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LEGAL PROBLEMS OF TRADE WITH THE EUROPEAN ECONOMIC COMMUNITY*

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At the outset, I think I should indicate what I hope to cover under the topic, "Legal Problems of Trade with the European Economic Community." You might say that I am about to enter a fifth amendment plea as protection against biting off more than I can chew. But specifically, I mean that I cannot hope to expound on the assigned topic to its possible total scope. To do so, would be somewhat like undertaking to cover a subject like "Legal problems of doing business in the United States." It may be that this latter topic is not quite as broad or involved as its European Community counterpart. At least, the American version would seem to have a bit more stability and certainty at the present stage of legal development.

Notwithstanding the caution just suggested, there is now in existence, as a legal entity, the European Economic Community, with readily defined institutions in a legal sense, and with a rapidly developing body of guidelines and rules which can correctly be described as "law."

In carrying out my assignment, I believe it would be appropriate first to describe briefly the European Economic Community, with its constituent legal institutions, followed by comment on the types of legal problems or questions generated by the EEC itself.

THE EUROPEAN ECONOMIC COMMUNITY

The treaty establishing the European Economic Community was signed in Rome on March 25, 1957.¹ This was a treaty between Belgium, the Netherlands, Luxembourg (these three known as the Benelux nations), France, West Germany, and Italy. These six nations are today the only full members of the European Economic Community. Countries whose applications for membership were until recently pending are Great Britain, Ireland, Denmark and Norway.

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¹ 1958 J.O. 1188, 294 U.N.T.S. 23. There is a complete English translation in 298 U.N.T.S.

Under article 237² of the treaty only European states can become full members. There is, however, provision (article 238) for participation by association which is available to both European and non-European nations. Greece is now "associated" with the Community, as are some sixteen African countries which were formerly colonies or dependencies of EEC member nations.

The language of article 1 of this 1957 Treaty of Rome reads, "By the present Treaty, the High Contracting Parties establish among themselves a *European Economic Community*."

For what purpose was this Community established? The answer is given in article 2: "It shall be the task of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States."

What specific activities is the Community undertaking to accomplish this purpose? The answer is set forth in article 3. In accordance with an agreed timetable set out in the treaty the member nations as between themselves are to: (1) eliminate customs duties and quantitative restrictions on imports and exports; (2) establish a common external tariff and common commercial policy towards third countries; (3) abolish obstacles to free movement of persons, services and capital; (4) adopt a common agriculture policy; (5) adopt a common transport policy; (6) establish a system to ensure competition in the Common Market; (7) adopt procedures for coordination of economic policies of member states; (8) harmonize their respective national laws to the extent required for orderly functioning of the Common Market; (9) create a European Social Fund for workers; (10) establish a European Investment Bank to facilitate economic expansion; and (11) the Community is to "associate" with overseas countries and territories for the purpose of increasing international trade.

And what institutions does the Community have to carry out these activities? The answer is given in article 4: an Assembly, a Council of Ministers, a Commission, and a Court of Justice.

In short, this 1957 Treaty of Rome committed the six member

² An article by article analysis of the Treaty of Rome may be found in, CCH COMMON MKT. REP. ¶¶ 201 to 6830 (1962) (includes text of the treaty in English, French and German).

nations to a course of economic integration in many respects as complete as that which obtains between the individual states of the United States. The treaty further established an institutional framework (legislative, executive, judicial) which is structurally quite different from our own federal government, yet having authority which is definitely federal in character.

The 1957 Treaty of Rome which brought the European Economic Community into existence was not a quick-flash development; it was not just conceived and produced in a few months of international bargaining. Like all significant events profoundly affecting the destinies of nations, the treaty is the culmination of an idea that had been seriously advanced in various forms for many years.

Following World War I, the first attempt to unite European countries in an international organization was made through the League of Nations. The League contemplated a degree of unity and cooperation on economic as well as political matters. The ultimate failure of the League spelled failure also of efforts to abolish restrictions on imports and exports, and a 1927 Geneva Treaty to this effect was never ratified. In the midst of World War II, Winston Churchill, already looking far beyond the cross-channel invasion which was yet to come, spoke in stirring terms of a "United States of Europe." This was in 1943.

Following the termination of hostilities in 1945, the divided nations of Western Europe were no longer great world powers. Europe was in a shambles and the economic chaos which was overcome by the Marshall Plan provided the compelling impetus toward a degree of European unity that was not to be denied. But the American Marshall Plan involved more than generous financial aid for the rebuilding of Europe; it also called for closer economic cooperation between the participating nations and this American program was intended to lay the foundations for a single European market. Thus, the 1950 declaration of French Foreign Minister Schuman announcing a new concrete policy of economic integration for uniting Europe, soon culminated in the European Coal and Steel Community Treaty of 1951, which introduced the common market concept for coal and steel. The successful experience with these two basic products laid the further groundwork for unifying the entire economy of the Community, resulting in the 1957 Treaty of Rome, which became effective January 1, 1958, marking the formal establishment of the European Economic Community.

As already indicated, the Community has an institutional structure which is federal in character, with an executive functioning independently of the national governments, but subject to parliamentary and judicial control. To work closely with the Community executive body is a Council of Ministers which consists of representatives of the national governments.

The Commission. The Rome Treaty establishes the executive body of the Community, which is the Commission, consisting of nine members appointed for terms of four years, by mutual agreement of the governments of the member states. However, not more than two members of the Commission may come from any one member country. At the present time, there are two members each from France, Italy and West Germany, and one each from the Netherlands, Belgium and Luxembourg.

Article 157 of the treaty is quite explicit concerning the relationship of Commission members to the national governments:

The members of the Commission shall act completely independently in the performance of their duties, in the general interest of the Community. In the performance of their duties, they shall neither seek nor take instructions from any Government or other body. They shall refrain from any action incompatible with the nature of their duties. Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their duties.

What are the duties of the Commission? To see that the provisions of the treaty and actions taken by Community institutions are carried out. To formulate recommendations and stimulate action in furthering the aims of the Community. To bring to account before the Court of Justice any offenders who violate the treaty or violate valid rules, regulations or decisions issued pursuant to the treaty.

The Council of Ministers. This body consists of one representative from each of the member governments, and for most matters is the ultimate policy-making body of the Community. The Council might be regarded as that institution of the Community to remind us that the Community is really comprised of individual nations which act through national governments. Thus, while the other bodies of the Community may be regarded as federal in character, the Council of Ministers looks in the opposite direction. Although the Council

consists of one representative from each of the national governments, its decisions are for the most part taken by qualified majority vote with the votes of the members weighted as follows: France, Germany and Italy, four; Belgium and the Netherlands, two; and Luxembourg, one.

Article 148 of the treaty further requires, in most cases, for adopting resolutions, at least twelve votes in favor. This means that except where the treaty requires a unanimous vote no single country of the Community can exercise a veto in the Council of Ministers. It is also important to keep in mind that while the important Community decisions are taken by the Council, in the last instance the Council can in most cases act only on proposals of the Commission, and the Council may amend a proposal of the Commission only by unanimous vote. Thus it is apparent that while the Council of Ministers consists of members representing individual national governments, the authority vested in the Council and the procedures which govern the Council's actions are designed to make the Council function as a Community institution, to express the general interest of the Community as a whole rather than to act merely as an international forum where each participating nation bargains to get as much for itself as it can.

The Assembly. The treaty establishes an Assembly, also called the European parliament, consisting of 142 delegates from the six member nations, divided as follows: Belgium, fourteen; France, thirty-six; Germany, thirty-six; Italy, thirty-six; Luxembourg, six; the Netherlands, fourteen. While article 137 of the treaty states in so many words that the Assembly is to consist of representatives of the peoples of the nations within the Community, article 138 provides that the delegates shall be nominated by the respective parliaments of the member nations. The treaty also states that the Assembly shall prepare proposals for election by direct universal suffrage in accordance with the uniform procedure applicable in all the member nations. A proposal to the Council of Ministers for direct election has been made by the Assembly but this has not been adopted by the member nations. As previously mentioned, the real decision-making body of the Community is the Council of Ministers. What then does the Assembly do and what is its authority? The Assembly is required to hold an annual session, meeting in October, and may meet in special session upon request of a majority of its members or at the request of either the Council of Ministers or the Commission. The Assembly receives reports from the Commission, and the Council

and the Assembly may require the Commission to answer questions in writing or in oral appearances before the Assembly. Thus the Assembly can influence policy through its debates and its standing committees which carry on continuous studies. The one direct authority that the Assembly has is to compel the Commission to resign in a body, by passing a vote of censure by a two-thirds majority of the votes cast representing a majority of the members of the Assembly.

The Court of Justice. The judicial body of the Community, the Court of Justice, consists of seven judges, assisted by two advocates-general. It functions in accordance with recognized judicial procedures, and it has authority to decide whether actions of the Commission and of the Council of Ministers shall be upheld. The judgments of this court have the force of law in the Community. They are directly enforceable on private individuals, firms, and Community officials by the courts of the member states and these judgments cannot be set aside, or enforcement suspended, except by a decision of the Court of Justice itself.

This in broad outline is the structure of the European Economic Community.

LEGAL PROBLEMS GENERATED BY THE EEC

Let us look now at some of the consequences for American businessmen and their lawyers deriving from the establishment of the European Economic Community.

One immediate result has been greater involvement with the national laws of member countries. Many U.S. businessmen have seen the market's plan to eliminate internal tariffs and maintain a common external tariff as handwriting on the wall, dictating the necessity of establishing a position within the market. This has led to the setting up or expansion of European businesses, to new licensing arrangement, and to expanded distributional arrangements within the territory of the EEC. A necessary prelude for the lawyers, and in many respects a continuing problem, has been to advise their clients concerning the national laws of each member state into which new or expanded business operations may take them—the customs laws, the industrial and other property laws, the tax laws, company law, labor laws, laws concerning competition, laws concerning foreign exchange, and so forth.

But in addition to this greater involvement in national laws which the EEC has caused, it has generated, and increasingly will generate, its own legal relationships. I cannot catalogue here all the main actions which the EEC has taken, and the legal consequences which they have had or may have for American businessmen. It may be useful, however, to outline the several different *types of action* which the Community may take, the *types of legal problems* which may result, and the *manner* in which resolution of such problems may be sought.

The Treaty of Rome is a kind of constitution. The Community which it established is a kind of government, and this government has a kind of legislative authority. It can act under the treaty in a variety of ways, each having different consequences, to carry out and implement the provisions of the treaty.

At least four distinguishable types of Community actions are contemplated by the Rome Treaty. *Regulations* are general rules of broad applicability which are directly binding both on member states and on enterprises engaged in economic activities within the Community; they are akin to our federal statutes. Regulations have been adopted on a wide variety of subjects not covered in complete detail in the treaty itself. An example of conspicuous importance for United States businessmen is regulation 17 issued by the Council of Ministers in 1962 to implement the basic antitrust rules set forth in articles 85 and 86 of the treaty.

Directives are binding orders addressed only to member states, requiring them to achieve a specified result but not specifying the means to be employed—for example, leaving them a choice as between national legislation and administrative action to carry out the directive. Had the Community's antitrust rules been implemented by directive rather than by regulation, each member state would have the task, within its territory, of filling out the substance of such rules and adopting appropriate procedures—and obviously a rather complex situation would have resulted.

Decisions are binding actions in particular matters, and may be addressed directly to enterprises as well as to member states. For example, the Commission's action on an enterprise's application for an antitrust exemption under article 85(3) is a decision.

Recommendations or *opinions* are non-binding advice to member states or enterprises—which however are not necessarily without legal significance—as, for example, if the Community were to cast

what might have been (and might yet be) a "decision" in the form of an opinion.

In addition to the foregoing specified types of action, the Community also takes action in other forms from time to time (*e.g.*, notices or rulings and answers to questions), and it may take action having important legal consequences wholly outside the machinery set forth in the Rome Treaty. A notable example of the latter is its sponsorship of the draft European Patent Convention, which would establish for its signatories a common patent law, with common administrative and judicial machinery.

An American businessman trading or doing business in the Community may find himself accused of having violated a Community regulation or decision, or a self-executing provision of the treaty itself. If, for example, he had been a party during 1962 to a restrictive business agreement of the sort proscribed by articles 85 and 86 of the Rome Treaty, and he failed by the close of business on February 1, 1963 to notify the EEC of such agreement, he may be subject to a fine. Or he may be fined for refusing to submit to an investigation ordered by a Commission decision. Fines are the normal sanction for violation by a business enterprise of Community law; they may be imposed in certain instances by the Commission, subject to an appeal to the Court of Justice; otherwise they are imposed by the Court itself.

The Community has no machinery of its own for collecting fines which it imposes. But this affords slim comfort to the transgressor enterprise, for Community judgments are entitled to the fullest faith and credit in the courts of member states. Execution can be had simply by proving the Community judgment, and it cannot be collaterally attacked. It is a fact of central importance to the development of the EEC that in this and other matters involving the proper application of Community law, the Community itself has the last word.

The American businessman may also have an opposite kind of legal problem in his relations with the Community; he may feel that its action or inaction is unlawful. What are his remedies? Invalidity of the Community action can be asserted in a number of ways, but perhaps the most important is a straightforward action to annul in the Court of Justice. The number of such actions under the Rome Treaty is as yet small, but in the case of the Coal and Steel

Community this has been the most important aspect of the Court's jurisdiction.

Non-binding recommendations and opinions of the Community are the only Community actions not subject to review in the Court of Justice. In general, all other Community actions can be appealed, where they are of "direct and specific concern" to the enterprise, and will be annulled if found to be invalid in a direct attack before the Court of Justice.

There are four grounds for attack (direct or collateral) on Community actions, all of which may be reduced to the concept of the Community's having exceeded its power, procedurally or substantively, under the Rome Treaty. The broadest of these grounds of appeal can best be translated simply as "abuse of power." Under these provisions it would appear that an antitrust decision, for example one denying an antitrust exemption, might be annulled because of substantial procedural defects, or because it was based on a misinterpretation of the treaty, or simply because the exemption was denied without good cause.

Similarly, where an enterprise or business feels that a failure to act by the Community is in violation of the treaty, it can bring what is in effect a mandamus action in the Court of Justice, for example to force a decision on its application for an antitrust exemption. Such a suit can only compel a particular action with respect to the enterprise, however (*i.e.*, a decision), not the issuance of a general regulation or directive, and it cannot be used to compel action by a member state, as opposed to the Community itself.

The significance of these provisions for Court of Justice review of Community actions is enhanced by the fact that the Court of Justice is the *only* forum within the EEC in which their lawfulness may be tested. As mentioned previously in connection with Community fines, the Court of Justice has the last word in interpreting the treaty, or determining the validity of a Community action under the treaty; when such issues are raised in national court proceedings they must be referred to the Court of Justice. This power to make final judgment as to the validity of its own actions is of course vital to maintaining the integrity of Community actions, and preventing their erosion in the national courts of member states.

A third type of legal problem which establishment of the EEC may visit upon at least an occasional American businessman concerns its liability in tort and contract actions. The Court of Justice has

exclusive jurisdiction over tort actions against the Community (and this includes actions for damages resulting from Community actions which have been annulled or are subject to annulment).

The Court also has exclusive jurisdiction of contract claims against the Community, where such jurisdiction is reserved in the contract itself. However, these provisions for exclusive jurisdiction would not, of course, preclude suit in the courts of a non-member state (*e.g.*, the United States), assuming jurisdiction could be obtained, and assuming the difficult question of sovereign immunity to suit were resolved unfavorably to the Community.

A fourth class of cases generated by the existence of EEC—and one which in the long run might conceivably generate as much litigation as any other—is that in which an enterprise feels that Community law has been violated, not by the Community itself, but by a member state, or by another enterprise. For example, a member state fails to carry out its obligations under the Rome Treaty, or under a Community directive issued pursuant thereto. Or an enterprise violates Community laws concerning competition, to the damage of another enterprise. The Community does not provide a remedy to the enterprise for such injuries. However, the Community itself can bring action in case of a claimed violation by a member state. Indeed the Community has in fact instituted several actions in the Court of Justice against member states, based upon unlawful imposition of new import restrictions intended by the member state to cushion the shock of the progressive dismantling of its internal tariff structure, as required by the treaty.

One final word on the amount of litigation before the Court of Justice. Thus far the great bulk of such litigation has arisen under the European Coal and Steel Community Treaty, rather than under the EEC Treaty. As of January 1960, there were sixty-four cases pending before the Court of which sixty arose under the Coal and Steel Community Treaty and four under the EEC Treaty.

As of late 1962, some ten EEC cases had been considered by the Court, of which four involved purely personal matters. The remaining cases fall into two categories.

One category consists of cases brought by the EEC Commission against member states for alleged infringement by them of EEC Treaty obligations—chiefly imposition of restrictive import measures of different kinds to offset internal duty reductions. The other category consists of various cases involving interpretation of the EEC

Treaty. Some of these cases were referred to the Court of Justice by other courts or administrative tribunals within the Community because of its exclusive jurisdiction in matters of Community law; others were brought directly in the Court by private interests seeking to have the Court declare particular Community regulations or decisions inapplicable or invalid.

In conclusion, it seems evident that as a generator of new legal, as well as new economic, problems for American business, the full impact of the European Economic Community is still in the future.