the obligation to state reasons.[76]

The judgment of the Court of First Instance was confined to determining whether *Jégo-Quéré*'s claim was admissible under Article 230(4) of the EC

[71] Case 222/84 *Johnston* v. *Chief Constable of the RUC* [1986] ECR 1651.
[72] Above n 6.
[73] Above n 37.
[74] Above n 38.
[75] OJ 2001 L 159/4.
[76] Above n 6 at para 18.

Treaty, with determination of substantive issues left for future deliberation. The Court first observed that Articles 3(d) and 5 of Regulation 116/2002 were 'by their nature, of general application',[77] given that they were 'addressed in abstract terms to undefined classes of persons and apply to objectively determined situations'.[78]

The Court of First Instance further took the view that, if the *Plaumann* test,[79] and related case law, had been the sole benchmark against which to measure 'individual concern', then *Jégo-Quéré* would fail the *locus standi* requirements of Article 230(4).

Jégo-Quéré's position as the only operator fishing for waters in the South of Ireland with vessels over 30 metres (the provisions did not apply to vessels of less than 12 metres in length which leave port for less than 24 hours) did not 'differentiate' *Jégo-Quéré* within the meaning of case law hitherto elaborated. It was concluded that: 'the contested provisions are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation'.[80]

Nor was there any other basis on which 'individual concern' could be satisfied. There was no legal obligation on the Commission to take *Jégo-Quéré*'s position into account before adopting the contested provisions,[81] and nor had EC legislation granted *Jégo-Quéré* procedural guarantees allowing it to assert rights, such as the right to be heard.[82] Finally, the Court of First Instance held that 'the applicant had produced no evidence to show that the contested provisions affect it by reason of a special situation of the type identified by the Court of Justice'[83] in *Extramet*[84] and *Codorniu*.[85]

However, this did not reflect the limit of the investigation that the Court of First Instance was prepared to undertake. Given that doubts had been raised as to whether *Jégo-Quéré* had been granted right of access to a court (as guaranteed by Articles 6 and 13 of the ECHR, and Article 47 of the EU Charter of Fundamental Rights), and given that this right 'is one of the essential elements of a community based on the rule of law',[86] the Court of First Instance deemed it 'necessary to consider whether, in a case such as this, where an individual applicant is contesting the lawfulness of provisions of general application

[77] *Ibid* at para 24.
[78] *Ibid* at para 23.
[79] Above nn 26 to 27.
[80] Above n 6 at para 30.
[81] *Ibid* at paras 32–33. See further above text nn 35 to 36.
[82] *Ibid* at paras 34 to 36. See further above text nn 22 to 26.
[83] *Ibid* at para 37.
[84] Above n 37
[85] Above n 38.
[86] Above n 6 at para 41.

directly affecting his legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.'[87]

This question was answered in the affirmative for three reasons. First, there were no national acts implementing Regulation 1162/2001, which the Court took to mean as limiting activation of the Article 234 validity procedure to violation by *Jégo-Quéré* of the limitations on mesh sizes imposed by Articles3(d) and 5. At this juncture the Court of First Instance adopted the recommendation of Advocate General Jacobs in his Opinion in *UPA*.[88] The *Jégo-Quéré* court held as follows:

> The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice.[89]

Secondly, the action for damages under Article 288(2) was equally viewed as inadequate, because it would not result in the removal of the measures attacked by *Jégo-Quéré*. Nor the Court observed, was the Community judicature able to undertake, in Article 288(2) proceedings, 'the comprehensive judicial review which . . . is its task to perform.' In particular, the Court observed that, where a measure was of general application, Article 288(2) review is confined to censure of sufficiently serious breaches of rules of law intended to confer rights on individuals.[90]

Thirdly, the Court of First Instance adopted the views of AG Jacobs in *UPA*[91] in so far that it held that there was 'no compelling reason to read into the notion of individual concern . . . a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.'[92]

Having decided, therefore, that neither Article 234 validity review, nor the Article 288(2) damages procedure guaranteed the right to an effective remedy (at least with respect to Community measures of general application directly affecting an applicant's legal situation)[93] the Court of First Instance proposed a new test for 'individual concern'. It ruled as follows:

> a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of

[87] *Ibid* at para 43.
[88] Above n 7 at para 43.
[89] *Ibid* at para 45.
[90] *Ibid* at para 46.
[91] Above n 7 at para 59.
[92] *Ibid* at para 49.
[93] *Ibid* at para 47.

> other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.[94]

The *Jégo-Quéré* claim was thus declared admissible.

Therefore, 'definite and immediate' effects have been proposed by the Court of First Instance as the benchmark against which 'individual concern' should be assessed. In this regard the ruling goes further than the principles established in *Extrament*,[95] and *Cordoniu*,[96] since the latter were taken as affording *locus standi* in the event of particularly severe *economic* effects, in comparison with other traders.

The proposed abandonment of the obligation on the applicant to prove they are distinguished from all others, in the *Plaumann* sense, does not necessarily guarantee direct access to Article 230 (4) for all measures of general application, even if the *Jégo-Quéré* principles are ultimately adopted by the Court of Justice. First, the fact that there was no national measure for *Jégo-Quéré* to attack seemed to be a weighty factor in the Court's deliberations. There will, however, be many circumstances in which private parties will have such a measure at their disposal. An obvious example in which such a situation arises (but it is only one of many) is European Community Customs law. In this domain, broad policy is set at EC level via Regulations, and then implemented nationally by domestic customs authorities. In customs cases, therefore, the *Jégo-Quéré* ruling may not be sufficient to guarantee direct access to the Court of First Instance under Article 230(4) with respect to Regulations mapping out customs policy. The effect of such measures may not be 'immediate' and a national measure at which to direct domestic challenge may be readily available.

Similarly, Directives may continue to fall among the instruments requiring review via the Article 234 mechanism, and recourse to Article 288(2) damages. Not only may they fail to produce 'immediate' effects for private parties (in the *Jégo-Quéré* sense) Directives are classically viewed as instruments that cannot be of 'direct concern' to private parties within the meaning of the Article 230(4). As will be discussed in Part IV B below, the discretion in the hands of Member States, as stated in Article 249 of the EC Treaty, as to the 'form and methods' of a Directive's implementation continue to be viewed by the Court of First Instance as a barrier to their 'direct concern' to private litigants. The measure impugned in *Jégo-Quéré* was held by the Court of First Instance to satisfy the requirement of 'direct concern',[97] so this issue did not receive detailed attention in the *Jégo-Quéré* case. It is likely to resurface in future case law.[98]

There are, it is submitted, two initial grounds on which the logic employed by the Court of First Instance might be subject to debate. The first lies in the

[94] *Ibid* at para 51.
[95] Above n 37.
[96] Above n 38.
[97] Above n 6 at para 26.
[98] AG Jacobs in *UPA* above n 7 at para 79.

assertion that the absence of a national implementing measure rendered impossible the instigation of the Article 234 validity process by *Jégo-Quéré*. It is now established that the courts of at least one Member State, namely the United Kingdom, allow private parties to launch 'pre-empitve strikes' questioning the validity of Directives that are not yet implemented. This emerged in the *Imperial Tobacco* litigation,[99] in which the English High court referred to the Court of Justice questions concerning the validity of the Directive banning tobacco advertising, even though its date for implementation had not yet expired. Unfortunately the Court of Justice had no opportunity to rule on the admissibility of this reference, given all substantive issues were resolved in the parallel case of *Germany* v. *Council*.[100] The *Jégo-Quéré* ruling may suggest that Member State courts are in no way bound to supply the remedy of a 'pre-emptive strike' as a matter of Community law, but with EC rules in no way precluding national avenues of redress of this kind.

Secondly, some may be troubled by the assertion made in *Jégo-Quéré*, and supported by Advocate General Jacobs in *UPA*[101] that 'access to justice' is somehow imperiled by a situation in which a private party cannot test the legality of a Community measure, save for breaching its terms. In contrast, Advocate General Teasauro has observed that this 'is a situation which normally arises whenever persons affected wish to contest the lawfulness of Community or national provisions which impose burdens, obligations, or other restrictions and cannot be challenged directly by them'.[102] It might be argued that, given the primacy of EC rules in the Community legal order, it is self-evident that they merit compliance by private parties, in the same way as national law, and must be assumed to be lawful until shown to be otherwise. On the other hand, this solution may be viewed as unduly harsh, in Member State legal systems which offer no facility for private parties to petition the courts, seeking a declaration on the legality or otherwise of a measure adversely affecting their interests.

(ii) The Opinion of Advocate General Jacobs in UPA

The Opinion of AG Jacobs in *UPA* goes somewhat further than the ruling of the Court of First Instance in *Jégo-Quéré*. The Advocate General expresses the broader sentiment that the Article 230(4) procedure is manifestly more appropriate for examining the validity of *all* EC measures of general application. Aside from the drawbacks of Article 234 validity review (reproduced in Part III B above), the Advocate General took the view that Article 230(4) carries some inherent advantages. The defendant institution is a full party to the proceedings

[99] For the decision of the Court of Appeal See *R* v. *Secretary of State for Health, and others ex parte Imperial Tobacco Ltd and others* [2000] 1 CMLR 307.

[100] Case C–376/98 *Germany* v. *Parliament and Council (Tobacco Advertising)* [2000] ECR I–8419.

[101] Above text nn 42 to 43.

[102] AG Tesauro *Assurances du crédit* above n 9 at para 9.

from beginning to end, and involves a full exchange of pleadings, as opposed to a single round of observations and oral observations before the court, the latter being the standard with respect to Article 234 validity review. In nullity proceedings the Community judicature are empowered to make a Community wide interim order, carrying obvious advantages for the uniform application of Community law, and Article 230(4) applicants themselves.[103] Further, the public are informed of Article 230(4) nullity review through publication of a notice in the Official Journal. They are then able to intervene, if they show sufficient interest, as prescribed by Article 37 of the Statute of the Court. In Article 234 validity review, Article 20 observations can only be submitted by those who have been a party to national proceedings. Although information about reference proceedings is also published in the official journal, this may be too late to allow interested parties to intervene.[104]

But most importantly, the Advocate General contended that it was 'manifestly desirable for reasons of legal certainty that challenges to the validity of Community acts be brought as soon as possible after their adoption.'[105] This made the two month time-limit supplied by Article 230(4) preferable to Article 234 validity proceedings which 'may, in principle, be questioned before the national courts at any point in time.'[106]

The test for individual concern, prescribed by Advocate General Jacobs in *UPA*, was as follows:

> a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.[107]

Unlike the Court of First Instance in *Jégo-Quéré*, the Advocate General would not oblige litigants to prove 'definite and immediate' effects. Even the potential for substantial adverse effects would be sufficient to satisfy 'individual concern' under the test prescribed by Advocate General Jacobs. The usual mechanism for challenging the legality of EC measures of general application would thus shift from national courts and validity review, to the Article 230(4) nullity procedure.

There are three potential difficulties with this development. First, the effects of general legislative measures can remain unfelt for a long time after their entry into force. It may be queried, therefore, whether it is fair to oblige private parties to monitor the Official Journal of the EU for measures that may adversely affect them, and then bar them from judicial review if they have failed to meet the two-month limitation period prescribed by Article 230(4)? Advocate General Jacobs meets this concern by suggesting that litigants would still

[103] Above n 7 at para 46.
[104] *Ibid* at para 47.
[105] *Ibid* at para 48.
[106] *Ibid*.
[107] Above n 7 at para 60.

be entitled to ask for references from the national courts, post-expiry of the two-month time limit, if those questions concerned both *interpretation* and *validity*.[108] Yet, it might asked whether this concession would render ineffectual the change prescribed by the Advocate General, in favour of Article 230(4) as the usual forum for challenge to general measures. It may be possible simply to cast late national claims as pertaining to both interpretation and validity of the measure impugned, thereby evading time-limits and any other problems concerning admissibility.

Secondly, the term 'substantial adverse effects' is inherently uncertain. It is less precise than the test which emerged in *Extramet* and *Codorniu*, given that those cases have been interpreted as vesting standing in the event of severe *economic* effects on the applicant, when compared with competitors. 'Substantial adverse effects' would appear to encompass a wider range of circumstances.

Thirdly, the *TWD* principle may become unworkably complex.[109] As already mentioned, the *TWD* case precludes Article 234 validity claims when the applicant 'without any doubt' could have brought an action under Article 230(4). Advocate General Jacobs favours limiting the scope of *TWD*, in that it should not be extended to 'general measures'. This presumably means that failure to strike within two months, under Article 230(4), will not be fatal if an Article 234 reference concerns both interpretation and validity of the measure impugned. It remains to be seen, however, whether this solution is viable, especially in the absence of clear definition of the types of EC rules that amount to 'general measures'.

B. Direct Concern and the Salamander Case

Moreover, it may be that greater recourse to Article 230(4) will not result with respect to Directives, under either the test advocated by the Court of First Instance in *Jégo-Quéré*, or that of AG Jacobs in *UPA*, unless the case law on 'direct concern' is altered. Potentially two different avenues of judicial review could emerge, one for Regulations and the other for Directives.

Regulations generally satisfy the 'direct concern' test, discussed in detail in Part II D above. Provided litigants can meet the requirements of a liberalised rule on 'individual concern', Regulations would generally become reviewable under Article 230(4). Review of legality of Directives, because of continuing difficulties with 'direct concern', would remain channelled through Article 234 validity proceedings.

This is established by the decision of the Court of First Instance of 27 June 2000 in *Salamander AG and Others* v. *European Parliament and Council*.[110] There the Court of First Instance denied standing to a group of undertakings

[108] *Ibid* at para 49.
[109] Above n 15.
[110] Joined Cases T–172/98 and T–175/98 to T–177/98, judgment of 27 June 2000.

wishing to challenge the aforementioned Tobacco Advertising Directive,[111] not because of failure to show individual concern, but for absence of 'direct concern'. The Court recalled that a Directive 'cannot of itself impose obligations on an individual',[112] and that a Directive which requires the *Member States* to impose obligations on economic operators, was not of itself, prior to the adoption of implementing measures and independently of such measures, such as to directly affect the legal situation of the applicants.[113] Just how the *Salamader* ruling will be accommodated alongside the new test for 'individual concern' suggested by Advocate General Jacobs, or that adopted by the Court of First Instance in *Jégo-Quéré,* remains to be seen.

C. *Fundamental Rights Protection and Article 230(4): the Impact of UEAPME*

In the *UEAPME* case[114] Article 230(4) 'individual concern' was prised open, albeit slightly, by reference to the 'fundamental' nature of the rights alleged by the applicant to been infringed.

In that case the Court of First Instance was presented with challenge by an organisation representing the interests of small and medium sized undertakings, to Council Directive 96/34 on the framework agreement on parental leave.[115] It was declared admissible, under Article 230(4) of the EC Treaty, even though the Court of First Instance initially concluded that UEAPME was not entitled to participate in the procedure leading to the adoption of the Agreement.[116]

However, UEAPME was held to be both directly and individually concerned due to the peculiar features of the procedure leading to the adoption of Directive 96/34. Recourse had not been made to the classic procedures for the adoption of Directives; rather Directive 66/34 merely implemented an accord that had been struck by employer and union groups, with no engagement of the European Parliament. Therefore, UEAPME was vested with standing so that the 'representativity' of the organisations which made the agreement could be judicially reviewed. In short, the Court of First Instance deemed it necessary to determine whether the 'principle of democracy on which the Union is founded'[117] had been complied with, given that the Community's normal legislative processes had not been activated in the Directive's promulgation.

[111] Above text n 99 to 100.
[112] *Ibid* at para 54, citing, *inter alia* Case C–91/92 *Faccini Dori* v. *Recreb* [1994] ECR I–3325.
[113] *Ibid* (my emphasis).
[114] Above n 1.
[115] OJ 1996 L 145/4.
[116] Above n 1 at paras 69 to 82.
[117] *Ibid* at para 89.

The fundamental nature, therefore, of the rights at stake, may have been of some influence on the Court of First Instance in deciding whether to vest UEAPME with standing to sue under Article 230(4). From this perspective it amounts to a tentative step toward linking the question of *locus standi* to the protection of EU fundamental rights.

D. The Substantive Test for Damages Under Article 288(2) and the Rulings in Fresh Marine and Bergaderm

In the *Fresh Marine* case[118] the Court of First Instance abandoned application of the arduous *Schöppenstedt* formula with respect to EC anti-dumping measures that might more properly be viewed as administrative, as opposed to legislative measures involving choice of economic policy. It will be recalled from the discussion in Part III E above, that the Community judicature, in the latter context, traditionally required those seeking damages to prove breach of a superior rule of law for the protection of the individual, and manifest grave disregard for the limits on the exercise of discretionary powers.[119]

The applicant, a Norwegian company, sought compensation for a Commission Regulation imposing provisional anti-dumping duties,[120] and which had prevented them from selling salmon in the European Community. Traditionally such measures have been viewed by the Community judicature as 'legislative' in nature, with compensation being payable only on satisfaction of the strict *Schöppenstedt* formula.[121] However, the Court of First Instance ruled that the case before it had 'special features'.[122] These were grounded in the fact that the damage arose from the allegedly unlawful conduct of the Commission in examining a report to check whether the applicant had complied with undertakings given in the course of an anti-dumping investigation. The Commission's (erroneous) assessment that such undertakings had been breached led to the promulgation of the anti-dumping Regulation which the applicant had challenged.

The Court of First Instance thus took the view that the Commission's allegedly unlawful conduct 'took place in the course of an administrative operation which specifically and exclusively concerned the applicant. That operation did not involve any choices of economic policy and conferred on the Commission only very little or no discretion.'[123] It concluded as follows:

[118] Above n 3.

[119] Above text nn 54 to 58.

[120] Regulation (EC) No 2529/97 OJ 1997 L 346/63

[121] Case C–121/86 *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE and others* v. *Commission and Council* [1989] ECR I–3919; Case T–167/94 *Nölle* v. *Council and Commission* [1995] ECR II–2589 .

[122] *Fresh Marine* above n 3 at para 57.

[123] *Ibid*.

> mere infringement of Community law will be sufficient, in the present case, to lead to the non-contractual liability of the Community . . . In particular, a finding of an error which, in analogous circumstances, an administrative authority-exercising ordinary care and diligence would not have committed will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 215 [now Article 288] of the Treaty.[124]

Slightly more complex initiatives were taken by the Court of Justice in Case C–352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil* v. *Commission*[125] In that case, the Court of Justice, collapsed the *Schôppenstedt* formula, into the *Brasserie du Pêcheur* test for State liability,[126] and went on to observe that where a Member State or a Community institution has only considerably reduced discretion 'the mere infringement of Community law may be sufficient to prove a sufficiently serious breach'.[127] This meant that, in principle, the Court was prepared to assess realistically the scope of the discretion enjoyed by an institution, and deploy a test for damages liability, indexed to this discretion.

However, in the context of a challenge to the validity of a Directive restricting the use of an allegedly carcinogenic molecule in sun protection and bronzing products,[128] the Court of Justice declined to adopt the applicant's argument that the Directive in reality amounted to an individual decision. This would have led to its examination under Article 288(2) by reference to the simple formula reserved to non-discretionary administrative measures. The Court observed that 'the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question.'[129] It therefore followed that the ground of appeal from the Court of First Instance failed, given that it was based on the categorisation of the measure.

Since the ruling in *Bergaderm* the Court of First Instance has tended to refrain from reference to the *Schöppenstedt* test, which requires proof, in legislative fields characterised by a wide discretion, that the institution concerned 'manifestly and gravely' disregarded the limits on the exercise of its powers.[130]

[124] *Ibid* at para 61.

[125] Above n 4.

[126] See in particular at paras 41 to 44. For a discussion see Tridimas "Liability for Breach of Community Law: Growing Up and Mellowing Down?" 38 (2001) *CMLRev*. The *Bergaderm* approach has been employed subsequently. See for example *Cordis Obst und Gemüse Großhandel GmbH* v. *Commission*, above n 5, esp at para 45; *Bocchi Food Trade International GmbH* v. *Commission*, above n 5, esp at para 50; *T Port GmbH & Co KG* v. *Commission*, above n 5, esp at para 45; Joined Cases T–198/95. T–171/96, T–230/97, T–174/98 and T–225/99 *Comafrica SpA and another* v. *Commission*, judgment of the CFI of 12 July 2001, esp at para 134.

[127] Above n 4 at para 44.

[128] Council Dir. 76/768 of 27 July 1976 OJ 1976 L 262/169.

[129] *Bergaderm*, above n 4 at para 46.

[130] Above text nn 55 to 56.

Rather, it has consistently referred to the *Bergaderm* case in support of the proposition that, in such fields, the right to reparation requires 'a serious and obvious disregard by a Community institution of the limits on its discretion.'[131] The fact that the Court of First Instance is no longer expressly referring to the *Schôppenstedt* formula, and has replaced the words 'manifestly and gravely' with the less onerous test of 'seriously and obviously' raises the potential for success of litigants seeking compensation under Article 288(2).

E. Legal Certainty and Inordinate Complexity: Alleviated by Bocchi Foods and Masterfoods?

The ruling of the Court of First Instance in *Bocchi Foods*, and two other cases decided on the same day,[132] brought much needed clarity to the rule, under Article 288(2), on exhaustion of domestic remedies, as discussed in Part II and Part III F above. It will be recalled that the circumstances in which a litigant must first seek to challenge the validity of an EC measure in national courts, via Article 234 of the EC Treaty, as a pre-requisite to an Article 288(2) damages claim, have been for some time subject to conjecture.

In *Bocchi Foods* the applicant, a wholesale trader in fruit and vegetables, sought Article 288(2) damages with respect to a Commission Regulation which led to a substantial reduction in the quota of bananas it was entitled to import into Germany. The Commission alleged that the Article 288(2) action was inadmissible, as Bocchi Foods should have tried to prevent the loss occurring, by bringing an action before the German courts. The loss, in the Commission's view, was in fact caused by a national administrative measure adopted in order to implement Community law, and review of such measures fell exclusively to the German courts. Those courts, the Commission observed, enjoyed a discretion to refer the matter to the Court of Justice under Article 234, to question the validity of the relevant Community provisions.[133] The Commission argued that it 'is only where national courts are unable to guarantee adequate legal protection and/or the possibility of obtaining compensation that a direct action would be admissible.'[134]

The Court of First Instance did not adopt these arguments. It pointed out that the alleged unlawful conduct in issue was not that of a Member State body, but that of a Community institution, so that any loss arising was attributable

[131] E.g. Case T–196/99 *Area Cova SA and others* v. *Council and Commission*, judgment of the Court of First Instance of 6 December 2001, para 45. For further examples of application of the 'sufficiently serious' test see *Bocchi Foods* above n 5, para 50; *Cordis* above n 5, para 45; *T Port* above n 5, para 45; Case T–174/002 *Biret International* v. *Council*, judgment of 11 January 2002, para 45; Case T–210/02 *Établissements Biret et Cie SA* v. *Council*, judgment of 11 January 2002, para 52.

[132] *Cordis* above n 5; *T. Port* above n 5.

[133] *Bocchi Foods* above n 5 at paras 27–28.

[134] *Ibid* at para 28.

to the Community.[135] Since the Community judicature had exclusive jurisdiction under Article 288(2) to hear actions seeking compensation for damage attributable to the Community, remedies available under Member State law could not automatically guarantee effective protection of the applicant's rights.[136] The Court of First Instance observed that a national court, in Article 234 validity proceedings, would not have the power to adopt itself the measures needed in order to compensate the full loss alleged, so that direct application to the Court of First instance under Article 288(2) would still be necessary.[137]

These principles indicate, therefore, that if the applicant's primary objective is payment of compensation, and the illegality alleged is squarely grounded on misconduct by a Community institution, as opposed to a Member State authority, then any action for damages should be brought directly to the Court of First Instance under Article 288(2). Article 234 validity proceedings need only be pursued if the applicant, in addition to compensation, seeks a declaration that the relevant EC measure is invalid. The route via national courts will of course only be necessary if the applicant is unable to satisfy the requirements of 'direct and individual' concern under Article 230(4).

Finally, deeper definition to the judicial architecture was brought with the ruling of the Court of Justice of 14 December 2000 in *Masterfoods Limited* v. *HB Icecream Limited*.[138] There valuable guidance was provided of which court should suspend its proceedings, the Court of First Instance or a national court, in the event of both of them being seized of the same dispute.

By a Decision dated 11 March 1998 the Commission concluded that an exclusive distribution agreement operated by HB with respect to freezer cabinets supplied by it to retailers, infringed Article 81(1) of the EC Treaty. Under the terms of the agreements, retailers were precluded from stocking products other than 'single wrapped items of impulse ice cream' in the freezers, or having another freezer. On 21 April 1998 HB instituted an action for annulment of the Decision before the Court of First Instance, and sought its temporary suspension.

Confusion arose in that in March of 1990 HB's competitor, Masterfoods, had brought an action before the High Court of Ireland seeking a declaration that the exclusivity clause was null and void under domestic law, and under Articles 81 and 82 of the EC Treaty. HB brought a separate action for an injunc-

[135] *Ibid* at para 31. See also; *Cordis* above n 5 at para 26; *T Port* above n 5 at para 26; *Biret International SA* v. *Council*, above n 131, para 33 ; *Établissements Biret et Cie SA* v. *Council*, above n 131, para 36.

[136] *Ibid* at para 32. See also: *Cordis* above n 5 at para 27; *T Port* above n 5 at para 27; *Biret International SA* v. *Council*, above n 131, para 34; *Établissements Biret et Cie SA* v. *Council*, above n 131, para 37.

[137] *Ibid* at para 33. See also: *Cordis* above n 5 at para 28; *T Port* above n 5 at para 28; *Biret International SA* v. *Council*, above n 131, para 35; *Établissements Biret et Cie SA* v. *Council*, above n 131, para 38.

[138] Case C–344/98 above n 2.

tion to restrain Masterfoods from inducing retailers holding freezer cabinets from breaching the exclusivity clause. In April 1990 the High Court granted this injunction, and on 28 May 1992 it issued a permanent injunction in favour of HB, dismissing Masterfoods claims. This was of course at odds with the position ultimately taken by the European Commission. Masterfoods appealed to the Supreme Court of Ireland, who sent questions for preliminary ruling to the Court of Justice to ascertain, *inter alia,* if it should stay its proceedings pending the outcome of the litigation commenced before the Court of First Instance.

The Court of Justice ruled that, while the national courts continue to have jurisidiction to apply provisions of Article 81 and 82 of the EC Treaty, even after the Commission has initiated proceedings,[139] the Commission could not be bound by a ruling of a national court on application of Article 81(1) and 82 of the EC Treaty. The Court further recalled that, in order not to breach the general principle of legal certainty, national courts must avoid giving rulings which would conflict with a Decision contemplated by the Commission.[140] If the Commission had already taken a Decision, national courts were precluded from taking decisions running counter to it.[141]

The Court of Justice then fell short of obliging the Irish Supreme Court to stay the proceedings, but indicated that this was preferable. It held as follows:

> When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment . . . unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.[142]

F. Problem Areas Yet to Be Addressed by the Community Judicature

One issue that has not been tackled by the Community judicature is the range of sanctions that it is empowered to issued in Article 230 (4) nullity proceedings. As noted in Part III G above, restricting the sanction available to a declaration that the measure in question is void sometimes supplies an inadequate remedy. This restriction, written into the EC Treaty by Articles 231 and 233 of the EC Treaty, may not comply with Article 6 and 13 of the ECHR, or Article 47 of the EU Charter of Fundamental Rights if it vests too much discretion in the hands of the wrongdoer on how to remedy an unlawful act.

It is submitted that the Community judicature has the authority to issue more particularised orders than those mandated by Articles 231 and 233, due to

[139] Case C–344/98 judgment of 14 December 2000 at para 47.
[140] *Ibid* at para 51.
[141] *Ibid* at para 52.
[142] *Ibid* at para 57.

its duty to secure compliance with EU fundamental rights, as recognised under Article 6(2) of the TEU. Treaty amendment is not necessary for the Court of Justice and the Court of First Instance to upgrade the remedies they are able to award. If national courts are bound to supply an effective remedy in the event of Member State breach of EC law, then should not the same obligation apply to the Community judicature with respect to EU institutions? In its absence, applicants aggrieved by the limits of the sanctions available after successful Article 230(4) review could potentially petition the Strasbourg human rights court. Any Member State ultimately responsible as a signatory to the EU Treaty, for the restrictions imposed by Articles 231 and 233 could be a potential defendant against a claim of breach of Article 6 and 13 of the ECHR.[143]

VI Conclusion

The Court of Justice and the Court of First Instance have been gently chipping away at some of the perceived 'access to justice' problems in the scheme for challenging the legality of EC measures. Concerns over the appropriate test for 'individual concern' are being addressed; fundamental rights considerations are being viewed in the round before decisions are reached on *locus standi* under Article 230(4); the substantive test for damages under Article 288(2) has been upgraded; and the relationship between national and Community courts has been clarified. However, it is hoped that the discussion above has exposed the fact that landmark rulings such as the *Jégo-Quéré* represent only the tip of a very deep and dense iceberg. They are the end result of a lack of certainty on whether EU institutions are acting in a 'legislative', 'administrative', or 'executive' capacity when promulgating measures.

The incoherence in the system of legal instruments employed by the political arm of EU governance is exemplified by the measures reviewed in *Cordoniu*[144] and *Bergaderm*.[145]

In the latter case, a highly particularised prohibition on the use of a chemical in a particular type of sun tan oil was housed in a Directive. This measure was hardly one laying out general policy, and would have perhaps sat more comfortably within the framework of a Regulation or a Decision, In *Cordoniu* the reverse problem occurred. A general measure laying out the entities entitled to use a trade mark appeared in a Regulation, when it might be argued that this law should have been framed within the context of a Directive.

Admirable though the work of the Community judicature may be in crafting a coherent system of administrative and constitutional review, the time is more than ripe for increased involvement by political actors in undertaking this task.

[143] *Matthews* v. *the United Kingdom* 28 EHRR (1999) 361.
[144] Above n 38.
[145] Above n 4.

At minimum, efforts need to be made to ensure that recourse is made to Community instruments in a fashion that loosely mirrors the 'legislative', 'executive' and 'administrative' paradigm known to the legal systems of all Member States. Ideally, however, revision of the EU Treaty itself would assist legal certainty, improve transparency in the law, and ease the problem-solving burden with which the Community judicature is presently grappling.

Somewhat ironically, thus far the judicial architecture of the EU has become more complex, rather than more transparent, with each Treaty revision arising from Inter-Governmental Conferences.[146] The Amsterdam revision established, in addition to the restriction described in Part II above on reference to the Court of Justice in the context of Title IV measures on visa, asylum, and immigration policy, expansion in the jurisdiction of the Court of Justice with respect to the right of private parties to bring suit. For the first time, the Court of Justice has been vested with some authority to review EU measures, as opposed to EC measures, at the behest of private litigants. Under Article 35(2) TEU, the Member States have a discretion to allow their courts to refer questions to the Court of Justice requesting preliminary rulings with respect to laws passed under the intergovernmental pillar of Police and Judicial Co-operation in Criminal matters (PJCC). Pursuant to Article 35(3), the Member States exercising this discretionary authority must state whether any court may refer questions, or whether it is confined to courts against whose decision there is no judicial remedy.[147]

The latest layer of complexity that has been added to the judicial architecture is found in the proposal in new Article 225(3) of the Treaty of Nice. It carries the potential for the Court of First Instance to receive Article 234 references from national courts with respect to specific fields to be laid down by statute. Possible candidates for this transfer of jurisdiction from the Court of Justice to the Court of First Instance include customs classification cases, and the interpretation of social security regulations.[148] Further, new Articles 220(2) and 225a EC enables the Council to create, by unanimous vote 'judicial panels' whose decisions, under Article 225(2) and (3) will be subject to appeal to the Court of First Instance. Staff cases and trade mark disputes are among the matters that

[146] For a detailed discussion of the Amsterdam revisions see Albors–Llorens 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam' 35 (1998) *CMLRev* 1273.

[147] There is no right of direct access to the Court of First Instance, in the hands of private parties, to seek annulment of PJCC measures. Under Article 35(6) and (7), only Member States and the Commission can bring nullity proceedings. Further, Article 35(5) TEU precludes the Court of Justice from reviewing the validity or proportionality of operations carried out by police or law enforcement services of a Member State, and decisions relating to maintenance of law and order and the safeguarding of internal security. These matters may therefore be excluded from consideration in questions sent to the Court of Justice from national courts concerning PJCC measures.

[148] Judge Nicholas Forwood 'The Evolving Role of the Court of First Instance of the European Communities' (2000) 3 *Cambridge Yearbook of European Legal Studies* 139, 146.

could be transferred to panels of this kind.[149] It is to be hoped, however, that any future revisions of the judicial architecture undertaken by the Member States first address the subsisting difficulties that have been here canvassed, prior to institution of major changes to the scheme of judicial review presently in place.

POST-SCRIPT

After time of writing, the Court of Justice laid fimly to rest the notion that problems with the 'individual concern' test could be resolved by judicial re-interpretation of this element of Article 230(4). The Court of Justice, in its ruling of 25 July 2002 in *UPA*[150] rejected all of the recommendations of Advocate General Jacobs, save for the advice that:

> 'it is not acceptable to adopt an interpretation of the system of remedies . . . to the effect that a direct action for annulment before the Community court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue.'

Such an interpretation, the Court observed; 'would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.'[151] For the Court of Justice, the solution lay not in opening up Article 230(4) in the way subscribed by Advocate General Jacobs. Rather, the Court of Justice placed the ball squarely back in the court of the governments of the Member States and both judicial and political arms thereof.

First, in declaring inadmissible UPA's attempt to annul a general Regulation reforming the common organisation of the olive oil market, the Court of Justice recalled that 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'[152] The national courts were thus required 'to interpret and apply national procedural rules', as far as possible, in a way enabling validity review to take place.[153] Secondly, the Court declared that 'it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force', if the system of reviewing measures of general application were to change.[154]

The main practical consequence then of the *Jégo* ruling and the Opinion of Advocate General Jacobs in *UPA* rests with an intensification of pressure on

[149] *Ibid* at 142–44.
[150] Case C–50/00 P.
[151] *Ibid* at para 43. See AG Jacobs above n 7 at paras 50 to 53.
[152] *Ibid* at para 41.
[153] *Ibid* at para 42.
[154] *Ibid* at para 45.

national courts and Member State political actors, to address and rectify subsisting problems with the judicial architecture. With regard to the former, the Court of Justice has effectively ruled that the Article 10 principle of sincere co-operation binds Member State tribunals to do as much as they can to overcome domestic barriers to validity review. If they are not able to do so, then the only route left for an aggrieved private party will be to plead Article 241 invalidity, before the Court of First Instance, if at some later stage a collateral EC measure is passed which is of direct and individual concern to them.[155]

As for the latter, the Court of Justice has sent a clear signal to Europe's political masters that any short-comings in the rules on challenge to the legality of EC rules will not be corrected via case law. To the extent that problems exist, they can only be addressed by Treaty revision. This makes for an important landmark in EU constitutional jurisprudence, with the Court of Justice establishing a clear boundary with respect to the constitutional responsibilities it is prepared to shoulder.

Some signals have emerged from the European Convention which indicate that the technicalities of judicial review are receiving a measure of attention at political level. A note from the Convention Secretariat to the Working Group on Incorporation of the Charter/Accession to the ECHR[156] poses the following question:

> Should Article 230(4) of the EC Treaty be amended to extend the conditions of admissibility for direct actions by individuals? If so, how? Or would it be better to allow case-law to define the conditions of admissibility, taking into account the right to effective judicial protection? Would it be appropriate to establish a new direct form of legal action to protect the fundamental right of individuals, along the lines of certain national constitutional procedures? What consequences would an amendment to the Treaty on this issue have for the organisation and operation of the Community's judicial system?[157]

The European Ombudsman Jacob Söderman, has made his view known on the issue of judicial remedies.[158] He has suggested that a 'chapter on remedies' should be added to the EC Treaty, which would include a provision that '[n]atural and legal persons have the right to bring proceedings in the Court of Justice against the Community and its institutions and bodies, in accordance with [Articles 230, 232 and 235 of the EC Treaty].'[159]

And finally, the members of the European Convention have been supplied, by the Praesidium, with a descriptive note on the legal instruments presently

[155] *Ibid* at para 40.

[156] Brussels, 18 June 2002 (20.06) CONV 116/02 WG II 1.

[157] *Ibid* at 17.

[158] Contribution of Mr Jacob Söderman, European Ombudsman: 'Proposals for Treaty changes', Brussels 26 July 2002 CONV 221/02, Contrib 76, The European Convention, the Secretariat.

[159] *Ibid* at 4.

operative in the EC legal system.[160] This document observes that 'the Union's institutional system does not rest on the principles of separation of powers accompanied by a definition of the usual functions of the institutions, as found in traditional constitutional law. Instead, the treaties sketch out pragmatically forms of co-operation between the institutions which represent different interests.'[161] The note then goes on to ask if 'this lack of a coherent system of decision taking procedures and their great diversity' is an additional cause of complexity and opacity?[162] This could conceivably lead the members of the Convention to consideration of how this incoherence is impacting on administrative and constitutional review.

The next chapter, then, in the development of the EU's judicial architecture seems destined to be developed at political level. The impetus for this to occur may have its origins in concerns played out before the Community judicature, but the latter has, for better or for worse, left the task of rule crafting to non-judicial players in EU governance.

[160] Brussels, 15 May 2002 CONV 50/02, The European Convention, the Secretariat.
[161] *Ibid* at 3.
[162] *Ibid*.

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