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American Enterprise in the European Common Market: A Legal Profile. Volume 1.

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American Enterprise
in the
European Common Market
A Legal Profile

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American Enterprise in the European Common Market A Legal Profile

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Foreword and Acknowledgments

The rapid expansion of international trade during the past fifteen years has confronted the American business counselor with a great variety of new problems. Solutions to these problems were not expounded to him in his pre-war legal education, nor are they to be found in the rich proliferation of advance sheets, digests, and loose-leaf services with which the modern American lawyer is blessed. When he turns to foreign counsel, he finds that a lack of common legal background makes meaningful professional communication difficult.

This book has been prepared with the primary purpose of helping those American lawyers who, because of their clients' expanding activities, confront for the first time the problems of trading with and trading in the European Common Market. It is designed to give them an over-all picture of the new legal framework of the Market itself and of the laws of business organization, labor relations, industrial property, competition, and taxation which prevail there. With this background American lawyers should be better able to select and use the services of the European experts on whom they must, of course, depend for definitive counsel.

Better books on the European Common Market will no doubt appear very soon in this country, including particularly analytical monographs, and we hope they will be better in part because of the exploratory work done in this one. Eventually, a commercial publisher, emboldened by this and future studies developing and correcting many of the things said in these pages, may furnish the American lawyer with a current service on European trade.

We hope, too, that this book—conceived within the framework of the international and comparative legal studies at the University of Michigan Law School—may have interesting progeny in the academic world. We would like to think that it may encourage more teachers of comparative law to venture from the traditional paths of civil law into the more rapidly evolving areas of commercial law; that it may help students of American commercial law to compare American institutions with their European correlatives; and

that it will direct the attention of constitutional and international lawyers to a new kind of emergent federalism and "supranational" organization which "breaches the integrity of national legal systems."

The purposes of the book explain its content. Since the American lawyer's job will be to conceive and plan, rather than to execute details, we have sought to explain the legal and administrative structure of the European Community and the broad outline of the national legal systems, rather than to tell in detail "how to. . . ." Since our principal audience is composed of American business counsellors, we have omitted many aspects of the Community of the greatest interest to Europeans—such as agricultural and transportation policy—in favor of topics like business organization. The hard choice of priorities has also forced us to omit or deal only incidentally with many topics of great interest both to Americans and Europeans—the role of state-owned enterprises, government purchasing regulations, and price controls, for example.

Even after these and other topics had been eliminated, the breadth of the subject matter obviously called for a cooperative effort by scholars and practitioners on both sides of the Atlantic. It is inherent in a cooperative undertaking of this type that the completion of the contributions cannot be exactly synchronized in point of time. While most of the chapters were completed in the fall of 1959, some carry the story into the early months of 1960.

I wish to record here our profound gratitude for the assistance and advice we have received from a multitude of sources.

The concept of the book emerged from discussions with my friend and colleague Alfred F. Conard, whose ideas had a determining influence on the selection of the topics and organization of the book.

Financial support came from the Ford Foundation and from the Cook Research Funds of the University of Michigan Law School. Dean E. Blythe Stason, Professor Allan F. Smith, Director of Graduate Studies, and Professor William J. Pierce, Editor of Michigan Legal Publications, deserve our particular thanks for their consistent support and wise advice.

The late Tullio Ascarelli, Professor of Comparative Law at the University of Rome, a brilliant scholar and successful practitioner, helped us greatly in developing the plan for the book. His sudden death just prior to his planned teaching assignment in Ann Arbor

cast a tragic shadow upon our effort. The suggestions of Professor Jean Limpens, Director of the Centre Interuniversitaire de Droit Comparé in Brussels, were also most useful in the planning stages.

Our expression of profound appreciation goes to Professor Paul Reuter of the Paris Law Faculty who did not spare time and effort in instructing us in the intricacies of the Community and offering extensive comments on parts of the manuscript.

It is more than the usual cliché to say that this book could not have been written without the help and encouragement of Mr. Michel Gaudet, Director of the Legal Services of the European Communities. Mr. Gaudet made detailed suggestions on parts of the manuscript, answered innumerable queries, and even visited with us in Ann Arbor. We also obtained valuable counsel from Mr. Theodor Vogelaar, Director of the Legal Services of the Euratom Commission, and—in the planning stages—from Dr. Robert Krawielicki, Director of the Legal Services of the High Authority of the Coal and Steel Community. Our thanks go also to Professor Bruyas, Dr. Minunni, and Baron de Vos van Steenwijk, who commented on parts of the manuscript, and to the numerous other officials of the European Communities who assisted us. Two distinguished members of the Commission of the European Economic Community, Dr. Hans von der Groeben and Mr. Jean Rey, visited the Law School, and our undertaking was discussed with them at some length during their visits.

Professor Kahn-Freund desires to express his thanks to the Division for Labor Problems of the European Coal and Steel Community; to Mr. Van Werwecke and Mr. Ewen of the Ministry of Labor in Luxembourg; and to Professor Gino Giugni of Rome for his assistance with regard to Italian Law.

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Professor Conard received the helpful collaboration of experts in the six countries of the Community. These included Mr. Arendt

of Luxembourg, Professor Ascarelli and Dr. Bruna of Rome, Professor Bernini of Ferrara, Mr. Deelen and Mrs. van Vlis of Amsterdam, Professor Heenen of Brussels, Professor Houin of Paris, and Professor Serick of Heidelberg. The respective contributions of these experts are identified in more detail at the outset of Mr. Conard's chapter.

Dr. van Hoorn, co-author with Professor Wright of the chapter on taxation, wishes to acknowledge the assistance of the staff members of the International Bureau of Fiscal Documentation, Messrs. W. H. J. Charbon, J. P. C. Huiskamp, and D. A. van Waardenburg. Dr. van Hoorn's findings concerning tax laws in the Common Market countries other than the Netherlands were verified by the following national experts who are referred to in more detail in the chapter on taxation and to whom he extends his appreciation: Dr. Giancarlo Croxatto of Genoa; Dr. Albert J. Rädler, Dipl. Kfm., of Munich; Mr. Jean H. Rothstein, H.E.C., of Paris; and Mr. Paul Sibille of Brussels.

Professor Wright received able research assistance from Mrs. Elizabeth Brown, research associate at the University of Michigan Law School and Mr. Robert Wartell, a senior at the same school.

Mr. Nicholson owes special thanks to Mr. Herman Walker, Jr., of the Department of State.

Others who offered valuable suggestions on portions of the manuscript include Miss Miriam Camps of London; Dr. Hans-Wolfram Daig, attaché of the Court of Justice of the Communities in Luxembourg; Dr. Isaiah Frank of the U.S. Department of State; Professors William W. Bishop, Jr., Frank Cooper, Paul Kauper, S. Chesterfield Oppenheim, and Hessel Yntema, all of the University of Michigan Law School.

We wish to mention the invaluable aid of Dr. Vera Bolgar, Executive Secretary of the American Journal of Comparative Law, and Mrs. Lilly Roberts, Bibliographer of the Michigan Law Library, in translating parts of the manuscript and on bibliographical work.

In completing the research and editorial work we had the efficient assistance of Mrs. Hortense Berman of Ann Arbor, and Mrs. Trudy Fisher of Washington, D.C.; of Mr. Dudley Chapman, Instructor at the Michigan Law School; of the graduate students of the Law School, Messrs. Jacques Bourgeois of Brussels (Belgium), Geerd Muntinga of Tübingen (Germany), Dr. Hermann Roos of Bonn (Germany), Dr. Peter Ulmer of Heidelberg

(Germany), Mr. Laurence Ziman of Cambridge (England); of Mr. Peter Eld of the University of Michigan Law School.

In the early stages of the project Professor Conard and I had extensive interviews with officials of the American diplomatic missions in Brussels, Luxembourg, Paris, London, and elsewhere in Europe, with foreign diplomats and other governmental officials, with parliamentarians, and with officials of the Organization for European Economic Cooperation and the Council of Europe, with European attorneys, businessmen, labor leaders, and scholars in European universities, and with American attorneys and executives stationed in Europe. In this country we interviewed government officials, members of the Bar, and businessmen, too numerous to mention individually. We wish to thank all of them for their generous help and attention.

Mr. Thomas L. Nicholson joined us in Ann Arbor in the summer of 1959 after a year in Europe, and did most of the editorial work on the manuscript in addition to contributing his own chapter.

It goes without saying, of course, that the positions taken and views expressed in this volume are those solely of the respective authors.

E.S.

Ann Arbor, Michigan
May, 1960

Table of Contents

Volume I

	PAGE
FOREWORD AND ACKNOWLEDGMENTS	v
ANALYTICAL TABLE OF CONTENTS	xii
CHAPTER	
I. AN AMERICAN LAWYER VIEWS EUROPEAN INTEGRATION: AN INTRODUCTION	<i>Eric Stein</i> 1
II. THE NEW INSTITUTIONS	<i>Eric Stein</i> 33
III. THE ESTABLISHMENT OF THE CUSTOMS UNION (APPENDIX: THE EUROPEAN FREE TRADE ASSOCIATION)	<i>Marc Quin</i> 101
IV. EXCHANGE CONTROL REGULATIONS IN FRANCE	<i>Fernand Charles Jeantet</i> 189
V. INDUSTRIAL PROPERTY	<i>Stephen P. Ladas</i> 235
VI. LABOR LAW AND SOCIAL SECURITY	<i>Otto Kahn-Freund</i> 297
VII. NEW LEGAL REMEDIES OF ENTERPRISES: A SURVEY	<i>Eric Stein and Peter Hay</i> 459

Volume II

VIII. ORGANIZING FOR BUSINESS	<i>Alfred F. Conard</i>
IX. THE SIGNIFICANCE OF TREATIES TO THE ESTABLISHMENT OF COMPANIES	<i>Thomas L. Nicholson</i>
X. PROTECTION OF COMPETITION	<i>Stefan A. Riesenfeld</i>
XI. TAXATION	<i>J. van Hoorn, Jr. and L. Hart Wright</i>
XII. THE ASSOCIATION WITH OVERSEAS COUNTRIES AND TERRITORIES	<i>Peter Hay</i>
ANNEX EUROPEAN FREE TRADE ASSOCIATION, TEXT OF CONVENTION AND OTHER DOCUMENTS	

Analytical Table of Contents for Volume I

	PAGE
CHAPTER I. AN AMERICAN LAWYER VIEWS EUROPEAN INTEGRATION: AN INTRODUCTION	I
I. A Perspective	I
A. A "Prophecy"	I
B. A Glance at History	2
C. Relevance of the Community for American Lawyers	4
II. Essential Elements of the European Economic Community	7
A. The Objectives of the Community and the E.F.T.A.	7
B. The Common Market vs. the Free Trade Area Arrangement	7
C. The Bases for "Common Policies" of the Community	9
D. The Timetable	12
E. The Geographic Scope of the Community	14
III. The Legal Framework of the European Economic Community	15
A. The Treaty: A Quadrilingual Labyrinth?	15
B. The Legal Nature of the European Economic Community	17
C. The Treaty as a "Constitution" and "Statute"	19
IV. Legal Problems for American Lawyers	20
A. Exporting to the Community	21
B. Doing Business in the Community	23
C. Conclusions	26
V. A Longer Range View	27
A. The Community and the Investment Climate	27
B. The United States and Europe	30

	PAGE
CHAPTER II. THE NEW INSTITUTIONS	33
I. The Council of Ministers: The Instrument of the Govern- ments	34
A. The Council as the Paramount Institution	34
B. The Voting Formula	36
C. The Composition of the Council	38
II. The Commission: The Community "Administration"	39
A. The Role of Initiative and Supervision	39
B. The Commissioners and Their Staff	40
C. Policy Makers or Administrators?	42
III. The Evolving Pattern of Council-Commission Rela- tions	44
A. The Treaty Procedure	44
B. The Evolving Practice	44
IV. Advisory Committees: The Voice of "Outside" Ex- perts and Special Interest Groups	46
V. The European Parliamentary Assembly: The Voice of the People?	51
A. Composition and Organization of the Assembly	51
B. International Assembly or Parliament?	55
C. The Working of the Assembly	57
D. The Assembly's "Political Control" over the Commission	58
E. The Assembly and the Council of Ministers: An Uneven Power Contest	61
F. The Assembly and the Member Governments	66
VI. The Court of Justice	68
A. Composition of the Court: The Judges and Ad- vocates General	68
B. The Jurisdiction of the Court	70
C. The Role of the Court	71
VII. Enterprises and the Community Institutions	73
A. Emergent Problems of the Scope of the "Law- Making" Power	73
1. How Much Implied Authority?	73
2. Regulation or Directive?	75

	PAGE
B. Legal Position of Enterprises in Proceedings Before Institutions	77
1. Quasi-Judicial Proceedings Before the Commission	77
2. "Law-Making" Proceedings	79
C. Organizing for Community Action	81
1. Community Level Organizations of Industry and Commerce	81
2. Community-Level Organizations of Labor	84
D. Effective Contact Points Between Institutions and Private Groups	86
1. Contacts with the Commission	86
2. Contacts with Advisory Committees of the Community	88
3. Contacts with Permanent Representatives, the Council and the Assembly	89
4. Contacts via National Governments	90
5. A Case of Inter-Action	91
VIII. Conclusions	92
Appendix—List of Selected Acts of the E.E.C. Council and Commission Issued During the First 18 Months of the Community's Existence	98
CHAPTER III. THE ESTABLISHMENT OF THE CUSTOMS UNION	101
I. Introduction	101
II. Relations among the Six	107
A. Abolition of Tariffs	107
1. The Basic Customs Duties to Which the Treaty Rules Apply	107
2. The Timing of the Progressive Abolition of Customs Duties	107
3. Flexibility of the Rules Abolishing Internal Tariffs	109
4. Safeguards Against Excessive Flexibility	109
5. Methods of Implementation on January 1, 1959, of the Rules Abolishing Internal Tariffs	111

6.	Technical Problems of the Implementation of the Rules Abolishing Internal Tariffs	111
B.	The Abolition of Quotas	113
1.	The Rules of the Organization for European Economic Cooperation	113
2.	The Rules of the Treaty	114
3.	Flexibility of the Treaty Rules and the Safeguards Against Excessive Flexibility	115
4.	Implementation of the Rules Eliminating Quotas on January 1, 1959	117
5.	Technical Problems of the Implementation of the Rules Eliminating Quotas	119
C.	The Meaning of "Libre Pratique" Under the Treaty	121
D.	Clauses Providing Safeguards Against Difficulties Resulting from the Elimination of Quotas	126
1.	The Clause Providing Safeguards Against Balance-of-Payments Difficulties	126
2.	The Clause Providing Safeguards Against Difficulties in Particular Sectors of the National Economies	129
III.	The Relations of the Six with Third Countries	131
A.	The Establishment of the Common External Tariff	132
1.	Methods of Determining the Tariff	132
2.	Means of Implementation of the Provisions Concerning the Common External Tariff	134
3.	Technical Problems of Implementation of the Rules Establishing the External Tariff	136
4.	List G: External Tariff Items Yet to be Negotiated Among the Six	137
B.	The Liberalization of Trade with Third Countries	139
C.	Safeguard Clauses	145
D.	The Principles of the Common Commercial Policy	147
E.	The External Commercial Policy of the Community Since Its Creation	149
1.	Negotiations with Regard to a European Free Trade Area	149

	PAGE
2. Specific Measures Taken on January 1, 1959, with Regard to Third Countries	153
3. The Report of the European Commission on Future Relations of the Six with Other European Countries	156
4. The Problem of the Harmonization of Commercial Policies in Regard to Certain Countries	157
5. The Dillon Proposal for Reduction of the Tariffs of the Parties to G.A.T.T.	159
IV. Conclusions	161
A. Difficulty of Forming Judgments	161
B. Lessons Drawn from the Experience of the First Months of the Community	166
C. The United States and the Common Market	170
Appendix—The European Free Trade Association (E.F.T.A.) (The Little Area of the "Seven")	172
A. Abolition of Tariffs	174
B. Abolition of Quantitative Restrictions	175
C. Definition of Origin	177
D. Safeguard Clauses	180
1. Difficulties in the Balance of Payments	180
2. Difficulties Arising in a Particular Sector	183
E. Conclusions	186
CHAPTER IV. EXCHANGE CONTROL REGULATIONS IN FRANCE	189
I. A General Survey of Exchange Control Laws and Regulations	190
A. The Hierarchy of Texts	191
B. The General Effect of These Rules	192
C. The Authorizations Delivered by the Exchange Control Office	193
D. The Various Agencies	194
E. The Definition of the Term "Franc Area"	195
F. The Definition of "Residence"	196
G. The Meaning of Some Frequently Used Expressions	198

	PAGE
II. International Payments	198
A. Basic Rules	199
B. The Currency Market	201
C. Foreign Accounts in Francs	203
1. Convertible Accounts	204
2. Bilateral Accounts	204
III. International Trade	205
A. Origins of the Prohibition	205
B. The Rome Treaty and the Trend Towards Lib- eralization	206
C. Importation	207
D. Exportation	210
IV. French Investments Abroad	212
A. Evolution Since World War II	212
B. The Present Situation	213
C. A New Flexible Policy Concerning Assets Abroad	215
V. Foreign Investments in France	217
A. Basic Rules	217
B. Real Property	220
C. Stock, Bonds, and Debentures Quoted on the Paris Stock Exchange or on the Paris Brokers' Exchange	220
D. Private Investment in Companies Organized in France	221
E. Opening of a Branch in France	223
F. Loans	223
G. Effect of the E.E.C. Treaty	223
VI. Sanctions	224
A. Penal Sanctions	224
B. Civil Law Consequences	226
VII. Probable Evolution under the E.E.C. Treaty	228
A. French Law and Community Law	229
B. A Transitional Period	230
C. Probable Effect of a Transfer of Powers	232

CHAPTER V. INDUSTRIAL PROPERTY	235
I. Protection of Industrial Property	235
A. Introductory Remarks	235
B. Rome Treaty Provisions	237
C. Protection of Industrial Property Based on National Legislation and International Treaties	239
II. Patents	243
A. Patent Laws in the Common Market Countries	243
1. Administrative Procedure	244
2. Patentable Inventions	244
3. Subject Matter Restrictions	245
4. Annuities	246
5. Working Requirements	246
6. Duration of Patents	247
B. Possibilities of Unification or Harmonization of Patent Laws in the Common Market	247
C. Effects of Unification or Harmonization on American Interests	256
III. Industrial Designs and Models	257
A. Industrial Design and Model Laws in the Common Market Countries	257
1. Administrative Procedure	258
2. Subject Matter	259
3. Scope of the Right	259
4. Duration of Protection	259
B. Possibilities of Unification or Harmonization of Laws Relating to Designs in the Common Market	260
C. Effects of Unification or Harmonization of Laws on American Interests in Industrial Designs	261
IV. Trademarks	261
A. Trademark Laws in the Common Market Countries	261
1. Administrative Procedure	262
2. Registrability	263
3. Effects of Registration	263
4. User Requirements	264

	PAGE
5. Term of Registration	265
6. Assignments and Licenses	265
B. Possibilities of Unification or Harmonization of Trademark Laws in the Common Market	265
C. Effects of Unification or Harmonization of the Laws of the Six on American Interests in Trade- marks	269
V. Other Rights of Industrial Property	270
A. Protection of Trade Name	270
B. Repression of False Indications of Origin	272
C. Protection Against Unfair Competition	275
D. Protection of Know-How	277
1. Definition of Know-How	278
2. Nature of the Right in Know-How	279
3. Restrictive Clauses	281
VI. General Questions	282
A. Problems of Territorial Assignments and Li- censes in the Common Market	282
B. Rules Against Restraints of Competition and Their Effects on Industrial Property Rights	284
VIII. General Conclusions	290
A. The Likelihood That Changes in Industrial Prop- erty Law Will Occur	290
B. The Probable Kinds of Changes	290
C. Laws Which are Likely to be Harmonized	291
D. How Harmonization May be Effected	293
CHAPTER VI. LABOR LAW AND SOCIAL SECURITY	297
Introduction	297
I. The Impact of the Treaty on Labor Law and Social Security	298
A. General	298
B. The Approximation of Legislative and Adminis- trative Provisions	305
C. Cooperation in General	310
D. Social Security	319

	PAGE
1. The Regulations Concerning Migrant Workers	320
2. Assimilation of Social Security Legislation	324
E. Three Special Problems of Harmonization	325
1. Equality of the Sexes	326
2. Holidays with Pay	330
3. Working Hours and Overtime Pay	332
F. Freedom of Movement	338
1. The General Principle and Its Exceptions	338
2. Changes During the Transitional Period	344
3. Methods of Giving Effect to These Changes	348
4. Exchange of Young Workers	350
G. The European Social Fund	351
H. Conclusions	359
II. A Sketch Map of Labor Laws in the Six	361
A. The Role of Legislation	362
B. The Method and Legal Significance of Collective Bargaining	374
1. Bargaining by Employers' Association	375
2. Contractual and Institutional Bargaining	377
3. Union Structures and Ideologies	380
4. Law of Collective Bargaining in General—Freedom of Collective Bargaining and Its Restrictions	388
5. The Collective Agreement as a Contract	393
6. The Collective Agreement as a Legally Enforceable Code	396
7. The Extension of Collective Agreements	398
8. Sanctions and Publicity	401
C. Employee Representation in the Plant and in the Undertaking	402
D. Settlement of Conflicts	417
E. Protection of Employees in the Event of Dismissal	428
1. Periods of Notice	429
2. Grounds for Instantaneous Dismissal	432
3. Socially Unjustified Dismissals	434
4. Dismissals Subject to Consent	438

Appendix—Social Security Benefits: A Skeleton Survey	442
A. Belgium	442
1. Unemployment Insurance	442
2. Sickness, Disability, and Maternity Benefits	443
3. Family Allowances	443
4. Old Age and Survivors' Pensions	443
5. Accidents	444
B. France	444
1. General Observations	444
a. Organization	444
b. Financing	445
c. Coverage	445
2. Unemployment	445
3. Sickness, Maternity, and Disability Insurance	445
4. Family Allowances	446
5. Old Age and Survivors' Pensions	446
6. Industrial Accidents and Diseases	446
C. Germany	447
1. Unemployment Insurance	447
2. Sickness Benefit (Including Maternity Benefit and Death Grant)	447
3. Family Allowances	447
4. Pensions (Rentenversicherung)	448
5. Accident Insurance	448
D. Italy	449
1. General Observations	449
a. Organization	449
b. Financing	449
c. Coverage	450
2. Unemployment Insurance	450
3. Sickness, Maternity, and Funeral Benefits	450
4. Family Allowances	450
5. Disability, Old Age and Survivors' Benefits	451
6. Industrial Accidents and Diseases	451
E. Luxembourg	452
1. General	452
2. Organization	452

	PAGE
a. Health, Maternity, Funeral Insurance	452
b. Old Age, Disability, Survivors' Pensions	452
c. Industrial Accidents and Occupational Diseases	453
d. Family Allowances	453
e. Unemployment Compensation	453
3. Unemployment Compensation	453
4. Health, Maternity, Funeral Insurance	453
5. Family Allowances	454
6. Old Age, Disability, Survivors' Pensions	454
7. Industrial Accidents and Diseases	455
F. Netherlands	455
1. General: Organization	455
a. Health and Maternity Insurance: Medical Benefits	455
b. Health and Maternity Insurance: Cash Benefits, Family Allowances, Unemployment Insurance	455
c. Disability, Old Age, Survivors' Pensions, Industrial Accidents and Occupational Diseases	456
d. Coordinating and Supervising Organ: Council of Social Insurance	456
2. Unemployment Insurance	456
3. Health and Maternity Insurance	456
4. Family Allowances	457
5. Old Age, Disability, Survivors' Pensions	457
6. Industrial Accidents and Diseases	458

CHAPTER VII. NEW LEGAL REMEDIES OF ENTERPRISES: A SURVEY	459
I. Administrative Acts of the Community	460
A. Form of Administrative Acts	460
B. Enforcement of Administrative Acts Against Enterprises	461
1. Imposition of Penalties	461
2. Collection of Monetary Obligations	464

II.	Legal Redress of Enterprises Against Administrative Acts	465
A.	Suit for Annulment in the Community Court of Justice	465
1.	The Enterprise as Party Before the Community Court	465
2.	Administrative Acts Subject to Appeal	466
3.	Grounds of Appeal Against Administrative Acts	466
4.	Scope of the Right of Appeal of Enterprises	470
a.	Direct Appeal Against Binding Acts	470
b.	Collateral Attack Against Regulations	472
c.	Appeal Against Decisions "Disguised" as Recommendations or Opinions	473
d.	"Unclassified" Acts	475
5.	The Suit for Inaction	475
6.	Relief in a Suit for Inaction and Appeal for Annulment	477
7.	The Scope of Review by the Court	478
B.	Redress in National Courts	479
1.	Jurisdictional Limitation on National Courts	479
2.	Suit for Unconstitutionality of Community Acts or of National Acts Issued Pursuant to the Treaty	481
III.	Redress Under National Law for Violation of the Treaty or of a Community Act by Governments or Other Enterprises	484
A.	Redress for Violation by National Governments	484
B.	Redress for Violation by an Individual or Enterprise	489
IV.	Legal Remedies in Contract and Tort Cases to Which the Community Is a Party	490
A.	Suits in the Community Court	490
B.	Suits in Courts of Member States	492
C.	Suits in Courts of Non-Member States	493
1.	Suits Against the Community in American Courts	493

	PAGE
2. Enforcement of Judgments Against the Community	498
3. Enforcements of Judgments Obtained by the Community	499
V. The Community Court: Procedure and Sources of Law	499
A. Procedure and Finality	499
1. Time Limitations	499
2. Procedure	500
3. The Judgments of the Court	502
B. The Court's Sources of Law	503
1. The Treaty	503
2. International Law	505
3. National Laws of Member States and Gen- eral Principles Common to Them	506
4. Acts and Practices of the Institutions	508
Conclusions	509

Chapter I

An American Lawyer Views European Integration— An Introduction

Eric Stein *

I. A PERSPECTIVE

A. A "PROPHECY"

The next few years will reveal whether the European Economic Community with its Common Market will in fact become "one of the most important undertakings of the Twentieth Century" as prophesied by a group of prominent American businessmen in 1959.¹ This is a hazardous prediction in a century which has already been rich in momentous events, and which, viewed from the mid-century vantage point, promises such important future developments.

If the Community becomes a reality in the image of the Treaty of 1957, a single market will be created within the territories of France, the Federal Republic of Germany, Italy, Belgium, the Netherlands and Luxembourg, comprising some 170 million people; this single market will result in rising living standards, rapidly growing productivity, and a more important role for the six countries in world trade. If the economies of the six Member States coalesce, a new and powerful economic entity of obvious economic and political importance will emerge. Should economic integration lead to political integration, the face of continental Europe would undergo a profound change—a change which would have world-wide repercussions.

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¹ THE EUROPEAN COMMON MARKET AND ITS MEANING TO THE UNITED STATES, A STATEMENT ON NATIONAL POLICY BY THE RESEARCH AND POLICY COMMITTEE FOR ECONOMIC DEVELOPMENT 19 (1959).

In the two years which have elapsed since the Treaty came into effect most of the steps envisaged by the Treaty have been taken in accordance with its timetable. Important questions have also arisen concerning the relationship of the Community to other Western European as well as non-European states.

B. A GLANCE AT HISTORY

The European Economic Community is an outgrowth of the European movement, a complex composite of political and economic forces which have come to the fore in strength since World War II. Europe, devastated and weakened by war and the loss of colonies, faced the two emergent giants, the United States and the Soviet Union. Its division by trade barriers underlined its weakness. Determined to build on pre-war ideas of a United Europe, on the feeling of the people that there must be no more internecine European wars and on a variety of special national interests favoring such a movement, a small group of individuals pressed for unification of Europe. NATO provided the defense shield. The Organization for European Economic Cooperation (O.E.E.C.) had paved the way in the economic field. This body, which before its reorganization had as members 18 countries of "Greater Europe,"² was originally set up to help distribute the all-important Marshall Plan aid. When this task was completed, O.E.E.C. worked with substantial, but nonetheless partial, success to free intra-European trade from quantitative import restrictions. Through its European Payments Union it provided a European clearing house for multilateral settlement of accounts. Belgium, the Netherlands and Luxembourg (together referred to as "Benelux") agreed on a closer association in a customs union. The Council of Europe originally conceived of as a framework for a federated Europe provided a "European" forum for an organized debate by national parliamentarians of fifteen European states. Finally, in 1952 the Six of "Little Europe" (Benelux, France, Germany, and Italy) established the European Coal and Steel Community which represents the first serious effort to advance toward a federal structure on the Continent of Europe. Institutionally, the Coal-Steel Community represented a compromise

² Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom. In addition the United States and Canada were associate countries, Yugoslavia was invited to be represented by an observer at meetings of the Council and of the subordinate bodies, and both Yugoslavia and Finland participated in certain activities of the Organization.

between the federalists who would subordinate national states to a European federal state possessing its own territorial sovereignty, and those who would not accept any limitations on the sovereignty of the Member States beyond revocable Treaty obligations directed at international cooperation within organizations such as the O.E.E.C.³

The next move was the 1952 plan for a "supranational" European Defense Community among the Six of "Little Europe" which envisaged a European Army. When it foundered in the French Parliament two years later, the cognate project for a European Political Community was also abandoned. Political integration, it was said, should be deferred until economic integration lays the necessary ground work; economic integration must proceed by "sectors" within the national economies of the Six.

The movement was given new momentum by a variety of factors: the intensified efforts of the militant "Europeans" such as Jean Monnet and his Action Committee, the need for pooling national resources to develop atomic energy in Europe, and somewhat later, the Suez crisis which emphasized Europe's lack of economic, as well as of political, independence. The 1955 conference of the six Foreign Ministers in Messina established a group of governmental delegates and experts which produced the "Spaak Report," named after its distinguished Belgian chairman. On the basis of this report, approved by the Ministers in Venice in May 1956, an intergovernmental conference prepared the texts of two new treaties, one establishing the European Economic Community, the other the European Atomic Energy Community. The two treaties were signed in Rome on March 25, 1957. After rapid approval in the national parliaments, they went into effect on January 1, 1958.⁴

³ Robert Schuman, *Preface*, in Reuter, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 7 (1953).

⁴ The Treaty establishing the European Coal and Steel Community (the E.C.S.C. Treaty) has been published in English translation by the High Authority of that Community. The Treaty establishing the European Economic Community (the E.E.C. Treaty) and the Treaty establishing the European Atomic Energy Community (the EURATOM Treaty) have been published in English translation by the Secretariat of the Interim Committee for the Common Market and Euratom in Brussels. The English text may be obtained from the Information Service of the European Communities, 220 Southern Bldg., Washington 5, D.C.

The national laws approving the E.E.C. Treaty are:

Belgium: Law of Dec. 2, 1957, [1957] *Pasinomie* 889.

France: Law No. 57-880 of Aug. 2, 1957, [1957] *Sirey*, *Lois annotées* 243.

Germany: Law of July 27, 1957, [1957] *Bundesgesetzblatt* II, 753.

Italy: Law No. 1203 of Oct. 14, 1957, [1957] *Raccolta ufficiale delle leggi e dei decreti* 3973.

C. RELEVANCE OF THE COMMUNITY FOR AMERICAN LAWYERS

These two volumes of essays are destined primarily for American lawyers. The European Economic Community and some of the concomitant developments are of considerable interest to an American lawyer for at least three reasons:

First of all, the American businessman has been increasingly interested in Western Europe. Rapid economic growth accompanied by rising purchasing power in that area has indicated attractive market possibilities. This prospect has been the primary reason for the dynamic upswing in American direct investment in Western Europe from about \$1.7 billion in 1950 to an estimated \$4.8 billion in 1959. The U.S. investment in the six countries of the European Economic Community amounts to about two-thirds of that in the rest of Western Europe (mostly the United Kingdom). However, the share of the Six has been increasing faster than the share held by the rest of Western Europe or, for that matter, by all foreign areas combined.⁵ The signing of the E.E.C. Treaty increased the attraction for American enterprises by creating a vision of a mass market within the territory of the Six similar to that of the United States. In fact, although new American investments decreased during the 1958 recession everywhere else in the world, they increased substantially in the Community countries.

The interest and involvement of the American businessman in Western Europe is growing then—whether he only sells his products, licenses his patents and trademarks, enters into joint ventures with local manufactures, or sets up his own plants in the area. His planning and his decision-making will have to adjust to the novel economic and legal framework of the Community. This in turn means that the American lawyer as his legal counselor must make the necessary adjustments in his own thinking.

The *second* reason why these developments are of concern to an American lawyer is because they have an impact upon the policies of the United States government. This is of importance not only to lawyers in government agencies and international organizations,

Luxembourg: Law of Nov. 30, 1957, [1957] *Pasinomie Luxembourgeoise*, Supp. du vol. XXX, 1.

Netherlands: Law of Dec. 5, 1957, [1957] *Staatsblad* No. 493, 1029.

⁵ Buchdahl, *U.S. Investment in Common Market Shows Growing Trend*, FOREIGN COMMERCE WEEKLY 19 (Dec. 21, 1959).

who deal with these matters professionally, but to all American lawyers, who, because of the influential role they play on the domestic scene, must keep abreast of foreign policy developments.

Since the end of the Second World War the United States government has advocated free trade on a world-wide nondiscriminatory basis. Despite the fact that the six Member States form a block whose members will grant each other tariff and quota preferences which they need not extend to it or to other non-member states, the United States has nonetheless supported the formation of the European Economic Community. It has been prepared to accept this discrimination not only in anticipation of an increased market for American goods but principally for political reasons. It has viewed the Community not as just a preferential trade arrangement, not as just a customs union authorized under the General Agreement on Tariffs and Trade (G.A.T.T.), but as an important step toward political unification of Europe. The United States has considered this unification necessary in order to provide a new framework for Franco-German relations and to preserve economic and political stability in Europe.

But other Western European countries—and most importantly the United Kingdom—fear that the successful creation of an integrated community will prejudice their own traditional trade interests in the community area and cause new American investments to concentrate there; they have therefore urged the formation of a larger free trade area which would include not only the six Community countries but all of the other members of the O.E.E.C. as well. The negotiations for the larger free trade area collapsed in 1958.

It is difficult to identify the principal reason for this collapse, but these reasons have been suggested: the reluctance as a matter of principle on the part of some Community members (particularly France) to open their national markets to goods from additional countries; the concern that the Community would be destroyed if it were “diluted” in a broader arrangement before its institutions are firmly established; the unwillingness of the United Kingdom to accept any limitation on its freedom to control its national tariff vis-à-vis the states outside the free trade area (presumably because of the Commonwealth preference arrangements); the United Kingdom’s need to protect its agriculture; technical difficulties created by the untried free trade area concept; and finally, the suspicion on the part of some that the United Kingdom’s primary purpose, in line

with its historic continental policy, was to prevent the emergence of a single powerful entity on the Continent.

After the negotiations had ended in a deadlock, the United Kingdom, along with Sweden, Denmark, Norway, Austria, Switzerland, and Portugal (the so-called "Outer Seven") initialed a Convention in November 1959 establishing a European Free Trade Area Association (E.F.T.A.).⁶ This Convention which was ratified in 1960 is to create a free trade area within the territories of the Seven, but it is devoid of any institutional, or other, elements of integration.

As a result of these developments the United States finds itself faced with two groups, the Six and the Outer Seven, which are not very friendly to each other and which as preferential trade groupings are inherently discriminatory against American-made goods. This unforeseen situation has occurred at a time when the U.S. balance-of-payments deficit has created a need to increase exports of American goods to Europe, when previously-existing grounds for discrimination against dollar goods based on shortages of hard currency have disappeared, when a coordinated Western effort on a far larger scale in aid of less-developed areas has become imperative, and when political unity within the Atlantic Community is as urgent as ever.

In the face of this situation, the United States took the initiative in January 1960 which led to the creation of a new forum for further study and negotiation concerning these complex questions.

A *third* reason justifying an American lawyer's preoccupation with the European Economic Community is this: the Community represents a new kind of organization. It is sometimes described as "supranational" because of the significant powers which the Member States have given to the Community institutions. The Community has the power to make Community law with direct and immediate impact upon the national laws of the six Member States and on enterprises in those States. It has a Community Court with the power to interpret this Community law and its interpretations bind national courts. And, finally, the Community envisages harmonization of the six national legal systems in those fields which affect the functioning of the Common Market. In the long run modifications of national law will therefore occur which will affect commerce and industry.

⁶ For the text of the E.F.T.A. Convention see EUROPEAN FREE TRADE AREA ASSOCIATION, Text of Convention and other Documents approved in Stockholm on 20th November, 1959, Cmnd. 906, London.

II. ESSENTIAL ELEMENTS OF THE EUROPEAN ECONOMIC COMMUNITY

This brief review will focus on the Community, but will make some reference to the European Free Trade Association (E.F.T.A.), since the Association is of obvious relevance to much that will be said.

A. THE OBJECTIVES OF THE COMMUNITY AND THE E.F.T.A.

When the Six established the Community, their aim was to expand their economies by increasing the effectiveness of their uses of national resources and to raise living standards; their ultimate aim was a coalescence of the six economies. The objective of the Seven in agreeing on the E.F.T.A. was firstly to enlarge trade among themselves and thus to compensate for any trade losses they may suffer in Community markets by remaining outside the Community; secondly, they hoped to strengthen their negotiating position vis-à-vis the Community.

The Six sought to achieve their objectives within a new extensive institutional framework in two ways: by establishing the so-called Common Market and by laying the foundation for the development of a common Community economic policy. The Seven of the E.F.T.A., on the other hand, sought to achieve their objectives by means of a free trade arrangement with little institutional machinery and a minimum of limitation on national policy-making.

B. THE COMMON MARKET VS. THE FREE TRADE AREA ARRANGEMENT

The Common Market of the Community has three main features:

- 1) In the first place it involves a customs union like that which has existed since 1950 among Belgium, Netherlands, and Luxembourg. Customs duties, import quotas and equivalent governmental restrictions upon the flow of goods will be gradually removed within the territories of the Six and a common external tariff on non-member goods will be progressively established. A common external tariff distinguishes a customs union from a free trade area such as the E.F.T.A. Thus within the E.F.T.A. customs duties and equivalent charges and quotas will be removed progressively on a time schedule substantially synchronized with that of the Community; but in the E.F.T.A. each of the seven members will retain its own

national tariff levels on non-member goods. In principle, agricultural products are subject to the tariff and quota provisions of the E.E.C. Treaty but are not within the reach of the comparable provisions of the E.F.T.A. Convention.

2) The second feature of the Common Market which distinguishes it from a simple customs union resulted from the conviction that free circulation of goods alone is not enough to ensure the most economical employment of labor and capital. The Common Market requires the removal of discriminatory governmental restrictions upon the movement of workers (so that they can move into areas of labor demand), and the removal of similar restrictions on the flow of capital and free access of individuals and companies to self-employed economic activities (so that individuals and companies may enjoy freedom of establishment and may freely supply commercial, industrial, and professional services across national frontiers). The E.F.T.A. Convention says nothing about the free movement of workers, apparently because the present national laws and international obligations of the Seven were considered adequate; although it views the prevailing international obligations with respect to the freedom of "invisible transactions and transfers" as "sufficient at present," the Convention contemplates possible future decisions of the E.F.T.A. Council in this field; and it contains a very flexible and qualified "national treatment" provision with respect to the right of establishment.

3) The third feature of the Common Market reflects the idea that effective employment of resources requires competition. Thus the Common Market includes the so-called "Common Rules" which are designed to maintain conditions of qualified free competition. Some of these rules will be enforceable by penalties against enterprises and others by proceedings against Member States. The rules prohibit specified restrictive agreements and practices by individuals or enterprises, some, but not all, governmental subsidies, dumping practices, protective taxes on imports and excessive drawbacks on exports within the Community. Public enterprises and state monopolies are to be governed by Treaty rules with certain qualifications. Indirect taxes are to be "harmonized." National laws which distort competition are to be modified so that the distortion is removed, and generally laws which have "direct incidence" on the establishment or functioning of the Common Market are to be "approximated."

There is, of course, little competition and extensive government

regulation in the field of agriculture and transportation. The E.E.C. Treaty recognizes this situation, but it provides that national regulation in these two vital areas is to be superseded by Community regulation and Community policy to be developed by the institutions of the Community.

The E.F.T.A. does not deal with transportation. Primary agricultural products (but not manufactured foodstuffs) are excluded from the provisions requiring the removal of customs duties and quotas and are to be the subject of "agricultural agreements" between members. Until the Community succeeds in the difficult task of formulating a common agricultural policy, the power of the Six to protect their agriculture, although it is subject to supervision by the Community institutions, does not, in effect, differ substantially from the power of the Seven.

No "approximation" or "harmonization" of national legislation is envisaged in the E.F.T.A. Instead of the fairly detailed "Common Rules" of the Community, the E.F.T.A. Convention contains broad and more or less general principles on restrictive practices, government export subsidies, public enterprises, dumping and the like. The violation of these principles may lead to a complaint by a member government before the Council of governmental representatives. The Council is to examine before the end of 1964 whether additional measures are necessary to deal with the effects of restrictive practices or dominant enterprises on trade between the members.

C. THE BASES FOR "COMMON POLICIES" OF THE COMMUNITY

The Common Market involves one single common external tariff against non-member goods. The Six transferred the control over this tariff to Community institutions and authorized the institutions to pursue a common commercial policy in relation to non-member states and to negotiate tariff agreements on behalf of the Community. This common commercial policy is to include uniform principles particularly in regard to tariff amendments and conclusion of tariff and trade agreements, alignment of measures of liberalization of import restrictions, export policy and protective measures such as those to be taken in cases of dumping and subsidies. Although the Community institutions will determine the tariff levels on imports from non-member countries, national authorities of the Member States will continue to collect the customs duties on these goods, and

the revenue from customs will continue to flow into national treasuries. The Treaty does, however, envisage the possibility of making customs revenues available to the Community to defray its expenses in lieu of direct financial contributions by the Member States. This substitution may be achieved by unanimous agreement in the Community Council of Ministers coupled with whatever implementing national action may be required under the constitutions of the Member States.

In sharp contrast to the Community arrangement, the E.F.T.A. members have retained control over their national external tariffs and commercial policies as well as their individual freedom to negotiate tariff agreements with third countries—subject, however, to consultation and complaints procedure in the event of trade deflections caused by differences in national tariff levels.

The Member States of the Community declared that their economic policies relating to cyclical boom and slump trends are a “matter of common interest” and agreed to consult on specific remedial measures. Moreover, the Community Commission may propose appropriate measures to the Council of Ministers; but it is only after the Council has unanimously agreed on a basic measure that it may issue implementing directives by a qualified majority. In March 1960 the Council of Ministers established a special committee on policy concerning economic trends and provided that the governments of Member States will keep the Commission informed of their projects which might affect economic trends. The E.E.C. Treaty provisions are substantially less specific than the corresponding provisions of the Coal-Steel Community Treaty, and they give no indication of the character and extent of “governmental” intervention by Community institutions which the Member governments may be prepared to accept in the event of economic strain.

The Six have retained separate budgets, currencies, central banks, reserves, and balance-of-payments. But they undertook in the Treaty to pursue an economic policy which would maintain sound currency while ensuring a high level of employment and price stability. They have accepted an obligation to coordinate their policies in order to achieve these “magic triangle” objectives. The coordination is to take place through the collaboration of governmental departments and central banks but the Community Commission may recommend to the Community Council of Ministers ways of bringing about such collaboration. A Monetary Committee helps to coordinate national policies in monetary matters but it has purely advisory

functions. The Six undertook further to treat their exchange rate policies as a matter of common interest and to accept national counter-measures, taken under the Community Commission's control, against unilateral alterations in exchange rates. Escape clauses and mutual assistance measures under the control of the Community institutions are also available to Member States which find themselves in balance-of-payments difficulties. In the present state of sound currencies and generally favorable balance-of-payments situation of the Member States, the objectives of coordination appear to be achieved; the test will only come if adverse changes occur in one or more of the Member States. But the fact that the Members have relinquished the right to re-impose restrictions and tariffs unilaterally should prove a powerful incentive to coordinate policies.

Apart from specific Treaty limitations (such as those concerning the free flow of capital) national policies regarding investment of public funds or the channeling of private investments will be circumscribed only to the extent that a common Community economic policy emerges by agreement among the members. The European Investment Bank, with a subscribed capital of \$1 billion and established by the E.E.C. Treaty as a Community body, was conceived of as a supplementary source of capital patterned after the International Bank for Reconstruction and Development. Its establishment reflects the concern expressed during the negotiations that new investment capital will tend to move to those areas of the Community which are already industrialized, with the result that the less developed regions like southern Italy will fall still further behind.

In the field of social policy the Community members stated their intention to improve the working conditions of labor by means of gradual equalization in an upward direction. This result is to be achieved not only through the changes brought about by the advent of a Common Market economy but also through Treaty procedures and "approximation" of national laws.

In viewing the E.E.C. Treaty provisions in the area of economic, financial and social policy, it is apparent that the specific legal commitments of the Member States are quite limited. Yet the Community machinery offers ample potential for the development of common Community policies through Community institutions if the Member States should wish to utilize the institutions for this purpose. Should the Community institutions be allowed to make important economic policy decisions, a move towards political integra-

tion would appear unavoidable since economic policy cannot be formulated without making important political choices. However, there is no indication at this time that the governments are willing to take such a step. A unified policy is more likely to emerge as a result of national action taken in response to the economic realities of the Common Market than as a result of the decisions of Community institutions.

The E.F.T.A. Convention contains no reference to social policies nor to a common investment agency. It limits itself to providing for periodic consultations on economic and financial policies and for consideration of balance-of-payments difficulties in the Council. In general, the Council may hear complaints of member governments, recommend remedies and authorize suspension of benefits against any member government which refuses to comply with a recommendation. The basic philosophy of the E.F.T.A. is one of economic cooperation among independent states coupled with a minimum of institutional machinery and only such institutions as are fairly common in public international organizations.

D. THE TIMETABLE

Some of the Member States of the Community like France and Italy, which have a long-standing protectionist tradition, were concerned during the negotiations for the E.E.C. Treaty that their industries would suffer from the new competitive conditions. To cushion the anticipated impact of the changes envisaged by the Treaty it was agreed that the various steps toward the realization of the Community should only be gradually taken—this step-by-step progression to be effected in three stages over a longish transitional period of twelve to fifteen years. This meant that the Common Market could have been in full operation by the end of 1969, and, in any case, by the end of 1972.

One of the most interesting and unexpected later developments has been the demand by industrial groups in the Community that the transitional period be shortened. These groups have accepted the Common Market, have made their investment plans on the basis of a large market and now wish that large market to come into being as quickly as possible. Some of the industries which opposed the Common Market in the earlier stages now favor acceleration. One reason may be that they have concluded that their earlier fears of competition were groundless. Another reason which may be suggested, if one chooses to be cynical, is that industrialists have now made restrictive arrangements with their potential competitors in

the other Member States of the Community which will prevent competition, although this may be contrary to the Common Rules of the Community. It is certainly true that there has been a wave of industrial mergers and agreements for cooperation and specialization across national frontiers in the Community in anticipation of the larger market. The overriding factor favoring accelerated reduction of internal tariffs and quota barriers and the erection of a common external tariff has, however, been the prosperous state of national economies.

In May 1960 the Council of Ministers, acting as an intergovernmental conference of the Member States, approved a modified acceleration proposal of the Commission. According to this decision, the tariff reduction within the Community on industrial goods was to be increased by the end of 1961 from 30% to 40% and, subject to a further Council decision in the light of the economic situation, to 50%. The first step toward the establishment of the common external tariff was to be advanced from the end of 1961 to the end of 1960. Because the external tariff is calculated on the basis of the arithmetic average of the national tariffs of the Member States, however, the low-tariff Member States, such as Belgium and the Netherlands, would have to increase their current customs duties on some non-member goods to approach the new external tariff level. An acceleration would require a speed-up in such increases, which in turn would create problems not only for the Member States concerned but for non-member states (such as the United States) whose exports will be affected by such increases. To meet this problem the Council decided that for the purpose of calculating the adjustments in national tariffs involved in the first step toward the establishment of the common external tariff, that tariff be reduced provisionally by 20% for the benefit of goods from non-member states on the assumption that non-members will grant reciprocal concessions in the G.A.T.T. negotiations in 1961. This step was to stress the liberal trade policy of the Community towards the outside world. The Council decided further that all quantitative import restrictions on industrial products of Member States must be removed by the end of 1961, while such restrictions on non-member products were to be removed "as soon as possible" in accordance with the obligations derived from G.A.T.T. and in the light of recommendations by the International Monetary Fund. Special provision was made with respect to agricultural products.

In a simultaneous "declaration of intention" the Council affirmed its desire to hasten the application of the Treaty with respect to

social measures particularly concerning occupational training of workers, their freedom of movement, equal pay for men and women workers, and the adjustment in social security systems. The Council also indicated its intention to move forward correspondingly in the fields of competition, transportation, and right of establishment and to ensure progress in the economic development of the associated overseas areas. The Commission was directed to submit the necessary proposals. The Council stressed the liberal trade policy of the Community toward third countries and called for negotiations particularly with the E.F.T.A. countries with a view to reciprocal reduction of trade barriers on the basis of G.A.T.T. principles.

Despite the complexities and difficulties arising especially with respect to agricultural products it is quite likely that the Community schedule will be substantially accelerated.

E. THE GEOGRAPHIC SCOPE OF THE COMMUNITY

The E.E.C. Treaty applies to the European territories of the Member States and to a substantial extent to Algeria and to French overseas *départements*. The other overseas dependencies of the Member States located mostly in Africa are tied to the Community in a special "association." The link between Europe and Africa involving territories almost ten times larger than the metropolitan areas of the Six and 55 million people is of obvious political significance. The tariff provisions governing the "association" are contained in the Treaty itself while the rules on import restrictions, right of establishment and financial assistance are included in a separate Implementing Convention annexed to the Treaty which is to be renegotiated in five years.

By virtue of this "association" the dependent territories will acquire free access for their products to metropolitan markets but may retain protection against the products of the Member States to the extent necessary for the development of their economies. Moreover, the Treaty established a Development Fund under the administration of the Community Commission to provide some \$580 million for economic development of the overseas territories during the first five years. The rapidly evolving changes in the political ties between the Member States and their dependent territories have, however, already brought about modifications in the membership of the "association."

If an overseas dependency associated with the Community becomes independent, its "association" with the Community terminates, as did that of the former French Guinea when it achieved

statehood. However, if such a newly independent state chooses to maintain a special relationship with a Member State, there appears to be no obstacle to a continuation of its "association" with the Community. There is a possibility that the new Malagasy Republic and Mali Federation, both former French dependencies, may choose this course.

The Community may negotiate an agreement of "association" with any third country, a union of states or an international organization. Such agreement is to embody reciprocal rights and obligations, provide for joint action and may or may not require a Treaty amendment.

Those independent overseas countries with which a Member State has maintained special relations have been invited to associate themselves with the Community. The negotiations for an "association" with one such country, Tunisia, appear to have been interrupted. Turkey, Greece, and Dutch East Indies (through the Netherlands government) have asked to be "associated" with the Community, and separate negotiations are in progress concerning association of each of the three.

As distinguished from "association," full membership in the Community is open only to European states; admission to full membership can be effected only after the necessary Treaty amendment has been ratified by all Member States.

III. THE LEGAL FRAMEWORK OF THE EUROPEAN ECONOMIC COMMUNITY

A. THE TREATY: A QUADRILINGUAL LABYRINTH?

The legal basis for the Community is a multilateral Treaty, a formidable instrument of 248 Articles with four Annexes, thirteen Protocols, and one Convention; another Convention relating to certain institutions common to the European Communities; and the Final Act concerning both the E.E.C. and Euratom Treaties with nine annexed Declarations. All these documents were drafted in the four official Community languages (Dutch, French, German, and Italian) and all four versions are equally authoritative.

Two members of the Paris Law Faculty disagree in their estimate of the E.E.C. Treaty. Professor Daniel Villey says:

[The Treaty] is interminable, complex, impossible to disentangle. This is not the form of the great texts which heralded and brought about the great transformations in history. . . . This then is how Europe—still in the proc-

cess of gestation—falls head first into byzantinism. . . . What is this mixed salad of eloquent declarations of principle, minute and at times ridiculously detailed regulations, platonic protestations of good intentions, technical rules of economic disarmament, pious wishes, principles and exceptions to principles and exceptions to exceptions? There is not an article affirming a proposition that another article hidden in another corner of the Treaty would not render almost meaningless. The judges of the Court of Justice better have their spectacles handy! The text which it will be their chore to interpret is a *maquis*, a labyrinth, a brain-twister, a puzzle.⁷

On the other hand Professor Paul Reuter of the same faculty, a leading authority in the field of European integration, points out that despite the vastness of the subject matter the Treaty is not any longer than the Coal-Steel Community Treaty. He describes its text as

terse and clear . . . without being sketchy. . . . [D]espite the resort to four languages . . . a comparison with the Havana Charter or with the General Agreement on Tariffs and Trade would redound to the advantage of the Treaty; only a few questions were resolved in too great a haste, . . . and thus are expressed in extremely defective formulae. . . . While not achieving the precision and clarity of the Treaty establishing Euratom, the Treaty establishing the European Economic Community reflects a certain conciseness. . . .⁸

The exceptions, the escape clauses and safeguards written into the Treaty, particularly at the insistence of France, give an impression of undue complexity. But if one considers the novel character of the Treaty, its scope and the need to accommodate vital national interests, as well as the continental approach to constitutional documents, it would be naive to expect a simple instrument. The Treaty extends to *all* economic activities of a complex industrial society—with the exception of those activities which relate to coal, steel, and atomic energy, to the extent that such activities are regulated either by the Coal-Steel Community Treaty or by the Euratom Treaty. Article 232 of the E.E.C. Treaty seeks to avoid conflicts in the application of the three Treaties by providing that the E.E.C. Treaty does not “modify” the Coal-Steel Community Treaty or “detract

⁷ *Les Communautés Européennes et leur incidence sur la profession d'avocat, Rapport de M. Claude Lussan, 1958 LE DROIT EUROPÉEN 49, at 52 (No. 2, Aug.-Sept. 1958)* (this author's translation).

⁸ Reuter, *Aspects de la Communauté Economique Européenne, 1958 REVUE DU MARCHÉ COMMUN 6, at 8 (No. 1, Mar. 1958)* (this author's translation).

from" the Euratom Treaty. Consequently, the latter two have priority as *leges speciales*. On the other hand the broader E.E.C. Treaty as *lex generalis* would apply to coal and steel products and nuclear materials where it does not conflict with the other two Treaties. This formula, however, does not provide simple solutions to a number of problems concerning the relationships of the three Communities. For instance, while the E.E.C. institutions will have exclusive jurisdiction with respect to commercial policy toward non-member states, under the Coal-Steel Community Treaty the Members retain in principle their freedom to determine national commercial policies with respect to coal and steel. The Coal-Steel Community Treaty, however, confers on the Community institutions powers under specified circumstances to restrict imports and exports to and from non-member countries, to determine maximum export prices and minimum or maximum tariffs on non-member goods, and to review trade agreements concluded by the members with non-member countries. Thus coal and steel appear excluded from the jurisdiction of E.E.C. institutions over general commercial policy; yet as a practical matter such exclusion seems hardly feasible. The answer lies perhaps in coordinated action by the institutions of the two Communities. Special problems arise from the fact that the Coal-Steel Community Treaty, unlike the other two Treaties, does not apply to the overseas areas. Again, the E.E.C. Treaty prohibits certain restrictive agreements unless they are specifically authorized; the Euratom Treaty contains no corresponding provision. Thus such agreements concluded among enterprises engaged in the production of nuclear materials would be illegal unless authorized in accordance with the E.E.C. Treaty procedure.^{8a} Obviously, problems of this kind will have to be considered on a case-by-case basis and, if necessary, resolved by the Community Court. In the long run the logical solution would be to replace the three Communities by a single Community.

B. THE LEGAL NATURE OF THE EUROPEAN ECONOMIC COMMUNITY

As suggested in the chapter entitled "The New Legal Remedies of Enterprises—a Survey," the Treaty provisions range from policy declarations and obligations imposed upon Member States to "self-executing" provisions applicable to individuals and enterprises.

^{8a} CATALANO, LA COMUNITÀ EUROPEA E L'EURATOM, 227, 101-102; cf. Carstens, *Die Errichtung des gemeinsamen Marktes*, 18 ZEITSCHR. FÜR AUSL. ÖFF. RECHT U. VÖLKERRECHT 459 at 461-462, 522-525 (1958).

The Treaty confers upon the Community an international legal personality (including the power to enter into international agreements, diplomatic immunity for missions of third states accredited at the Community, and the like) as well as "domestic" legal personality (including such rights as the right to sue and hold property) under the laws of the Member States. Interestingly, the Treaty does not guarantee the Community immunity from judicial process: it may be sued in national courts of the Member States or, in specified circumstances, before the Community Court.

In its legal foundation the Community resembles other public international organizations such as the United Nations, which was also established by a multilateral treaty. Unlike the Coal-Steel Community Treaty which was concluded for a period of fifty years, and like the United Nations Charter, the E.E.C. Treaty was concluded for an indefinite period of time, and no provision is made for withdrawal. Presumably, however, the E.E.C. Treaty could be terminated by mutual agreement of the Member States. A Treaty revision requires ratification of the amendment by all Member States in accordance with their constitutions, but, by unanimous agreement in the Community Council of Ministers, the institutions may take action necessary to achieve the objectives of the Treaty even if the Treaty does not expressly grant the requisite power. The Member States retain, of course, their own international legal personality; moreover, their role in the selection of the principal personnel and in the functioning of the institutions is a crucial one. The Community is financed by contributions of its Member States and has no independent source of revenue at the present time. If a Member State violates a Treaty obligation, the matter can be brought before the Community Court for binding adjudication; but there is no general enforcement procedure available against a Member State. In many respects the Community therefore resembles a public international organization rather than a federal state based on a constitution.

It has been said that the Community is a "supranational," rather than an international, organization because it can have direct impact on individuals and enterprises, because important powers have been "transferred" to it irrevocably rather than merely "delegated," because important binding decisions can be taken by majority vote in the Community institutions, and because the institutions have the task of fostering the development of a common policy and of enforcing its impartial execution.

The Community has also been called a "union of states," "a partial federal state," "a partial economic state," "a functional federation," and it has been likened to the German Zollverein as it existed after 1867. The analysis of the institutional framework in the next chapter concerning the new institutions and the description of the sources of the Community law in the chapter on the new legal remedies of enterprises will suggest the conclusion that the Community is a body which is *sui generis*, defying classification in any existing categories.

C. THE TREATY AS A "CONSTITUTION" AND "STATUTE"

Whatever the label which is most appropriate for the Community, the techniques and procedures of the Community resemble in many respects those of the public law of a state—predominantly of administrative law, but also those of constitutional law—rather than those of international organizations and international law.

It may help to understand the character of the Community Treaty if it is compared with the United States Constitution, providing of course, that fundamental differences, not only in the legal foundation but particularly in the functions and objectives of the Community and of the United States, are kept in mind. Obviously no comparison is possible between the scope of the powers granted to the federal institutions in the United States—power to tax, power over defense and foreign affairs, over interstate and foreign commerce, over currency and post offices, immigration, citizenship—and of the powers granted to the Community. But the Constitution and the Treaty both establish institutions, define the mutual relationship of the institutions and their jurisdiction with respect to the Member States, and provide legal protection for states as well as individuals. In addition, however, the Treaty incorporates, in more or less general terms, substantive policies which in the United States would be contained not in the Constitution but in federal statutes.

For example, the Constitution grants to Congress the right to regulate interstate and foreign commerce and deprives the individual states of the power to impose import or export duties. Apart from certain principles concerning commercial policy derived by the courts from the commerce clause, American commercial policy is not defined in the Constitution but in federal statutes, such as the Tariff Act and the Reciprocal Trade Agreements Act, and is implemented by reciprocal trade agreements concluded with other nations.

The Treaty also prohibits internal customs duties and grants exclusive power over the external tariff to Community institutions; but, in addition, it establishes a detailed time schedule of steps that must be taken by the Member States in order to remove intra-Community tariffs and to set up a common external tariff. These obligations are relatively well defined, and their fulfilment is subject to the supervision of the Community institutions.

Similarly, the antitrust policy of the United States is defined in federal statutes rather than in the Constitution; the statutes are based on the very general grant of power by the Constitution to the Congress to regulate interstate and foreign commerce. On the other hand, the Treaty, in addition to granting certain powers to the Community institutions in the antitrust field, defines Community policy in some detail in the Common Rules and accords to the Community institutions the power to issue implementing provisions with penalties enforceable directly against enterprises.

The six governments obviously sought to include in the Treaty as much substantive content as they were able to agree upon. Some portions, such as those dealing with internal tariffs, are elaborated in great detail while others contain little more than vague directives requiring the institutions to evolve general programs or calling for action by Member States. In such fields as agriculture or transportation, these directives in effect call for continuation of the negotiations which were not completed in the Treaty. Some of the gaps were unavoidable since the Treaty in some respects deals with national policies dependent on factors that are neither predictable nor necessarily subject to institutional controls. Because of its general character the Treaty is often referred to as a *traité cadre* or *traité institutionnel* as distinguished from the Coal-Steel Community Treaty, a *traité normatif*. Since the latter Treaty was limited in scope—covering only the fairly concentrated coal and steel industries—it lent itself to a more detailed and elaborate statement of policies and law.

One consequence of the general character of the Treaty is the difficulty of predicting the ultimate character of the Community. The second and related consequence is the importance of the role assigned to the Member governments and to Community institutions in filling in the gaps in the Treaty.

IV. LEGAL PROBLEMS FOR AMERICAN LAWYERS

The brief sketch of the Community's objectives, scope and legal basis drawn above leaves unanswered the question of the impact of

the Community on the concrete problems of an American lawyer advising a client who exports to, or does business, in Europe. The principal purpose of our book is to explore this question as far as it is possible at this very early date of the Community's existence. Only a few thoughts will be offered in this introduction in the hope that they will orient the reader before he embarks upon the detailed study of the various aspects considered in the individual chapters.

A. EXPORTING TO THE COMMUNITY

If, for example, an American client has been exporting American-made goods to France, his lawyer will still have the problem, as the Community develops, of making sure that the client does as little as possible that would subject him to French tax laws or to the jurisdiction of the French courts. The French authorities will still collect customs duties and French import restrictions and other regulations and laws will still have to be observed. But there will be new problems.

As the tariff and quota barriers are progressively lowered within the Community the American exporter will be in an increasingly difficult position vis-à-vis his German competitor who exports a similar product from Germany to France unless, of course, steps are taken to reduce the customs duties against non-member goods also. By the end of 1969, and possibly earlier, German goods will move into France freely while American goods will face the common Community tariff and whatever quota restrictions may be left.

Neither this introduction nor the book itself purports to inquire into the economic impact of the Community upon American exports to the Community area. Estimates of this impact vary and in any event only a detailed product-by-product analysis would be of practical value. One view holds that only a slight fraction of American exports will be injured severely.⁹ If the forecasts of a steep increase in the growth rate within the Community prove correct (one estimate suggests that by 1975 the Six will increase their gross product by 120% and perhaps 150%),¹⁰ the increased demand for imported raw materials such as foodstuffs, fuel, and special machinery is expected to cause an increase in absolute terms of imports from non-

⁹ Kreinin, *European Integration and American Trade*, 49 AM. ECON. REV. 615, at 620 (1959); cf. Piquet, *First Effects of the Common Market in American Management Association Report, The European Common Market, New Frontier for American Business*, 124-159 (1958); *Les États-Unis et le Marché Commun*, 1959 REVUE DU MARCHÉ COMMUN, 110-118 (No. 12, Mar. 1959).

¹⁰ *The European Economic Community, Problems It Confronts, A Statement by C.E.P.E.S.*, *op. cit. supra* note 1, at 84.

member countries. But the share of non-members countries, including that of the United States, in the Community market in certain groups of products may well diminish,¹¹ and there is concern that the evolving agricultural policy of the Community will restrict imports of American agricultural products.

Mr. Marc Ouin analyzes in his chapter the Treaty formula for the computation of the common Community tariff against non-member goods and the progressive steps to be taken toward the erection of this tariff. Since the completion of Mr. Ouin's study, the basic external tariff has been formulated except for a few gaps still to be determined.

A lawyer will also have to keep in mind that new procedural requirements exist—for instance, if American goods initially exported to France are to be re-exported to Germany during the transitional period while internal tariffs are being reduced but are still in existence. Moreover, the common Community tariff differs from the national tariffs not only with respect to the level of customs duties but also in its structure and headings. Finally, modifications will occur in the national customs laws and regulations of the six Member States since they are, in the words of the Treaty, to be "approximated," by the end of 1961.

The first 10 percent reduction in the internal tariffs within the Community has been made as prescribed by the Treaty. With some important exceptions, benefits of the first reduction have been extended voluntarily to all members of G.A.T.T. including the U.S.

Mr. Ouin also offers a detailed analysis of the Treaty provisions concerning the gradual removal of the quantitative import restrictions within the Community. The first two steps prescribed by the Treaty were taken on the specified dates and the Member States offered to extend certain benefits of the first step on the basis of reciprocity and—with certain reservations—to grant advantages "similar" to those involved in the second step, to all members of the O.E.E.C. The current trend towards an elimination of industrial (not agricultural) import restrictions in Europe—which certainly was not anticipated during the Treaty negotiations—may render moot the question whether the Members of the Community would infringe their G.A.T.T. undertaking by continuing to maintain quota restrictions against non-member goods despite their favorable balance-of-payments situation.

As far as the E.F.T.A. is concerned, the American client, export-

¹¹ *Ibid.* at 85.

ing for instance to the United Kingdom, will continue as before to face the national United Kingdom tariff, but here also his competitive position will become weaker, in relation for instance to Swedish exporters who will in due course introduce their goods into British markets unhampered by tariff or quota barriers. Because the different national tariffs will continue to exist, the E.F.T.A. Convention contains provisions intended to prevent the trade deflection which might occur if outside raw materials or semi-finished products could enter in large quantities the E.F.T.A. country with the lowest tariff and, after processing, move to the other Member States.

B. DOING BUSINESS IN THE COMMUNITY

The American client who thus far has exported his products from the United States into France may conclude that he should obtain a foothold within the Common Market for at least two reasons: first, because of the anticipated tariff disadvantages just mentioned and second—and probably more important—because he may have discovered that he can manufacture the same product at a substantially lower cost, for instance, in the Netherlands where labor costs are considerably lower than in the United States. In fact, he might calculate that the same product manufactured in the Netherlands will be competitive not only in the other Common Market countries to which it will move freely but also in the United States and perhaps in other markets thus far supplied from the United States—for instance those of Latin America.

Another client may have been doing business on the Continent for some time. He has a manufacturing plant in Germany and assembly plants in Belgium and in the Netherlands. In anticipation of the Common Market he sees little purpose in maintaining the assembly plants. He wants to liquidate the assembly operations and to expand his German manufacturing facility. This client may estimate that the E.F.T.A. will function at least for some time as a tariff grouping against both American and Common Market manufactured goods, and so he decides to establish a manufacturing plant also in Britain or to expand an existing British facility with a view to supplying the E.F.T.A. markets. British-manufactured goods, incidentally, will also benefit from the Commonwealth trade preferences if exported to Commonwealth countries.

Finally, still another client has manufacturing facilities in several European countries. He decides to simplify his line of products and to manufacture a standardized product in a single country for dis-

tribution in the entire Common Market area. This may require centralization of management and development of a "European" policy for investments, patent licensing, marketing and advertising.

Obviously some, if not most, of these situations will not become realities in the immediate future. But very little imagination is necessary to identify the legal problems involved in implementing the policy decisions of the client, if and when they are made.

The law at the basis of any legal advice on these problems will as before be predominantly the national law of the countries concerned: company law, tax law and tax treaties, patent and trademark law, the law of unfair competition, foreign exchange and credit regulations, labor legislation, and a host of other national laws and regulations. But as the client to an increasing degree comes to view the area of the Six as an economic unit, his lawyer (with the assistance of foreign counsel) must increasingly frame his advice in terms of the six (instead of one or a few) national legal systems—and, keeping in mind the E.F.T.A., perhaps in terms of the laws of other European countries as well.

In addition, new legal problems and new possibilities will arise for the client as individual provisions of the Treaty are applied. It would be unwise to expect far-reaching changes in the immediate future, but examples in seven areas dealt with in this book are suggested to illustrate the possible developments.

1) As Professor Conard and Mr. Nicholson point out in their contributions, the Council is to adopt by 1962 a general program which will ensure that nationals and companies of a Member State will not suffer discrimination by reason of nationality in regard to the freedom of establishment and to the supply of services in the other Member States. When this program is put into effect, an American subsidiary organized under German law and carrying on a bona fide operation in Germany should be able to establish itself in Belgium or sell its services there on the same basis as a Belgian company. This would still leave untouched the multitude of license and permit requirements and restrictions which condition access to industrial, business and professional activities for nationals and foreigners alike. But here also the Treaty calls for "coordination" with a view to making access to such activities easier. The obligations of the Member States in this latter respect are less precise and the exceptions and escape possibilities are many. The progress will, no doubt, be slow but a proposal for progressive action has already been developed by the Commission in cooperation with experts in the

national governments. For a long time to come an enterprise will be concerned primarily with the national laws of business organization explored by Professor Conard with the aid of advice from his expert consultants.

2) Will an American parent—given exchange controls—be able to transfer profits of its wholly-owned subsidiary in France to Belgium in order to invest them in a Belgian company? The Council of Ministers, by the end of 1960, is to adopt directives to remove restrictions on capital movement of this kind, and the Council has already adopted the first directive. Maître Jeantet suggests, in his chapter dealing with French exchange controls, that the implementation of the Treaty will sooner or later result in virtually complete freedom of transfer of funds within the Community except in case of emergency—and the Community institutions will decide, subject to review by the Community Court, whether an emergency exists.

3) When the program for the free movement of workers is put into effect—and it is to be in effect by the end of the transitional period—a German manager or engineer employed by an American subsidiary will be freely transferable to a sister subsidiary in Italy. Again, an American subsidiary which faces a labor shortage in Germany will be able to recruit in the surplus labor pool in Italy, since German regulations must be adjusted to allow entry and employment of Italian workers in Germany without discrimination. The reverse of the coin is that the enterprise will not be allowed to fire these Italians because of their nationality when German labor later becomes available. Perhaps the most important regulation adopted by the Council thus far was designed to help labor mobility by making transferable social security rights acquired by a worker in one country when he moves to another country. As Professor Kahn-Freund points out in his chapter, whether these provisions and other measures including the special Social Fund for temporary unemployment assistance will in fact bring about large scale mobility comparable to that in the United States is an open question in view of differing European mores.

The Treaty anticipates that the substantial differences in social benefits and working conditions generally within the Community will be equalized upward by virtue of the normal operation of the expanded single market (for example, under collective bargaining pressures); but intervention of the institutions and harmonization of national laws is also contemplated as a secondary means of advancing this process. The scope of this intervention and the extent

of the modification of national laws cannot now be foreseen. Pointing to the great diversity obtaining in national laws and practices in the Six, Professor Kahn-Freund concludes that the immediate effect on the national laws is not likely to be striking. The tendency towards harmonization of the various legal systems, he feels, is unmistakable, but it is anyone's guess how far harmonization will go. In any event, for a long time to come the lawyer will have to continue to consult the national legal sources which Professor Kahn-Freund surveys in his contribution.

4) A similar conclusion is reached in the chapter by Dr. Van Hoorn and Professor Wright concerning tax problems facing American enterprises in the Community. The national tax systems manifest important differences predicated on historic forces which cannot be easily deflected. Nevertheless, the Council of Ministers has been given the power under the Treaty, on the Commission's proposal, to take measures to harmonize national indirect tax laws "in the interest of the Common Market"; and in response to pressures from industry, studies have already been instituted to determine ways of harmonizing turnover taxes.

5) Mr. Stephen Ladas, viewing the industrial property laws of the Six against the background of the emergent Common Market, foresees limited modification of the patent laws, but a substantial harmonization of trademark laws with the possibility, for instance, of a "European Community Trademark."

6) In conducting its foreign operations in the Community an American enterprise must comply with national legislation pertaining to restrictive practices and mergers in the Community countries. Some such legislation exists in three of the Six and the remaining three may be expected to adopt measures in this field in due course. Professor Riesenfeld discusses this national legislation and the new problems which the Treaty rules governing competition create.

7) Enforcement of Treaty rules is to be provided for by Council regulation establishing penalties for violations by enterprises. Problems of the legal protection of enterprises are considered in the chapter entitled "The New Legal Remedies—a Survey."

C. CONCLUSIONS

The preceding observations viewed from an American lawyer's standpoint suggest three conclusions:

1) A client's policy decisions will obviously not be determined solely or even preponderantly by legal or tax considerations; for in-

stance, a decision to locate in France rather than in the Netherlands might be dictated by an opportunity to buy into a going concern in France which is not available in the Netherlands. But it is obvious that as the area of the Six tends to become a single economic unit a comparative investigation of the national laws of the Six will be increasingly necessary as a basis for competent legal advice.

2) In due course the Treaty provisions and acts of the Community institutions will have some impact on national laws and on enterprises.

3) In the long run differences in national laws and regulations will tend to lessen, particularly where these differences distort competition or otherwise interfere with the proper functioning of the Common Market. One commentator would include here legislation in the field of commercial law, negotiable instruments, law of business associations, unfair competition, indirect and even direct tax laws and civil procedure.¹² Although the Treaty confers substantial powers on the Community institutions in this field, there is no indication that the institutions will embark on a systematic effort to bring about a large scale assimilation of national laws. Instead, the Community Commission has proceeded, in cooperation with national officials, on the basis of a priority list which includes subjects where a disparity among the laws has already created or is expected to create practical problems and where pressures for action are exerted by trade organizations, by the European Parliamentary Assembly or by national governments. Studies and negotiations are in progress directed at assimilation of laws governing industrial property, indirect taxes, public bidding, sale of goods, health regulations, such as those governing contents and packaging of food products, safety regulations, and laws on recognition of foreign judgments and arbitral awards and some phases of company law. Such assimilation may be achieved by Council directives (particularly under Article 100) and by new international agreements.

V. A LONGER RANGE VIEW

A. THE COMMUNITY AND THE INVESTMENT CLIMATE

Although some of the Six, such as Belgium, have made more intensive efforts to attract American capital than have others, the climate for American investment has been generally favorable in

¹² Thiesing in *HANDBUCH FÜR EUROPÄISCHE WIRTSCHAFT, KOMMENTAR I/Teil B. IA52, 2-3 (1958)*.

all the Community countries and the rate of return high. With the increased demand for capital necessary for the development of the Common Market there is little reason to anticipate any change. Dr. Hallstein, President of the Community Commission, addressed an American audience in the following terms:

It seems to me that our Community has received no more gratifying vote of confidence than American industry's rapidly mounting investment in the Common Market. I can assure you—and I wish to make this point emphatically clear—that we welcome this import of capital and know-how from America, and we hope in the future to see a reciprocal movement of European investment to your country. Not only is this good economics for all of us, but it is a great force for unity. The more our businessmen become partners—the more our economic eggs are scrambled—the greater will be the strength and solidarity of the Western World.¹³

The experts differ in their estimates of the role which American capital will play in the industrial growth of the Community. Pointing to the current drive of the Community industries to marshal their resources and streamline their facilities and methods, some believe that the American role, while substantial in absolute terms, will be no more than marginal in the context of the over-all development in the Community.

In any event, one problem deserves consideration from the longer range viewpoint of American enterprise. It is reflected in the very first "parliamentary" question addressed in the spring of 1958 to the newly organized Community Commission. The question was asked in the just-born European Parliamentary Assembly by M. Michel Debré, then a parliamentary representative and later the first Prime Minister of the French Fifth Republic. M. Debré pointed to the investment plans of foreign and particularly American companies seeking to take advantage of the Common Market, which in his opinion, if unsupervised, might cause economic as well as political and social unbalance. He inquired of the Commission whether "strict regulation" should not be considered on an urgent basis to ensure that all the Member States of the Common Market would share the benefits and burdens of foreign investment on an equal basis. The Commission replied:

¹³ Remarks by Walter Hallstein, President of the Commission of the European Economic Community, at the National Press Club Luncheon in Washington, D.C., on June 11, 1959.

The Commission favors maximum development within the Community of private investment originating in third countries and believes it necessary to avoid discouraging it; it is, however, conscious of the problems which may result from an excessive concentration of such investment in any one country or in any given industry. . . .

The Commission went on to recall Article 72 of the Treaty which requires Member States "to keep the Commission informed of any movements of capital to and from third countries as are known to them" and authorizes the Commission to address to Member States appropriate "opinions." It indicated its intention to call promptly for the necessary information. "To the extent that investment projects known to it will call for concerted action," the Commission will issue opinions to governments and "seek, in accord with them, the bases for an effective collaboration."¹⁴ Since then the Commission has stated that it has completed the classification of capital movements and a study of methods of obtaining information concerning them and has invited the governments to supply it with specified information "known to them." The arrangement for the supply of information to the Commission is reported to be functioning regularly.

The implication of this exchange for long range investment plans of American enterprises is self-evident. Difficulties must be expected if an entire industry or an important part thereof in one or more Member States should come under American control. Similarly, problems would arise if American investment should tend to concentrate in one Member State at the expense of others with equal or more urgent capital requirements. It might be of interest to mention a few figures showing the relative level of saturation of the Community Members with American direct investment. In 1957, measured in terms of the relation of these American investments to the respective national incomes, the degree of saturation amounted in Italy to 1.1%, in France and in the Federal Republic of Germany to 1.2%, in Belgium to 1.9%, and in the Netherlands to 2.9%. These figures may be compared with 3.9% for the United Kingdom and 35.3% for Canada where the predominance of American capital has been the subject of considerable discussion.¹⁵

¹⁴ [1958] JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES 25-26.

¹⁵ *Les États-Unis et le Marché Commun*, 1959 REVUE DU MARCHÉ COMMUN 110, at 114 (No. 12, Mar. 1959).

B. THE UNITED STATES AND EUROPE

The re-emergence of Western Europe as an economic power of the first order has modified profoundly the relationship between the United States and Western Europe. The change from economic dependence to economic partnership requires adjustments in the forms of cooperation. The need for such adjustment was recognized at the Western Summit meeting at Paris in December 1959. The subsequent conference of Ministers of thirteen O.E.E.C. countries and the European Economic Community Commission led to the appointment of "Four Wise Men" who produced a report in April 1960 recommending a scheme for a reorganization of the O.E.E.C. The United States and Canada, which heretofore held the status of "associates" in the O.E.E.C. are to become full members of the remodeled "Organization for Economic Cooperation and Development."

The Report suggests as the first, and perhaps foremost, task of the organization continuous economic policy consultations to ensure coordination of national policies toward sustained economic growth under conditions of stability. The growing interdependence of national economies clearly requires coordination. The annual country review procedure developed by the O.E.E.C. under which each member submits its economic situation and policies to the examination of all its partners would continue to be the basis for the consultations.

It is logical that the new Western Europe must carry its share in what is perhaps the most vital undertaking of this century, the aid to developing countries. The Report recognizes the common interest in this "challenge of our time" and foresees that the Organization's role will be to coordinate technical and financial assistance. The "Development Assistance Group" consisting of capital-exporting O.E.E.C. countries and Japan, which was formed in January 1960, would become affiliated with the Organization. It would seem to this writer that wise policy will seek to utilize existing instrumentalities such as the World Bank and the United Nations in which all the states concerned, including the developing countries and other non-European capital exporting states, are full participants.

In the trade field the Report notes that the O.E.E.C. has largely achieved its regional European objectives: "balance of payments difficulties have, in general, disappeared; external convertibility of the principal currencies has been restored; and the liberalization of trade in industrial products is almost complete." Recognizing that

the context within which the O.E.E.C. operated has now changed, the Report recommends that the O.E.E.C. Code of Liberalization and the other O.E.E.C. decisions on commercial policy be terminated. However, the Report also suggests that commercial policy, *as an element of general economic policy*, will be within the responsibility of the Organization. The availability of G.A.T.T. as a permanent forum for trade matters is noted. Because it may prove difficult to transplant some of the O.E.E.C. methods to G.A.T.T. (such as the almost continuous confrontation of views of all interested members), the Report suggests that such methods might be adopted by the new Organization in considering "trade problems of a general and recurrent nature as well as for concrete problems causing special difficulties."

A draft Convention attached to the Report would retain in substance the institutional framework of the O.E.E.C., consisting of a Council composed of representatives of all member governments, a small Executive Committee, the Secretary-General with a Secretariat and certain subordinate bodies and agencies. In principle, decisions would require unanimous consent in the Council. The Convention is to enter into force not later than September 1, 1961, if by that time at least 15 signatories have completed the ratification or acceptance process required by their national constitutions.

* * * * *

There is little question that the present division of Western Europe into two groups, the Community and the E.F.T.A., harbors seeds of discord and threatens the unity of the free world. Germany for economic reasons and France for reasons of political policy are likely to oppose further integration of the Six in the immediate future. Nevertheless, the continuing co-existence of the Community as an economic grouping of increasing economic impact and of E.F.T.A. must be anticipated. Since Greece and Turkey are in the process of associating themselves with the Community and Finland is gravitating toward the E.F.T.A., only Iceland, Ireland and Spain of the 18 members of the old O.E.E.C. remain outside the two groupings. An important problem will be, on the one hand, to prevent conflict between the two groups which could have grave political consequences and, on the other hand, of course, to avoid trade arrangements between them which would prejudice non-member nations. Some observers discern a trend in the United Kingdom toward accepting membership in the Community providing that the Com-

munity functions will be limited to those of a customs union. The fact that both the Community and the E.F.T.A. depend greatly on trade with each other as well as with the outside world holds promise of a satisfactory solution—a general reduction of trade barriers. Efforts to achieve such a reduction would be most effective in the Geneva forum of G.A.T.T., since that forum assures broad participation of free world countries. The negotiations for tariff concessions scheduled for 1961 offer an opportunity to lower tariff barriers against American exports to Europe before the effects of the regional groupings on trade patterns are felt strongly. The emergence of other regional trade groupings, one in Central America and the other in South America, underlines the necessity for strengthening G.A.T.T. as an instrument for increasing world-wide non-discriminatory trade.

The countries of the Warsaw Pact led by the Soviet Union have been engaged in a massive regional integration undertaking of their own designed to create “a socialist market” as a corollary of their drive toward large-scale industrialization. The free world must be prepared to continue to face unrelenting and increasing pressures from the East. For this, if for no other reason, the strength and unity of the free world remain the overriding policy goals to which regional interests must be subordinated.¹⁶

¹⁶ Portions of this chapter were included in an address delivered before the Institute on Legal Aspects of the European Community held by the Federal Bar Association in Washington, D.C., on February 11-13, 1960.

Chapter II

The New Institutions

Eric Stein

Even a cursory review of the Treaty indicates that the tasks assigned to the Community institutions range across the entire spectrum of economic activities in the Community, but this general statement is subject to three reservations.

In the first place, the areas in which exclusive jurisdiction has been granted to the institutions are limited. In other areas the institutions have concurrent jurisdiction with national authorities and their primary role is to supplement and supervise national action. In many of these areas their powers of decision are granted for the purpose of "prohibiting certain practices rather than substituting themselves for national authority."¹ In others the institutions are limited, as a matter of Treaty law, to the issuance of recommendations or opinions addressed to the national governments.

Secondly, because of the very general character of major portions of the Treaty the eventual scope of the power of the institutions cannot yet be assessed. Only the Investment Bank, the Overseas Development Fund and in a lesser degree the Social Fund now have direct operational responsibility, although proposals have been made for the establishment of new agencies, such as a European Fund for Structural Improvement in Agriculture² or a European Center for Fuel and Power Policy to coordinate action in the energy field.³

Thirdly, in any organization the legal powers and structure created

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¹ Reuter, *Aspects de la Communauté Economique Européenne*, 1958 REVUE DU MARCHÉ COMMUN 160 at 166 (No. 3).

² Proposals by the E.E.C. Commission summarized in POLITICAL AND ECONOMIC PLANNING (P.E.P. LONDON), PROPOSALS FOR A COMMON AGRICULTURAL POLICY IN E.E.C. (1960).

³ 443 PRESS BULLETIN EUROPE, EURATOM AND COMMON MARKET (supplement) (June 24, 1959) [hereinafter cited as EUROPE].

by its constitutive document are only a part of the story. An institution, once created, tends to develop in ways which often differ substantially from the intentions of the drafters of its basic document. The United Nations offers a startling example of this developmental process.

In the Coal-Steel Community Treaty, provisions regarding the institutions figure prominently at the beginning of the Treaty. In the E.E.C. and Euratom Treaties these provisions are placed at the end. The former Treaty employs the term "supranational," the latter two do not. The chapter on institutions of the Coal-Steel Community Treaty begins with the "executive" while the chapters of the latter two deal first with the Assembly. There is reason to believe that these differences reflect an evolution in the attitudes of the national governments toward the role of the institutions in the Communities.

I. THE COUNCIL OF MINISTERS: THE INSTRUMENT OF THE GOVERNMENTS

A. THE COUNCIL AS THE PARAMOUNT INSTITUTION

In the Coal-Steel Community Treaty the "supranational" High Authority, composed of independent Community officials, is conceived of as the central organ. The primary task of the Council of Ministers is to approve the most important decisions of the High Authority and to harmonize its work with the general economic policies of the national governments.⁴ In the E.E.C. Treaty, on the other hand, the principal decision-making power is given to the Council of Ministers, whose members are subject to national government control, rather than to the independent Commission. This change from the Coal-Steel Community pattern was due as much to the substantially broader scope of the E.E.C. Treaty as to the political necessity of soft-pedaling "supranationality."⁵ The Coal-Steel Community Treaty extends to the production and some phases of distribution of coal and steel only; it does not deal with the general

⁴ See Stein, *The European Parliamentary Assembly: Techniques of Emerging "Political Control,"* 13 INTERNATIONAL ORGANIZATION 233, 239 (1959).

⁵ A spokesman for the French steel industry complained of the "premature" supranationality of the E.C.S.C. and proposed that the E.C.S.C. be gradually merged in the Common Market. N.Y. Times, July 6, 1959. The French Government spokesman indicated that the French Government may propose a revision of the E.C.S.C. treaty to align it to some extent with the E.E.C. Treaty. See 1959 Bulletin of the European Community 10 (No. 38, Oct.-Nov., 1959) quoting Agence France to the effect that such revision is unlikely.

economic policies and does not encompass the commercial or agricultural policies of Member States. This relatively narrow scope made an independent High Authority with strong regulatory powers palatable to national governments. The E.E.C. Treaty on the other hand extends to all economic activities and affects national policies in vital areas such as agriculture and commerce with non-member countries. Given the domestic political repercussions which important Community measures therefore might have, the national governments insisted that the political Council rather than the independent Commission be given preponderant power.

The difference between the Coal-Steel and the Economic Community patterns may not be as striking as it first appears. In some important instances the High Authority has acted independently, but as a rule it has hesitated to make important decisions without a prior assurance of support from the Council. The center of decision-making in the Coal-Steel Community has therefore in fact shifted at least in some measure from the High Authority to the Council.^{5a}

The relationship between the Council and the Commission is defined in the E.E.C. Treaty with considerable care. This relationship and the Council voting formula are among the most original features of the Treaty. Both represent a compromise between opposing views as to the relative weight to be given to Community as opposed to national interests. In most instances the Council can act only upon a formal proposal by the Commission, which ensures that Community interests to which the Commission has given recognition will be considered by the Council before it makes a decision.⁶ In some instances—generally those involving matters of intense political concern to Member States—even though no formal proposal is required, the Council must obtain at least a report, opinion or recommendation from the Commission.⁷ The Council acts without any reference to the Commission only in determining its own

^{5a} Marjolin, *Coopération intergouvernementale et autorité supranationales*, 1958 REVUE ECONOMIQUE 266 at 272 (No. 2, Mar. 1958). On the Coal-Steel Community generally see DIEBOLD, *THE SCHUMAN PLAN* (1959) and LISTER, *EUROPE'S COAL AND STEEL COMMUNITY* (1960). On European organizations generally see POLITICAL AND ECONOMIC PLANNING (P.E.P. LONDON), *EUROPEAN ORGANISATIONS* (1959).

⁶ For a list of those instances see *La Communauté Economique Européenne: Aspects Institutionnels*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 491, annex 2, at 506 (1957); France, ASSEMBLÉE NATIONALE, TROISIÈME LÉGISLATURE, SESSION ORDINAIRE 1956-1957, No. 5266, *Rapport fait au nom de la Commission des affaires étrangères sur le projet de loi (No. 4676) autorisant le Président de la République à ratifier: 1° Le Traité instituant La Communauté économique européenne . . . par MM. Savary et July, députés*, annexe B, 2366-67.

⁷ France, ASSEMBLÉE NATIONALE, *supra* note 6.

internal affairs or in matters concerning control over the Commission.

B. THE VOTING FORMULA

The Council acts either by a unanimous vote or by "simple" or "qualified" majority.

A vote by a "simple" majority of four out of the six Ministers (in effect a two thirds majority) applies only in a handful of relatively less important instances where the Treaty fails to specify another formula.⁸

Council measures which are most important to the creation and maintenance of the Common Market require a unanimous vote either during a part of, or during the entire, transitional period.⁹ In specified matters of essential political interest (including most instances of harmonization of legislation) and in those instances where gaps in the Treaty are to be filled or its provisions are to be modified, unanimity is required during and after the transitional period.¹⁰ The right of veto accorded to any one of the six Member States by these provisions may not be as potentially paralyzing as would appear at first glance.¹¹ In the first (and most numerous) group of instances mentioned above the veto power is, after all, temporary only and vanishes upon the expiration of the transitional period. In other instances, moreover, unanimity is required to *relieve* the Members of their Treaty obligations.¹² Finally, in some instances the Treaty itself provides a means for circumventing a veto¹³ or at least makes available to Member States measures of safeguard and retorsion in case of paralysis.¹⁴

A "qualified" majority vote based on weighted voting is required in some instances during the transitional period and will apply to a large majority of all measures after the termination of the transitional period.¹⁵ The weighted voting formula accords four votes to each of the Big Three (Germany, France, Italy), two votes each to

⁸ These matters, it has been said, include either problems in which smaller members have an interest equal to that of the larger, or questions of internal procedure. ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, *supra* note 6, at 493 and annex 5, at 510.

⁹ Cf. ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, *supra* note 6, annex 4, at 508-10.

¹⁰ E.g. Arts. 99, para. 2, 100 para. 1, 235.

¹¹ Cartou, *Le Marché Commun et la technique du Droit Public*, 74 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 186 at 216-17 (1958).

¹² E.g., art. 93(2) para. 3.

¹³ E.g., arts. 54(2), 63(2) when no general program has been adopted.

¹⁴ Arts. 70(2), 107(2).

¹⁵ ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, *supra* note 6, annex 6, at 510, 511.

Belgium and the Netherlands and one to Luxembourg. Of the total of 17 votes, 12 are required for a measure to be adopted on proposal of the Commission¹⁶ but the Council may modify such proposal by a unanimous vote only.¹⁷ Each Member State, in effect, may therefore exercise a veto in defense of the Commission's proposal. Where no proposal by the Commission is required for Council action, the 12-vote majority must include the votes of at least four members.

This ingenious formula obviously has a number of purposes. In the first place it excludes a veto by any one Member State acting alone or by Benelux acting as a unit in cases where the Council acts on a proposal of the Commission and thus presumably in the Community interest. If the Big Three agree, they can override the three smaller Member States, but only if the Community interest reflected in the Commission's proposal is the basis for the Council's action. The Big Three must enlist the support of at least one of the others—Luxembourg is enough—in instances where no Commission proposal is required. The Big Three are thus encouraged to agree among themselves, and the Community interest as well as the interests of the smaller members are given a measure of protection. If the Big Three do not agree, no two of them can, without the support of both Belgium and the Netherlands, force their position on the third. The purpose of this limitation appears to be to discourage alliances among two of the Big Three to the prejudice of the other members, and is particularly interesting in the light of the much publicized Franco-German "alliance" (or better DeGaulle-Adenauer entente) of recent vintage, which apparently has created some concern in the Benelux countries.¹⁸

A Minister can vote by proxy for not more than one other Minister—a corporation law concept transplanted into public law.¹⁹ Abstention does not prevent a decision even where unanimity is

¹⁶ Art. 148.

¹⁷ Art. 149.

¹⁸ In three instances the Treaty provides for special qualified majorities. Thus the establishment of minimum agricultural prices is to be decided by a majority of nine of the seventeen votes. Art. 44(6). The budget of the Social Fund is to be adopted by a majority of 67 of the 100 votes, of which Germany and France command 32 votes each, Italy 20, Belgium 8, Netherlands 7 and Luxembourg 1. Art. 203(5). Finally, in administering the Development Fund for the overseas territories, the Council acts by a majority of 67 of the 100 votes, of which France and Germany command 33 votes each, Belgium, Italy and the Netherlands 11 votes each and Luxembourg 1. Art. 7 Implementing Convention relating to the Association with the Community of the Overseas Countries and Territories.

¹⁹ Art. 150.

required if the abstaining Minister is present or represented by proxy. Unlike the practice of the Security Council of the United Nations, absence of a Minister would seem to prevent action where unanimity is required.²⁰

Although the Treaty is silent on the point, the Council has kept its deliberations and its voting secret—which has been a matter of some chagrin to the Assembly.

C. THE COMPOSITION OF THE COUNCIL

Since it is composed of Cabinet Ministers, the Council is a political body *par excellence*. Ministers change as governments change so that the Council reflects the prevailing political constellation in the Member States. Even though the Treaty conceives of the Council as a Community organ, it will act primarily as a center for composition of national governmental differences, particularly in the earlier stages.

As Ministers in the national Cabinets the Council members are responsible (to a larger or smaller degree depending on national constitutions) to their national parliaments. Although the European Parliamentary Assembly claims that the Council is politically responsible to it as well, the Assembly has no means of enforcing this responsibility. Acts of the Council, which are legally binding, are subject to attack on specified grounds before the Community Court by states, other institutions and individuals.

A government is free to designate any one of its Cabinet Ministers to represent it on the Council. It appears likely, however, that Foreign Ministers will continue to appear at the meetings of the E.E.C. and Euratom Councils at least whenever basic matters are to be discussed.²¹ The Foreign Offices seem concerned that they will lose control over "European" affairs if Ministers other than those of Foreign Affairs should sit on the Councils. By the same token no Foreign Office of the Six would, presumably, favor the creation of a new cabinet post of "Minister for European Affairs." The creation of such a post obviously would raise a variety of administrative problems, but it has been suggested as one method of establishing *in fact* a single Council of Ministers common to all three Communities, even if in law under the treaties the three Councils

²⁰ Although there is no specific provision in the Treaty to this effect, this conclusion may be reached from art. 148(3).

²¹ Ministers of Foreign Affairs often recess a Council meeting in order to meet as members of the governments of the Member States to discuss such matters as the selection of the seat of the institutions (art. 216).

remain separate organs. The E.E.C. and Euratom Councils sometimes meet jointly to deal with matters pertaining to both Communities.²²

In practice Cabinet Members other than Foreign Ministers (for example, Ministers of Finance, Transport, Agriculture) meet on Economic Community matters, but not as the Council, and suggestions have been made that these important meetings should be brought within the official Community framework.

The Councils have built up a Secretariat at Brussels composed of some 270 employees, and the large size of the Secretariat has been strongly criticized in the Assembly.²³ Taking advantage of the authorization of the Treaty,²⁴ the E.E.C. Council established a Committee of Permanent Representatives of Member States to which national governments have appointed high ranking diplomats with supporting staffs totalling some 150 persons. The Council has met as a rule not more than once a month²⁵ and has relied heavily on this Committee for preparatory work and to take follow-up action.²⁶

II. THE COMMISSION: THE COMMUNITY "ADMINISTRATION"

A. THE ROLE OF INITIATIVE AND SUPERVISION

In the Community jargon the Commission is referred to as "the executive,"²⁷ but the neutral term "Commission" is a substitute for the more impressive "High Authority" of the Coal-Steel Community Treaty and the adjective "supranational" it contained was, as already indicated, omitted in the corresponding article of the

²² In the E.E.C. Council the members are generally represented by their Foreign Ministers except for the Federal Republic of Germany which is represented by the Minister for Economic Affairs. In the Euratom Council the members are represented generally by Foreign Ministers or Ministers for Atomic Affairs. The Council of the Coal and Steel Community, perhaps because of its more specialized and less crucial role, is attended usually by Ministers of Economic Affairs or Ministers of Industry and Commerce and at times by other Ministers principally concerned with the subject under discussion. *ANNUAIRE MANUEL DE L'ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE 1958-1959*, 127-28. ROBERTSON, *EUROPEAN INSTITUTIONS* 159 (1959).

²³ Resolution of December 17, 1958, [1959] *JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES* (hereinafter cited as *J'L OFF.*) 15-17; *La Communauté à l'épreuve des faits, I-La Commission et les Gouvernements*, 1959 *REVUE DU MARCHÉ COMMUN* 425 at 426 (No. 20).

²⁴ Art. 151.

²⁵ 396 *EUROPE* item 2274 (April 25, 1959).

²⁶ E.E.C. COMMISSION, *FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY* 27 (1958).

²⁷ Thus, the High Authority, the E.E.C. Commission, and the Euratom Commission are referred to as the "three European executives."

E.E.C. Treaty.²⁸ These differences in terminology emphasize the fact that the Commission's power of independent decision has been curtailed as compared with that of the High Authority. The Commission's principal power is that of initiative in preparing and proposing action by the Council (and the Assembly). In addition, it ensures and supervises the application of the Treaty provisions and of Council measures. It has a limited power of independent decision ("under the conditions laid down in the Treaty") but it may issue recommendations and opinions "where the Commission considers it necessary" as well as where "the Treaty expressly so provides."²⁹ Again, the Council may charge the Commission with implementation of its measures. The Commission represents the Community in national courts,³⁰ in contacts with international organizations,³¹ and in negotiations for international agreements (under the direction of the Council).³² According to a reported internal arrangement between the Council and the Commission, any request from a foreign government for accreditation of a foreign mission is made to the Commission and forwarded by it to the Council which approves the request and the head of the mission. The official accreditation is then performed by the President of the Commission.³³

The Commission submits an annual report and special reports to the Assembly which are the basis of the Assembly's work. It is politically responsible to the Assembly which can force its resignation in a body (but not that of individual members) on a motion of censure by a vote of a two-thirds majority.³⁴

B. THE COMMISSIONERS AND THEIR STAFF

The Commission is composed of nine members, nationals of the Member States, "chosen for their general competence and of indisputable independence"³⁵ and appointed by the Member States,

²⁸ E.C.S.C. Treaty art. 9, E.E.C. Treaty art. 157, Euratom Treaty art. 126. Both the E.E.C. and Euratom Commissions call themselves officially "European Commission." E.E.C. COMMISSION, *op. cit. supra* note 26, at 15.

²⁹ Art. 155.

³⁰ Art. 211.

³¹ Art. 229.

³² Arts. 228, 111(2) of the Treaty and art. 6 of the Protocol on Privileges and Immunities; *cf.* art. 238 in connection with art. 228.

³³ *Cf.* the announcement that President Hallstein received the Chief of the Japanese Mission who presented to him his letters of accreditation, [1959] J'L OFF. 1127. As of March 1960, ten governments have accredited diplomatic missions to the Community. (United States, Greece, Israel, Denmark, Japan, Sweden, Switzerland, United Kingdom, Norway, Ireland), [1960] J'L OFF. 526-27.

³⁴ Arts. 156, 144.

³⁵ Art. 157.

“acting in common agreement,” for a four year term which is renewable.³⁶ Thus each Member State has a veto over any candidate. The Treaty directs that the Commissioners act in the Community interest; it specifically prohibits them from accepting instructions from their national governments and obligates the latter to refrain from seeking to influence them. The members are not allowed, while in office, to engage in any other occupation,³⁷ paid or unpaid, and their obligation of “honesty and discretion” with respect to their official duties extends beyond their term of office under the penalty of loss of pension. They are subject to provisional suspension by the Council and removal by the Community Court for serious misconduct.³⁸

At present each of the Big Three has two nationals and the Benelux countries have one each on the Commission. Professor Hallstein, former State Secretary of the German Foreign Office, is the President and there are French, Dutch and Italian Vice-Presidents.³⁹ While nationality was obviously a factor in their selection (the Treaty provides that not more than two nationals of any one Member State may be appointed), the present group appears competent and well qualified.⁴⁰ It includes three former ministers in national governments and represents a variety of educational and professional backgrounds ranging from law, diplomacy, and economics to finance, agriculture, journalism, colonial administration, and social work; it reflects experience in business, government, and university teaching.⁴¹ As a new body it has attracted top-notch personalities; past experience with other bodies points up the difficulties of retaining men of high caliber in similar positions.

The staff of the Commission (the 1960 budget authorizes 1,686 persons)⁴² is grouped into eight functional departments (General Directorates), corresponding broadly to the principal areas of the

³⁶ The High Authority is also composed of 9 members while the Euratom Commission has only 5. For considerations underlying these numbers see REUTER, *COURS DE DROIT INTERNATIONAL PUBLIC* 54 (Paris 1958-1959).

³⁷ Art. 157(2). The German text speaks of “Berufstätigkeit.”

³⁸ Art. 160. The German text of the Treaty refers to a “Verfehlung.”

³⁹ Art. 161 provides that the President and the Vice-Presidents are appointed from among the Commissioners by the governments acting in common agreement. (Although the Treaty provides for two Vice-Presidents, three Vice-Presidents have been appointed.)

⁴⁰ See CAMPS, *THE FIRST YEAR OF THE E.E.C.* 4-5 (1958), on the distribution of the presidencies in the three Communities.

⁴¹ See 1958 *REVUE DU MARCHÉ COMMUN* 23-24 (No. 1), for names and biographic sketches of the original members.

⁴² Budget de la Commission économique européenne pour l'exercice 1960, [1960] *J'L OFF.* 466.

Treaty, and an administrative department.⁴³ Each department contains three or four divisions (Directorates).⁴⁴ The members of the Commission have organized themselves in eight standing working groups of three or four. Each group supervises the work of one department. A group composed of the President and the three Vice-Presidents has responsibility for the department of administration. The President may place any matter before the Commission for its consideration at any time.⁴⁵

The Commission makes its decisions by a simple majority of five in meetings held, as a rule, weekly in Brussels.

C. POLICY MAKERS OR ADMINISTRATORS?

If one conceives of the Council of Ministers as analogous to the Head of the State in a parliamentary democracy, the members of the Commission could be deemed to have the status of Cabinet Ministers, and the heads of departments of the Commission the status of the ranking civil servants. The Commission seeks to stress its non-bureaucratic and "executive" character. In the words of its President, it sees itself primarily as a policy-making and coordinating authority with direct administrative functions limited to the operational responsibilities for the various Funds mentioned earlier. It is to act as a general staff relying on selected experts and specialists.⁴⁶

There may be some doubt whether the organizational pattern as well as the size and the character of the staff recruited at a brisk pace reflect the "general staff" concept.⁴⁷ Unquestionably the staff includes a number of exceptionally able and well-trained experts. Yet, a keen American observer felt that preoccupation with balanced distribution of nationalities throughout all staff levels, coupled with a somewhat elaborate staff hierarchy, created an impression of over-organization and possibly of temporary over-staffing. The latter may be due partly to the fact that the Commission has hardly begun to develop its policy in a number of fields and partly to the fact that,

⁴³ The eight general directorates are: External Relations, Economic and Financial Questions, Internal Market, Competition, Social Affairs, Agriculture, Transport, Overseas Countries and Territories. E.E.C. COMMISSION, *op. cit. supra* note 26, annex A at 129-30 (1958).

⁴⁴ *Id.*, annex B at 131-32.

⁴⁵ *Id.* at 21.

⁴⁶ Speech by E.E.C. President Hallstein of October 21, 1958, Community Publication 2089/2/58/5, at 36-37.

⁴⁷ At least one Member government was reported as believing that the Commission (and for that matter even the Council of Ministers) have become bogged down in detail. N.Y. Times, July 28, 1959.

because the Council must approve the budget, the Commission fears an early "freeze" of personnel at a too low level.⁴⁸

The Council did, in fact, reduce the Commission's first draft budget substantially.⁴⁹ When the Assembly debated the budget, the Christian Democratic group limited its criticism to what it considered the excessive size of the *Secretariat of the Councils*, and the Assembly resolution appears to reflect this position.⁵⁰ The resolution was interpreted, however, (particularly by the Liberals) as censuring also the size of the staff of the Commission, one Liberal speaking of a "pathological inflation" of administration, threatening administrative paralysis and usurpation of the policy-making functions of the Commission by its high-ranking staff.⁵¹ The Commission members, on the other hand, complained that the reduction ordered by the Council will gravely impair the preparation of the necessary studies, statistics, analyses of legislation for purposes of harmonization in the tax field and the like.⁵² The spectacle was, in short, reminiscent of budgetary debates in American legislatures and for that matter in any parliament. More recently the Assembly manifested its concern that the Commission would not be given adequate personnel to perform its tasks, and particularly those in the social field.⁵³

The fact that three "executives" operate independently under three different treaties is an absurdity explainable on political grounds but hardly compatible with effective administration. Efforts have been made to coordinate their work through joint committees and by other means. "Common services" have been established in the legal, statistical and information fields to serve all three "executives," but apparently only the statistical "common service" in fact operates as a unit.⁵⁴

⁴⁸ CAMPS, *op. cit. supra* note 40, at 5; the nationality key allows each of the Big Three 25% of all positions and the Benelux countries share the remaining 25%.

⁴⁹ Stein, *supra* note 4, at 248-49.

⁵⁰ Resolution of December 17, 1958, [1959] J'L OFF. 15-17; Resolution of April 11, 1959, para. 6, [1959] J'L OFF. 548, 550.

⁵¹ For a "liberal" view see also Margulies, *Die Kosten der Klein-europäischen Gemeinschaften*, 2 EUROPÄISCHE WIRTSCHAFT 292-94 (No. 12) (1959).

⁵² E.E.C. COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 16 (1959).

⁵³ [1959] J'L OFF. 1052.

⁵⁴ The problem of a "European Civil Service" has engaged the attention of the Council of Europe. Its consultative Assembly called—without noticeable success—for standardization of conditions of service, common recruitment methods and coordinated training of personnel in the numerous European organizations. 1959 COUNCIL OF EUROPE NEWS 9-10 (No. 4).

III. THE EVOLVING PATTERN OF COUNCIL-COMMISSION RELATIONS

A. THE TREATY PROCEDURE

The Treaty contemplates a close and continuing relationship between the Council and the Commission. The Commission proposal, as suggested, is a prerequisite of Council action in most instances. On the other hand, if the Commission fails to submit a proposal, the Council may request it to do so; and if the Commission fails to act as it is required to under the Treaty, the Council may bring the matter before the Community Court for adjudication.⁵⁵ The Commission, for its part, has the right to request that a meeting of the Council be held and likewise may bring the Council before the Court in specified circumstances.⁵⁶ The Treaty calls for consultations between the two bodies and the details of their collaboration are to be settled by "mutual agreement."⁵⁷ The essence of the Treaty pattern may thus be described as follows: the Commission develops proposals concerning Community policy, and, if they command the required support, the Council adopts them, after consulting with other bodies as prescribed.

B. THE EVOLVING PRACTICE

In practice the pattern of Council-Commission relations has developed somewhat differently. The Commission has been in close and continuing contact with the Committee of Permanent Representatives representing the governments of the Member States at the Brussels seat of the Communities. Through the Permanent Representatives the Commission obtains the views of national governments *before* making proposals to the Council. Through them it also arranges for conferences with experts supplied by national governmental departments. A number of mixed working groups composed of officials drawn from national administrations and the Commission staff meet regularly on problems under consideration by the Commission. For example, some nine groups of this type have been working on the general program for the removal of the restrictions on the right of establishment and supply of services which the Commission is to propose to the Council—each group examining

⁵⁵ Arts. 152, 175.

⁵⁶ Art. 147.

⁵⁷ Art. 162.

the national legislative and administrative provisions governing a given category of activities (insurance, banking, trade, crafts, agriculture, etc.) Similarly, negotiation in a number of working groups under a central group has produced agreement on most items of the common external tariff which the Treaty left to be determined by negotiation among the members. Groups of national experts have been considering with the Commission staff outlines of proposals for a common agricultural policy, and others concerning anti-dumping measures, state subsidies and the like. A conference of national experts under the chairmanship of a Commission member established three working groups on taxation problems.⁵⁸

Conferences and groups of this type have served to coordinate national action and to provide information to the Commission.⁵⁹ Experts from national administrations also bring to these conferences complaints against actions of other Member States which they view as violations of Treaty commitments. Even in the field of restrictive practices, where the Community was given powers of direct intervention, the Commission has proceeded with caution: the head of the Commission department concerned with competition chairs conferences of national experts designated by the governments. In these conferences agreement is sought on interpretation of the rather loosely-drawn provisions of the Treaty, and cases of restrictive practices suggested by national experts are examined to determine whether they fall into the categories proscribed by the Treaty.⁶⁰ While, of course, there are direct contacts between the Council and the Commission, the emerging pattern discloses continuing negotiations between the Commission and the national governments on various levels and particularly through the Permanent Representatives. As a result, where the Treaty requires the submission of a Commission-prepared proposal to the Council, the governments in fact pass upon it *before* it is submitted to the Council.

In exercising its power of supervision and enforcement the Commission has also communicated with the member governments concerned before concluding that the Treaty has been violated or taking other steps. In several instances where new customs duties, allegedly in violation of the Treaty's "standstill" provision, were introduced,

⁵⁸ See the communique of the Commission reported in 443 EUROPE, item 2694 (June 24, 1959).

⁵⁹ E.E.C. COMMISSION, *op. cit. supra* note 52, at 8-9.

⁶⁰ *Id.* at 86-89. Mixed Council-Commission committees have been established in a few instances, for example, to examine the problems raised by a possible European Economic Association.

the Commission, after discussion with the government concerned, took the preliminary steps of the enforcement procedure envisaged by the Treaty, but there has been no official public notice from the Commission on the outcome of this action. In one instance, the Commission is reported to have issued a "reasoned opinion" under Article 169 advising the French government that the imposition of a customs duty on paper pulp was in violation of the Treaty and inviting that government to remove the duty within a given period.⁶¹ On another occasion the Commission, acting under Article 93 (2), rendered a "decision" directing the same government to remove a subsidy in the form of tax benefits accorded to French industries only. The "opinion" and the "decision" respectively are prerequisite preliminary steps to bringing the matter before the Community Court for adjudication. But in both cases compliance by the government concerned made further steps unnecessary. Again, the Commission disclosed in its reply to a parliamentary question that it had instituted an investigation of an agreement concluded between producers and merchants of earthenware to determine whether the agreement infringes upon the antitrust provisions of the Treaty.⁶²

The pattern of negotiations, in which the Permanent Representatives play such a major role, may well be the only realistic *modus operandi* in view of the present powers of the Commission, the lack of information in its files, the time it will take to build up truly expert knowledge, the still limited awareness on the part of the public of Community issues and the unwillingness of some governments to support a stronger role for the Commission. The failure of the governments in the spring of 1959 to support the High Authority's proposals for the handling of the coal crisis has undoubtedly made the Commission even more inclined to seek to persuade national governments before making formal proposals to the Council.⁶³

IV. ADVISORY COMMITTEES: THE VOICE OF "OUTSIDE" EXPERTS AND SPECIAL INTEREST GROUPS

The Treaty creates a number of advisory bodies of which the three most important merit consideration here. The Economic and

⁶¹ Cf. *Les Échanges dans le Marché Commun*, pt. II, 1959 REVUE DU MARCHÉ COMMUN 239 (No. 15).

⁶² [1959] J'L OFF. 1122-23.

⁶³ E.C.S.C. HIGH AUTHORITY, SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 63-76 (1959); also E.C.S.C. HIGH AUTHORITY, RAPPORT SPÉCIAL DE LA HAUTE AUTORITÉ À L'ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE CONCERNANT LA QUESTION CHARBONNIÈRE (1959).

Social Committee is endowed with the broadest advisory functions.⁶⁴ It serves both the E.E.C. and Euratom. The Treaty provides that in specified instances the E.E.C. Council or the Commission *must* seek the Committee's opinion, which, however, is not binding on them. In addition, the Council or the Commission *may* seek the advice of the Committee whenever either deems it appropriate.⁶⁵

The Committee membership is rather large, consisting of 101 members serving in their personal capacities and therefore not subject to instructions from their governments. The Big Three are each allotted 24 seats, Belgium and the Netherlands 12 each and Luxembourg five.⁶⁶ Each member government submits to the Council a list of candidates containing twice as many names as there are positions and the Council makes the appointments from these lists after consulting the Commissions.⁶⁷ Under the Treaty the Committee is to include representatives of "the various categories of economic and social life, in particular, representatives of producers, agriculturalists, transport operators, workers, merchants, artisans, the liberal professions and of the general interest."⁶⁸

The Treaty reflects an intention of the governments to maintain fairly strict control over this Committee of uninstructed individuals: any Member State may veto in the Council the appointment of any representative; the Council must approve by unanimous vote the Rules of Procedure of the Committee and the Committee is to be convened "at the request of the Council or of the Commission."⁶⁹

In working out the Rules of Procedure a difference arose between

⁶⁴ Katzenstein, *Der Arbeitnehmer in der europäischen Wirtschaftsgemeinschaft*, 12 DER BETRIEBS-BERATER 1081 at 1083 (1957) is of the opinion that the Committee has a more far-reaching right to be heard by the executive institutions than the European Parliamentary Assembly.

⁶⁵ Art. 198.

⁶⁶ Art. 194.

⁶⁷ Art. 195.

⁶⁸ Art. 193, para. 2.

The Committee comprises a great variety of interests with emphasis on producers and labor both in industry and agriculture. The precise balance varies from one national contingent to the other. Among the members are officials of labor and white collar employees' unions and unionists from overseas areas; officials and executives of trade associations (composed of agricultural and industrial producers, merchants, and craftsmen) and of chambers of commerce and agriculture; bankers, shipping and river navigation company executives, import-export wholesale executives; experts in transportation, tourism, radiology, nuclear energy, and nuclear economics; university professors of chemistry and economics; representatives of cooperatives; a few government officials concerned with economic planning and agriculture; a single Italian lawyer representing liberal professions; a housewife-consumer expert, etc. For the original membership, see 1958 REVUE DU MARCHÉ COMMUN 131-137 (No. 3); for a more recent list, see ANNUAIRE-MANUEL DE L'ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE 1958-1959, at 185-94.

⁶⁹ Art. 196.

the Councils on one hand and the Committee on the other, as to the scope of the latter's right of initiative; a "compromise" was reached after considerable delay under which the Committee may meet on its own initiative and in the absence of a formal request for an opinion but only if one of the Councils or Commissions has given its prior approval and only on those questions on which it "must or may be consulted" under the Treaty.⁷⁰

Control of publicity by the Committee may have been considered a possible instrument of pressure upon the institutions: thus the Rules provide that the opinions of the Committee can be published only "under conditions and by means determined" by the institution concerned.⁷¹ No provision is made to preclude publicity originated by an individual Committee member concerning his attitudes or those of other members, however, and the right to seek assistance from outside expert consultants⁷² may also provide a method of circumventing the limitation on publicity.

The Assembly recommended that labor and employers be assured parity on the Committee and expressed formally its regret when the recommendation was not heeded.⁷³ The composition of the Committee was termed "thoroughly unbalanced" in certain labor quarters.⁷⁴ An early conflict between labor and employers over the allocation of the offices of the Committee President and Vice-President was solved by a compromise based on an overall increase in the number of Vice-Presidents:⁷⁵ it took time and considerable doing to complete the organization of the Committee.⁷⁶

The Committee is required by the Treaty to establish "specialized sections" in the fields of agriculture and transportation, in which the Community institutions are to develop common Community policies. It established similar sections in five other fields obviously in an attempt to overcome the handicaps of unwieldiness stemming

⁷⁰ Règlement intérieur, art. 18, para. 3 [1959] J'L OFF. 496.

⁷¹ *Id.*, art. 45, para. 3.

⁷² *Id.*, art. 14.

⁷³ Resolution of March 21, 1958, [1958] J'L OFF. 11; Resolution of January 15, 1959, pt. VI, [1959] J'L OFF. 167 at 169.

⁷⁴ Rosenberg, *Zusammenarbeit und Organisation der Gewerkschaften West-Europas*, 2 EUROPÄISCHE WIRTSCHAFT 165 at 166 (No. 7) (1959).

⁷⁵ The labor group claimed that a Vice-President elected to represent the "general interest" group in fact represented the employers. By way of a compromise the total number of Vice-Presidents as well as the number of Vice-Presidents representing labor interests was increased. 278 EUROPE, item 1350 (November 28, 1958).

⁷⁶ The Euratom Commission made it clear that the present composition of the Committee reflects only partially its suggestions concerning the number of nuclear specialists. EURATOM COMMISSION, FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 34 (1958).

from its size.⁷⁷ The work is done principally by the sections and by working groups within the sections and any proposed opinions—of which it had already rendered several by the beginning of 1960—are ratified in plenary meetings of the Committee. The institutions may not approach the sections directly.⁷⁸

The Committee's relations with the Commissions appear satisfactory. Several E.E.C. Commissioners have already addressed a plenary meeting of the Committee in order to describe the Commission's working plans in the social and other fields in which requests for opinion may be forthcoming, and, although not required to do so by the Treaty, the E.E.C. Commission asked the Committee for an opinion on a proposed directive concerning the application of the right of establishment to the overseas areas.⁷⁹

It is much too early to say to what extent this Committee will be more significant than a similar committee of the Coal-Steel Community.⁸⁰ It is important in that it offers a forum for private individuals and interest groups in the Community, and despite its circumscribed powers, it may play a useful role.

When the E.E.C. Commission asked the Committee for an opinion on the very topical question of harmonization of certain aspects of national commercial policies, for example, the Committee produced a provisional urgent recommendation addressed to the governments of the Member States urging them to adopt certain positions with respect to imports from third countries with exceptionally low wages, multiple exchange rates, and state trading systems. The Rules of Procedure provide for no such provisional recommendation, but this fact was brushed aside by the Committee.

Another advisory body, the Monetary Committee, may become of considerable importance particularly because the Committee may offer opinions to the Council or to the Commission on its own initiative as well as at their request.⁸¹ Its function is to assist in the coordination of national policies in monetary matters in accordance with a charter (*Statut*)⁸² established by the Council. Each Member State has appointed one executive of its central bank and one high official of its Ministry of Finance and the Commission has designated two officials from its own staff to serve on the Com-

⁷⁷ [1959] J'L OFF. 503-507.

⁷⁸ Art. 197, para. 3.

⁷⁹ E.E.C. COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 23 (1959).

⁸⁰ ROBERTSON, EUROPEAN INSTITUTIONS 169 (1959).

⁸¹ Art. 105.

⁸² [1958] J'L OFF. 390.

mittee. The work of the Committee may be facilitated by the fact that the governors of the central banks have been discussing common problems regularly over many years in the sessions of the Board of Governors of the Bank of International Settlements in Basel and have established close personal relationships. The Committee, with the assistance of the Commission staff, has been engaged in a quarterly examination of the monetary and financial situations of the Six, in studies of convertibility and in working out a program for lifting restrictions on flow of capital.⁸³

A third advisory body, the Transportation Committee "composed of experts appointed by the Governments"⁸⁴ has been established to advise the Commission on matters relating to transportation.⁸⁵ In accordance with this committee's charter (*Statut*), formulated by the Council,⁸⁶ each government ultimately appointed two high level officials and three transportation experts (with alternates) to membership. The members serve in their personal capacity and must not receive instructions from their governments.⁸⁷ The Committee elects its Chairman and Vice-Chairman from among the members who are government officials.⁸⁸ It may meet and render opinions at the request of the Commission.⁸⁹

Controversy arose at the outset in connection with the composition of the Committee with the result that it was not formed until more than a year after the Treaty had come into effect. Moreover, the Commission has since been closely questioned in the Assembly because the role of experts as compared with that of government officials in the Transportation Committee was thought to be disproportionately small, the Parliamentary Assembly Committee on Transportation having expressed the view that the Committee should be composed of independent experts rather than governmental officials or spokesmen for special interest groups.⁹⁰ The labor unions have also demanded that at least one representative

⁸³ E.E.C. COMMISSION, *op. cit. supra* note 79, at 24.

⁸⁴ Art. 83.

⁸⁵ This committee must be distinguished from the specialized section for transportation of the Economic and Social Committee mentioned above.

⁸⁶ Statut du Comité des Transports, [1958] J'L OFF. 509.

⁸⁷ *Id.*, art. 3.

⁸⁸ *Id.*, art. 5, para. 1.

⁸⁹ *Id.*, arts. 6 and 7.

⁹⁰ Parliamentary question and answers of the E.E.C. Commission and the E.C.S.C. High Authority in [1959] J'L OFF. 685-86. Speeches by Rapporteur Kapteyn and Commissioner Schaus in the European Parliamentary Assembly, ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE, DÉBATS, COMPTE RENDU IN EXTENSO DES SÉANCES, ÉDITION PROVISOIRE [hereinafter cited as Parl. Debates] (No. 5A, Jan. 13, 1959) 147 at 149-50 and 165 at 168-70.

be appointed to this Committee from their ranks by each government.⁹¹

The Committee has already been called upon by the Commission to give its opinion on a proposed regulation for the abolition of certain forms of discrimination in transportation.⁹²

The Treaty provides for other advisory bodies. Because of its "triangular" composition, mention may be made particularly of the mixed Committee which is to assist the Commission in the administration of the European Social Fund. It is chaired by a Commission member and composed of representatives of governments, labor unions and employers' associations.⁹³

V. THE EUROPEAN PARLIAMENTARY ASSEMBLY: THE VOICE OF THE PEOPLE?⁹⁴

A. COMPOSITION AND ORGANIZATION OF THE ASSEMBLY

The Assembly and the Court of Justice are the two institutions common to all three Communities.⁹⁵ The Assembly's functions under the three treaties differ somewhat. It succeeded the Common Assembly of the Coal-Steel Community which was in existence from 1952 until 1958. Although technically a new institution, the European Assembly has adopted in substance the practices and procedures of the Common Assembly and has been seeking to perfect them. It has been able to profit from the expertise and experience accumulated in the more than five years of its predecessor's work.

When the Rome Treaties were in the process of negotiation, the French delegation insisted that an entirely new assembly be created

⁹¹ 317 EUROPE, item 1622 (January 19, 1959). Only the Benelux countries included labor union representatives among the three experts; France appointed a unionist as an alternate expert. *Ibid.*

⁹² Art. 79(3). E.E.C. COMMISSION, *op. cit. supra* note 79, at 25-26 (1959). 246 EUROPE, item 1858 (February 24, 1959); 373 *id.*, item 2083 (March 27, 1959); 407 *id.*, item 2381 (May 12, 1959); 415 *id.*, item 2455 (May 22, 1959).

⁹³ Art. 124. *Cf.* also Committee of Control which is charged with auditing the budget. Art. 206. Its *Statut* (charter) is contained in [1959] J'L OFF. 861. For a description of the E.E.C. Administrative Commission for Social Security of Migrant Workers see the chapter of this book by Otto Kahn-Freund. The *Statut* of this Commission is contained in [1959] J'L OFF. 1213.

⁹⁴ This section is based in part upon this writer's article: Stein, *The European Parliamentary Assembly: Techniques of Emerging "Political Control,"* published in XIII INTERNATIONAL ORGANIZATION 233-54 (1959); on the European Parliamentary Assembly generally see HEIDELBERGER, DAS EUROPÄISCHE PARLAMENT (1959).

⁹⁵ Arts. 1 and 3, Convention Relating to Certain Institutions Common to the European Communities. Both the E.E.C. and Euratom treaties speak of "the Assembly," but the Assembly assumed the name "European Parliamentary Assembly" in its first session.

for the E.E.C. and Euratom. This would have meant a fourth Assembly in Western Europe, to be added to the Common Assembly of the Coal-Steel Community, the Consultative Assembly of the Council of Europe and the Assembly of the Western European Union. The strong and coordinated opposition on the part of the three Assemblies then in existence was an important factor in creating the single European Assembly.⁹⁶

The Assembly has been called the most "supranational" of the Community institutions.⁹⁷ Composed of "representatives of the peoples"⁹⁸ independent of national governments and independent of the other institutions, the Assembly has exclusive control over matters of its own organization⁹⁹ and votes in most instances by simple majority.¹⁰⁰ Yet it is in no sense a legislature and its powers are limited.

The 142 representatives are members of the national parliaments of the six Member States and are selected by them.¹⁰¹ The assembly hall in Strasbourg, borrowed from the Council of Europe Assembly, has the semi-circular design typical of national parliaments and for the first time in the history of international assemblies, the representatives are seated not according to nationality but according to political affiliation.¹⁰²

Three political "groups" currently exist in the Assembly. These are, from left to right, the Socialists, the Christian Democrats and the Liberals with affiliates. Just as the United States Constitution contains no reference to political parties, so the three treaties setting up the Communities make no mention of political groups. Nevertheless, political groups are as much the mainspring of political action in the Assembly as are political parties in the U.S. Congress. Political groups are regulated by the Rules of Procedure of

⁹⁶ ROBERTSON, *EUROPEAN INSTITUTIONS* 167 (1959); France, CONSEIL DE LA RÉPUBLIQUE, SESSION ORDINAIRE DE 1956-1957, ANNEXE AU PROCÈS-VERBAL DE LA 1^{re} SÉANCE DU 12 JUILLET 1957, No. 873, *Rapport fait au nom de la Commission des Affaires étrangères sur le projet de loi . . . autorisant le Président de la République à ratifier: 1^o le Traité instituant la Communauté économique européenne . . . par MM. Carcassonne et Biatarana, sénateurs*, at 7239. On European Assemblies see LINDSAY, *EUROPEAN ASSEMBLIES—THE EXPERIMENTAL PERIOD 1949-1959* (1960); LINDSAY, *TOWARDS A EUROPEAN PARLIAMENT* (1958).

⁹⁷ Héraud, *Observations sur la nature juridique de la Communauté économique européenne*, 62 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 26 at 45 (1958).

⁹⁸ Art. 137.

⁹⁹ Arts. 140, 142.

¹⁰⁰ Arts. 141.

¹⁰¹ E.C.S.C. Treaty art. 21, E.E.C. Treaty art. 138(1), Euratom Treaty art. 108(1).

¹⁰² E.E.C. COMMISSION, *FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY* 19 (1958).

the Assembly,¹⁰³ which require a minimum membership of 17 for the formation of a group,¹⁰⁴ since both political and financial considerations make it desirable to avoid proliferation. There was also some concern that groups under the guise of political affinity might serve as cover for national rather than Community-wide blocs.¹⁰⁵

The treaties do not expressly prohibit the representatives from receiving instructions from their parliaments, but such instructions would obviously impair the Assembly's role as a representative of Community interests. The practice of the Coal-Steel Common Assembly had already established the independence of representatives from their parliaments,¹⁰⁶ and in order to encourage it, the Common Assembly made arrangements for funds to provide the political groups with independent secretariats.¹⁰⁷ When the Assembly convenes in Strasbourg, one therefore finds the secretariats of the three political groups,¹⁰⁸ as well as offices of the national contingents. While the political groups meet frequently under their respective presidents, the national contingents meet only rarely, and it has been said that in the past the French contingent, for instance, met only to note that it was divided. The differences within the national contingents have moreover led to spirited exchanges on the floor.¹⁰⁹

The key to the composition of the Assembly is nationality: the Big Three (France, Germany, and Italy) hold 36 seats each, Belgium and the Netherlands 14 each, and Luxembourg six.¹¹⁰ This

¹⁰³ Rules of Procedure, art. 34(5), [1958] J'L OFF. 217.

¹⁰⁴ There are seventeen members in the smaller of the thirteen standing committees. Resolution of March 20, 1958, [1958] J'L OFF. 4.

¹⁰⁵ DOC. NO. 17 ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE (JUNE, 1958), *Rapport fait au nom de la Commission du Règlement, des questions juridiques, des pétitions et des immunités sur le Règlement de L'Assemblée Parlementaire Européenne par A. van Kautenberg, Rapporteur*, para. 11 at 12; cf. also Parl. Debates (No. 7, June 1958) (mimeo.) 5-6.

¹⁰⁶ C.E.C.A., L'ASSEMBLÉE PARLEMENTAIRE DANS L'EUROPE DES SIX (P. Wigny, rapporteur) 24 (1958) [hereinafter cited as Wigny Report].

¹⁰⁷ Decision of June 16, 1953, *id.* at 25.

¹⁰⁸ HAAS, THE UNITING OF EUROPE 411 (1958).

¹⁰⁹ See, for instance, the debate of two German parliamentarians, Mr. Deist (Christian Democrat) and Mr. Burgbacher (Socialist), on the German coal-oil cartel. Parl. Debates (No. 2, Jan. 9, 1959) 38 at 44 and 48.

¹¹⁰ E.C.S.C. Treaty art. 21, as modified by art. 2(2) of the Convention Relating to Certain Institutions Common to the European Communities; E.E.C. Treaty art. 138(2); Euratom Treaty art. 108(2).

The representation of the Big Three in the new Assembly was doubled from what it was in the Common Assembly while the representation of the Benelux countries was increased by 40 to 50 per cent. The object was to equal the number of representatives plus substitutes of each of the member countries in the Consultative Assembly of the Council of Europe in order to permit the appointment of one "set" of European parliamentarians. Belgium, CHAMBRE DES REPRÉSENTANTS, *Rapport fait au nom de la Commission Spéciale*, 727 (1956-1957), No. 2, at 23-25; CATALANO, LA COMUNITÀ ECONO-

distribution of seats resulted in a larger representation of the Benelux countries than is justified by their population, but the Big Three agreed to it in order to permit the smaller countries to send politically diversified delegations. However, it was pointed out in the German ratification debates that the distribution of seats may have to be reexamined when the Assembly is elected directly by universal suffrage as eventually contemplated in the three treaties.¹¹¹

In the June 1959 session there were 69 Christian Democrats, 32 Socialists, and 40 Liberals and affiliates.¹¹² The Liberals have since increased substantially in number, principally as a result of the shift in the composition of the French National Assembly resulting from the De Gaulle landslide in the 1958 elections.

The national contingents are composed of members of both chambers of the national parliaments, with the exception of that from Luxembourg, which has a unicameral system, and that of Germany. The German upper chamber (*Bundesrat*), with the support of the government, claimed the right to participate in the German contingent, but the lower chamber (*Bundestag*) proceeded to fill the entire German contingent from its own membership on the ground that the *Bundesrat* is an appointed and not an elected body.¹¹³

The procedure for designating the national contingents varies from parliament to parliament. As a rule, the political parties within the parliament divide the total number of seats among themselves and select their own candidates; this selection is then formally ratified by the parliament. The national parliaments have excluded the Communists (and the Poujadists) from their Strasbourg contingents.¹¹⁴

In contrast to the national parliaments, the Assembly has no true

MICA EUROPEA E L'EURATOM 20 (1957); von Stempel, *Die Institutionen der Europäischen Wirtschaftsgemeinschaft*, I EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT 167 at 168 (1958) No. 9.

¹¹¹ Germany, DEUTSCHER BUNDESTAG, 2 WAHLPERIODE 1953, DRUCKSACHE 3440 ANLAGE C, *Erläuterungen zu den Verträgen zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft*, 142 (1957). It is reported that the French delegation took the same position during the negotiations for the Rome Treaties.

¹¹² [1959] J'L OFF. 791-93.

¹¹³ Germany, BUNDES RAT, *Niederschrift über die Sitzung des Sonderausschusses "Gemeinsamer Markt und Euratom" vom 24 April, 1957*, 65-68; BUNDES RAT, DRUCKSACHE NR. 146/57, *Anlage zu dem Schreiben des Präsidenten des Bundesrates an den Bundeskanzler vom 3 Mai, 1957*; BUNDES RAT, No. 181 SITZUNGSBERICHT 744 (July 19, 1957); Gesetz zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft, [1957] Bundesgesetzblatt II, 753.

¹¹⁴ Reuter, *Les Institutions de la Communauté à l'épreuve*, 17 DROIT SOCIAL 518, 522 (1954).

"administration" and "opposition" parties. The Assembly is not "organized" by any one of the three groups, but the principal offices (President and eight Vice-Presidents) and the composition of the thirteen standing committees reflect an effort to assure fair national as well as political representation. In this respect the Assembly has characteristics both of an international assembly and of a national parliament.

In the Common Assembly the Christian Democrats were said to have been forced into the position of the "administration" party, particularly because of their opposition to Socialist attacks against the High Authority of the Coal-Steel Community. The Liberal group was composed of a variety of political parties with varying objectives, but they joined with the Christian Democrats whenever the latter took a position favoring free enterprise. When the Christian Democrats were divided on High Authority policy, as was frequently the case, the Liberals tended to use their influence to block action.¹¹⁵ While it may be too early to draw any definite conclusions concerning the European Assembly, a similar pattern apparently is emerging in it. The Socialists, certainly the most cohesive group, would seem to be playing an even more "activist" role than they did in the Common Assembly, pressing for Community planning, action and direct intervention in a variety of fields.

B. INTERNATIONAL ASSEMBLY OR PARLIAMENT?

What are "the powers of deliberation and of control" ¹¹⁶ which are entrusted to the Assembly by the E.E.C. Treaty?

The Commission is obligated to submit to the Assembly an annual general report.¹¹⁷ The Assembly and the individual representatives may address questions to the Commission, which is required to answer orally or in writing.¹¹⁸ The Assembly may force the resignation of the Commission at any time by a motion of censure based on any of the Commission's activities and adopted by two-thirds of the votes cast representing a majority of all representatives.¹¹⁹ In instances specified by the Treaty, the Assembly *must* be consulted by the Council: these include important matters of Community policy,

¹¹⁵ HAAS, *op. cit. supra* note 108, at 436.

¹¹⁶ Art. 137. The German text speaks of "Beratungs-und Kontroll-befugnisse," the French of "pouvoirs de délibération et de contrôle."

¹¹⁷ Arts. 143, 156. Cf. E.E.C. COMMISSION, FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY (1958); and E.E.C. COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY (1959).

¹¹⁸ Art. 140.

¹¹⁹ Art. 144. Cf. E.C.S.C. Treaty art. 24.

some of the measures affecting national legislation,¹²⁰ "extension" of the powers of the institutions,¹²¹ the calling of conferences to amend the Treaty¹²² (but not the amendments themselves) and the conclusion of agreements of association with other entities (but not the decision to admit a new member to the Community).¹²³ The Assembly must also be consulted on the budget and has the right to propose modifications.¹²⁴ The Assembly "consultations" are not binding on the Council.

In terms of its power the Assembly resembles in some respects an international organization assembly, and in other respects a national parliament.¹²⁵ Like the United Nations General Assembly, it discusses, obtains facts, and recommends. Its powers over the budget are inferior to those of the United Nations Assembly which determines the budget of the Organization. Like a national parliament the European Assembly exercises a measure of control over the "executive" organ and may force its resignation. Unlike a parliament, it has no power to legislate and thus to impose its policy, nor does it possess "the power of the purse" in the parliamentary sense.

Both the Common Assembly and its successor, the European Assembly, have consistently stressed their parliamentary characteristics. One report states, "if legitimate doubt arises with respect to a question concerning the status of this Assembly one must seek the solution in the traditional parliamentary law and not in the unfounded comparisons with commissions, assemblies or organizations of an international character."¹²⁶

Since the Council and not the Commission is the principal decision-making body, it could be argued that the Assembly's power of

¹²⁰ *E.g.*, arts. 43 (2), 75 (1), 87 (1), 100.

¹²¹ Art. 235.

¹²² Art. 236.

¹²³ Art. 238; *but see* art. 237. Although the decision to admit a new Member State is not subject to consultation with the Assembly it cannot be implemented without Treaty amendment and the Assembly plays a role in the amending procedure.

¹²⁴ Art. 203 (3).

For other instances in which the Assembly must be consulted see Soulé, *Comparaison entre les dispositions institutionnelles du Traité C.E.C.A. et du Traité C.E.E.*, 1958 REVUE DU MARCHÉ COMMUN 95, 102 (No. 2); *La Communauté Economique Européenne: Aspects Institutionnels*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, annex 10, at 513 (1957). The obligatory consultation is an innovation not known in the E.C.S.C. Treaty.

¹²⁵ DOC. NO. 2. ASSEMBLÉE COMMUNE (November 1955), *Rapport sur l'organisation à donner à l'Assemblée Commune pour rendre plus efficace son action dans le cadre des dispositions actuelles du Traité, présenté par M. Poher, Rapporteur*, para. 13 at 14-15.

¹²⁶ *Avis sur la participation des observateurs du Conseil de l'Europe à l'Assemblée Commune et sur la conclusion d'un accord à cet effet*, as cited in the Poher Report, *id.* at 14, n. 3, this author's translation.

control under the E.E.C. Treaty is narrower than under the Coal-Steel Community Treaty, according to which the High Authority, the central body, is subject to Assembly motions of censure. Yet, as suggested, the practical difference between the schemes of the two Treaties may be less significant than would appear from the texts. Moreover, even though the Council makes final decisions, the Commission plays an important part as a result of its power of initiative. Thus the Assembly's control over the Commission and its right to be consulted by the Council have given it a measure of authority, and this it has sought to develop with vigor and ingenuity. In doing so it has drawn upon "general principles" governing national parliamentary procedures and has assumed what it considered implied powers.

C. THE WORKING OF THE ASSEMBLY

The Assembly has sought to assure the continuity and effectiveness of its activities by greatly increasing the frequency of its meetings. In 1959 seven meetings of two to seven days duration were scheduled.¹²⁷ The schedule reflects the thorny problem of coordinating the meetings of the Assembly not only with those of the national parliaments, but also with the Consultative Assembly of the Council of Europe and of the Western European Union, in view of the joint mandates held by a number of representatives in all of these bodies.¹²⁸ A Belgian Senator predicted that a parliamentarian will have to spend about 100 days annually on his "European mandates" and at the risk of neglecting his national parliamentary activities.¹²⁹ The many vacant seats commonly seen in the Assembly are due, at least in part, to conflicting sessions of national parliaments.

The Assembly has established a substantial number of standing committees. Most of the Assembly's work and most of the compromising is carried out by these committees, which meet throughout the year, ordinarily in private sessions, to examine sections of the general reports of the "executive." On the basis of this examination the committees prepare their own reports and draft resolutions

¹²⁷ 284 EUROPE, item 1381 (December 5, 1958).

¹²⁸ See Speech by Representative Santero, No. 8 ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE, COMPTE RENDU STÉNOGRAPHIQUE PROVISoire 18 (June 1958).

¹²⁹ Speech by Senator Motz, Belgium, SÉNAT, ANNALES PARLEMENTAIRES, SÉANCE DU MERCREDI, 27 NOVEMBRE, 1957, at 137. The problem of co-ordinating the work in the European Assemblies and the national parliaments was also mentioned by LINDSAY, TOWARDS A EUROPEAN PARLIAMENT 31, 32, 81 (1958), with respect to the Council of Europe.

which then form the basis for floor debate. A large majority of committee reports has received unanimous approval by both the committee and the Assembly.¹³⁰ This contributes to the impression that no real "opposition" exists in the Assembly. The number of amendments to resolutions offered from the floor during plenary debates is, however, increasing. In debate the *rapporteur* of the committee introduces and defends the report, and Assembly representatives frequently speak for an entire political group.

In their private meetings the committees hear members of the Commission and of the other two "executives", as well as their expert staffs, and consider whatever documentation is submitted by them. Independent experts and missions of study and inquiry are also employed.¹³¹ One such mission of representatives was dispatched to overseas areas of the Community.¹³² In addition, the social, transportation, and agriculture committees have heard private interest groups representing labor, management and the like. In contrast to committees of the United States Congress, however, the Assembly committees (and for that matter the Assembly itself) do not have the power to subpoena witnesses. Moreover, because most committee meetings are private, they have not performed the public-opinion-forming function which is such a striking characteristic of American congressional committee hearings. In some areas of Community activity, such as the application of antitrust provisions or in dealing with social affairs, public hearings of formal testimony by the committees might well be advantageous, even though foreign to European parliamentary practice.

Voting on the various draft resolutions often takes place in the final plenary meetings after a number of representatives have departed from Strasbourg. As a rule the representatives vote by a show of hands.^{132a}

D. THE ASSEMBLY'S "POLITICAL CONTROL" OVER THE COMMISSION

The members of the Commission (but not staff members)¹³³ have the right under the Treaty to attend "all meetings" of the Assembly and "to be heard,"¹³⁴ although the Assembly has made

¹³⁰ HAAS, *THE UNITING OF EUROPE* 410-12 (1958).

¹³¹ Rules of Procedure, arts. 37(4), 38(2), [1958] J'L OFF. 229.

¹³² Resolution of April 15, 1959, [1959] J'L OFF. 554-55; also [1959] J'L OFF. 674, 797.

^{132a} Rules of Procedure, art. 33(1), [1958] J'L OFF. 227.

¹³³ *Id.*, art. 29(4), at 226.

¹³⁴ E.E.C. Treaty art. 140.

attendance by Commission members at committee meetings subject to invitation.¹³⁵ Correspondingly, the Commission members have the obligation under the Treaty to reply orally or in writing to questions put to them either by the Assembly or by individual representatives.¹³⁶ Commission members most directly concerned with agenda items have invariably been in attendance at Strasbourg.

As national parliaments do, the Assembly has sought to act as a "watchdog" over the "executive," particularly in connection with the Commission's budgetary functions. The Assembly has done this by means of parliamentary questions, some of them obviously motivated by party politics. The questioning has related to such subjects as the size of the severance payments and pensions of former members of the "executive"¹³⁷ and the involvement of one of the Commission members in a national court proceeding¹³⁸ and the activities of one of the judges of the Community Court.¹³⁹

More important, however, have been the efforts on the part of the Assembly to influence, and help develop, the policies of the "executive." The technical nature of the problems in the coal and steel industry initially proved to be an obstacle to a similar effort by the Common Assembly. That Assembly urged the High Authority to formulate broad and long-range policies as distinguished from its day-to-day operations and to state them distinctly in its reports in a long-range context lest the trees obscure the forest. When the policy issues were presented, the political groups in the Assembly were forced to develop policy positions, no easy matter in the absence of experience and specialized knowledge.¹⁴⁰ By now a number of representatives have developed considerable expertise and, as a result, some Assembly committees are capable of producing policy reports whose impact promises to exceed that which the formal powers of the Assembly would give them. This is particularly obvious at present in the fields of agriculture and transportation.

The debates and resolutions reflect the Assembly's desire to encourage the Commission in—and sometimes to prod it into—-independent and vigorous exercise of its functions. The Commission has been urged to reject restrictive and formalistic interpretations of the Treaty in dealing with national measures designed to circumvent

¹³⁵ Rules of Procedure, *op. cit. supra* note 131, art. 38(2).

¹³⁶ E.E.C. Treaty art. 140.

¹³⁷ [1959] J'L OFF. 682, 687.

¹³⁸ [1959] J'L OFF. 686-88.

¹³⁹ [1959] J'L OFF. 849-59.

¹⁴⁰ See Speech by High Authority President Monnet, DÉBATS DE L'ASSEMBLÉE COMMUNE (No. 1, September 11, 1952) 18; Wigny Report, *supra* note 106, at 12-13.

reductions in customs duties¹⁴¹ and to propose the required directive for the removal of charges equivalent to customs duties.¹⁴² The Socialists have pressed strongly for action in the antitrust field; one Socialist has blamed the "executive" inaction for the emergence of the new (and short-lived) German oil-coal cartel.¹⁴³ The Assembly as a whole has gone on record in support of the Commission's position that the antitrust articles are applicable even before promulgation of the Council regulations required by the Treaty. It called for prompt and practical solutions which would allow present application of these articles.¹⁴⁴ The Commission has also been pressed by Assembly resolutions to take an active role in social affairs, in the coordination of economic policies,¹⁴⁵ in the development of a coordinated policy embracing the different sources of energy (coal, nuclear energy, oil),¹⁴⁶ and in organizing investments.¹⁴⁷ In the investment field differences in the Assembly are apparent in the points of view of those who see the European Investment Bank as a main investment source and "liberals" who view it as a source of capital supplementary to private investment.¹⁴⁸ Some representatives have even cautioned the Commission not to rely excessively on national governments,¹⁴⁹ also warning that the conferences with national experts through which the Commission has become accustomed to seek prior agreement of national governments to its proposals have no standing under the Treaty.¹⁵⁰ The Commission has been promised support even if it should take action in areas not clearly within its jurisdiction.¹⁵¹ Suggestions have been made in Assembly reports

¹⁴¹ Representative Illerhaus, presenting the report of the Internal Market Committee, Parl. Debates (No. 1, Jan. 8, 1959) 7; Resolution of January 15, 1959, [1959] J'L OFF., para. 3, at 165.

¹⁴² Representative Kreyssig, speaking on behalf of the Socialist group, Parl. Debates (No. 1, Jan. 8, 1959) 10.

¹⁴³ Speech by Representative Conrad, *id.* (No. 2, Jan. 9, 1959) 38 at 39-41; Speech by Representative Deist, *id.* (No. 2, Jan. 9, 1959) 48 at 56-58.

¹⁴⁴ Resolution of January 15, 1959, [1959] J'L OFF., para. 5; *cf.* Speech by Representative Deringer, Parl. Debates (No. 1, Jan. 8, 1959) 13-14.

¹⁴⁵ Resolution of April 15, 1959, [1959] J'L OFF. 557; Resolution of January 15, 1959, [1959] *id.*, para. 15, at 167; *id.*, part IV, para 12, at 168; *id.*, part I, para. 3, at 167.

¹⁴⁶ Resolution of January 15, 1959, [1959] J'L OFF., para. 3, at 169-70.

¹⁴⁷ See Speech by E.E.C. Vice-President Malvestiti, Parl. Debates (No. 1, Jan. 8, 1959) 16-19; speech by Representative Deist, *supra* note 143, at 57; Resolution of January 15, 1959, [1959] J'L OFF., paras. 5-7, at 166.

¹⁴⁸ See speeches by Representative Battaglia, Parl. Debates (No. 5A, Jan. 13, 1959) 185 at 189; by Representative Lindenberg, *id.* (No. 5B, Jan. 13, 1959) 201-03; and by Representative Nederhorst, *id.*, 193-201.

¹⁴⁹ Representative Kapteyn as quoted by E.E.C. Commissioner Schaus, Parl. Debates (No. 5A, Jan. 13, 1959) 165 at 168.

¹⁵⁰ Speech by Representative Deringer, *supra* note 144, at 13.

¹⁵¹ Speech by Representative Kreyssig, *supra* note 142, at 12.

and statements that Community regulation of transportation, now limited to road, railroad and inland waterway transportation, should be extended to include pipe lines and civil aviation, that the Monetary Committee and the Council be given additional powers similar to those of the United States Federal Reserve System.¹⁵² Moreover, the Commission has been urged to consult with private interested parties¹⁵³ as well as with governments. Only relatively rarely (for example, in the debates on the budget and on the Free Trade Area negotiations) have complaints been heard on the floor that the Commission has not provided sufficient information to the Assembly.¹⁵⁴

In statements before the Assembly, Commission members have expressed appreciation for the Assembly's support and have sought to explain and defend the steps taken by the Commission, giving assurances of further study of any Assembly suggestions. It is especially interesting that members of the Commission have lectured the Assembly on the Commission's lack of legal power under the Treaty to take action suggested in the Assembly,¹⁵⁵ asserting that increases in powers of the Commission in a given field¹⁵⁶ may not be necessary or desirable, that, since the power of decision currently lies with national governments in some fields such as transportation, negotiation rather than independent Commission initiative is essential¹⁵⁷ and that the establishment of "joint services" for all three Communities would be illegal in the transportation field¹⁵⁸ and unwise in the energy field.¹⁵⁹

E. THE ASSEMBLY AND THE COUNCIL OF MINISTERS: AN UNEVEN POWER CONTEST

The legal basis for the development of relations between the Assembly and the Council is limited.¹⁶⁰ The first problem for the

¹⁵² Speech by Representative Troisi, Parl. Debates (No. 5A, Jan. 13, 1959) 189 at 191.

¹⁵³ Reference to statements by Representative Deringer in speech by E.E.C. Commissioner von der Groeben, Parl. Debates (No. 1, Jan. 8, 1959) 19 at 21.

¹⁵⁴ Speech by Representative Leverkuehn with reference to the negotiations for a European Economic Association, Parl. Debates (No. 6, Jan. 14, 1959) 238; para. 6 of the Resolution of April 11, 1959, [1959] J'L OFF. 548, 550, with reference to the budget.

¹⁵⁵ E.E.C. Commissioner Schaus with respect to control of pipelines, *supra* note 149, at 187; E.E.C. Vice-President Malvestiti with respect to investments, *supra* note 147; E.E.C. Vice-President Marjolin with respect to fuel policy, Parl. Debates (No. 2, Jan. 9, 1959) 67 at 69, 70.

¹⁵⁶ E.E.C. Vice-President Marjolin, *supra* note 155.

¹⁵⁷ E.E.C. Commissioner Schaus, *supra* note 155.

¹⁵⁸ *Id.* at 170.

¹⁵⁹ E.E.C. Vice-President Marjolin, *supra* note 155, at 68.

¹⁶⁰ Poher Report, *supra* note 125, par. 13 at 14-15.

Assembly was one of communication with the Council. The Treaty provides that the Council "shall be heard" by the Assembly "under the conditions which the Council shall lay down in its rules of procedure."¹⁶¹ Obviously, it was important to have the Ministers attend. Nevertheless, the Assembly took the position that the Ministers, like Commission members, may attend the meetings of its *committees* upon invitation only. The Ministers objected, but acquiesced when the Assembly stood firm.¹⁶² Nevertheless, the Ministers have made it clear that for practical reasons they will not attend meetings of Assembly committees except in unusual circumstances. At least one Minister now attends part of each plenary session of the Assembly but the absence of all Ministers during important phases of the debate continues to be the subject of strong criticism from the floor.¹⁶³

In its rules of procedure, the Assembly asserted its right to address resolutions to the Councils and passed some such resolutions, which have received varying responses from the Ministers.¹⁶⁴ The three treaties contain no provision relative to addressing questions to the Councils. The Committee on Procedure of the Common Assembly ruled in 1955 that a written question submitted by a representative could not be transmitted to the Council.¹⁶⁵ However, the argument was advanced in the committee drafting the Rules of Procedure for the new Assembly that, since the decision-making process under the new treaties had shifted to the Councils, the Assembly must have the formal power, first, to address questions to the Councils, and second, by way of "a sanction," to adopt a motion of disapproval of the Councils' policies—an idea taken from the Charter of the Western European Union.¹⁶⁶ The argument in favor

¹⁶¹ E.E.C. Treaty, art. 140.

Does a member of the Council have the right to be heard "at any time?" The German version of art. 29(4) of the Rules of Procedure includes the word "jederzeit" while the French version only states "sur leur demande." Cf. Parl. Debates (No. 7, June 1958) (mimeo.) 42-45. The additional German word being superfluous, members of the Council may speak "upon demand," which is tantamount to "at any time." van Kauenbergh, *id.* at 42.

¹⁶² COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, RÈGLEMENT DE L'ASSEMBLÉE COMMUNE (edition of March 1956), art. 38(2); Rules of Procedure, art. 38(2), [1958] J'L OFF. 229; LYON, L'ASSEMBLÉE COMMUNE DE LA C.E.C.A. 51 (1957).

¹⁶³ Speech by Representative Duveiusart, Parl. Debates (No. 2, Jan. 9, 1959) 58-59; Resolution of April 11, 1959, [1959] J'L OFF. 548.

¹⁶⁴ Rules of Procedure, art. 25, [1958] J'L OFF. 225. There was a similar provision in art. 26 of the Rules of Procedure of the Common Assembly, *op. cit. supra* note 162. Cf. LYON, *op. cit. supra* note 162, at 52.

¹⁶⁵ Decision of May 12, 1955, Kauenbergh Report, *supra* note 105, para. 23, at 28-29. In the Common Assembly, resolutions addressed to the Council in a sense provided a substitute procedure.

¹⁶⁶ Kauenbergh Report, *supra* note 105, para. 22, at 27-28; Speech by Representative van Kauenbergh, *supra* note 161, at 12.

of the power to question the Council prevailed, but the committee decided not to pursue the suggestion concerning the motion of disapproval "at the moment."¹⁶⁷ Accordingly, the Rules were adjusted to create the power of addressing oral or written questions to all three Councils¹⁶⁸ not only for the Assembly itself, but also for the individual representatives. The Assembly agreed, however, that the Councils have no legal obligation to respond.¹⁶⁹ Nevertheless, an interesting provision was included in the Rules to the effect that, if the Council should fail to respond within two months to a question addressed to it, the question will be published in the Official Journal of the Communities.¹⁷⁰ In fact, the Councils have answered in writing questions directed to them by representatives although some answers were quite perfunctory and not at all enlightening. The questions and the answers have been published in the Journal.¹⁷¹ More recently, the Ministers have taken the position—although not quite consistently—that they shall reply only to questions within the jurisdiction of the Council but not to questions which, although pertaining to the Community, under the Treaty fall within the jurisdiction of the national governments. They have also indicated unwillingness to reply where the Council has not yet made a decision on the matter raised in the question. These attitudes have been criticized by the Assembly.^{171a}

The Treaty requirement that the Assembly be consulted before certain measures are taken is the most important *legal* link between the Council and the Assembly. While the Treaty is not explicit, the consultation formula seems to indicate that the Council, having received a proposal from the Commission, will transmit it to the Assembly.¹⁷² The Commission will be able to explain and defend the proposal in the Assembly and, possibly, to modify it on the basis of the Assembly debate before the Council makes a final decision.¹⁷³ The Assembly committee which prepared the Rules of Procedure noted that parliamentary concepts would be applied more effectively

¹⁶⁷ *Ibid.*

¹⁶⁸ Rules of Procedure, arts. 25, 41, [1958] J'L OFF. 225, 230-31.

¹⁶⁹ "We are convinced," said Mr. Deringer, speaking for the Christian Democratic group, "that independently of the letter of the treaties, the Council will answer these questions." Parl. Debates (No. 7, June 1958) (mimeo.) 20, (this author's translation).

¹⁷⁰ Rules of Procedure, art. 41(4), [1958] J'L OFF. 231.

¹⁷¹ *Cf.* [1958] J'L OFF. 629; [1959] J'L OFF. 180-82, 258-59, 509-10, 849-53.

^{171a} DOC. NO. 71 ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE (NOV., 1959), *Rapport fait au nom de la commission des affaires politiques et des questions institutionnelles sur les relations entre l'Assemblée parlementaire européenne et les Conseils de ministres des Communautés Européennes par M. Charles Janssens, rapporteur.*

¹⁷² *E.g.*, art. 87(1): "... the Council . . . on a proposal by the Commission and after the Assembly has been consulted . . ."

¹⁷³ *Cf.* art. 149, para. 2.

if the *Commissions themselves* consulted the Assembly *before* they made their proposals to the Councils. This would enable the Assembly to express its view at the outset of the decision-making process, although it could obviously not deprive the Councils of their independent right to consult the Assembly. A joint Assembly-Commission position on any question, agreed to before the Council came into the picture, would have "unquestionable weight" in the eyes of the Council.¹⁷⁴ The intent of the Treaty formula may have been, however, to preclude precisely this kind of prior understanding between the Commission and the Assembly, which could create political pressures on the Council, in the hope of encouraging instead cooperation between the Council and the Commission.¹⁷⁵ The final text of the Rules of Procedure does not preclude direct Assembly-Commission consultations.¹⁷⁶ In fact the Assembly committee on agriculture, in examining the Commission's annual report and preparing its own recommendations, has formulated common policy suggestions *in advance* of the Commission's proposal to the Council.¹⁷⁷ Although the Commission apparently has cooperated in this effort and participated in the Assembly debate thereon, it has made it clear that it feels free to frame its own proposal to the Council independently of any prior position taken by the Assembly.¹⁷⁸ An Assembly committee suggested recently that the procedure followed in connection with the Euratom health rules and the rules for the European Social Fund has now established a pattern of consultation along the following lines: the Commission informs the Assembly committee concerned of any proposals it intends to make to the Ministers; the committee, "in the normal exercise of parliamentary control," discusses the proposals and offers suggestions; when the Commission submits the proposals to the Councils the latter consult the Assembly.^{178a}

The Assembly has not been happy about its relationship with the Councils. As a demonstration of this dissatisfaction it proposed that a substantial amount be included in the first budget for the purpose of developing this relationship.¹⁷⁹ The Assembly's resolution on

¹⁷⁴ Kauenbergh Report, *supra* note 105, para. 22 at 24.

¹⁷⁵ *La Communauté Économique Européenne: Aspects Institutionnels*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 491, 499 (1957).

¹⁷⁶ Rules of Procedure, art. 23, [1958] J'L OFF. 224.

¹⁷⁷ 413 EUROPE, item 2499 (May 20, 1959).

¹⁷⁸ See statements made by Vice-President Mansholt as reported 444 EUROPE, item 2697 (June 25, 1959).

^{178a} Rapport Janssens, note 171a *supra*.

¹⁷⁹ Resolution of April 11, 1959, para. 5, [1959] J'L OFF. 548, 549. The Council did not accept this proposed modification. See Budget of the European Economic Community, sec. II, ch. II, para. 243, art. 24, [1959] J'L OFF. 885, 907.

the budget of December 1958 contained 27 paragraphs bristling with criticisms of the Councils and was adopted despite the efforts on the floor by the President of the Council of Ministers to offer explanations and to sooth ruffled feathers. The basic complaint was the failure of the Councils to supply timely information on which the Assembly could form intelligent opinions concerning various budgetary questions.

Other paragraphs of the resolution reflect concern that the Committee of Permanent Representatives, mentioned earlier, may usurp the powers of the Councils of Ministers, and also gradually assume the preparatory functions of the Commission, thus destroying a crucial institutional feature of the Treaty.¹⁸⁰ Primarily because of this desire to preserve the constitutional balance, the Assembly called for reduction of the size of the Secretariat of the Councils and protested the employment by the Councils of another special committee of national experts (not envisaged in the Treaty) for the review of the budget.¹⁸¹ For the same reason the Assembly formally warned against an undue increase in the staffs of the Permanent Representatives.¹⁸² Still other criticisms were directed at delays in the transmission of the proposed budgets to the Assembly.¹⁸³ Indications are that at least some of the difficulties which arose in connection with the first budget will be avoided in the future.^{183a}

During the recent economic crisis caused by the surplus of coal in the Community, the High Authority appealed to the Assembly after the Council rejected its proposed solutions. The Assembly adopted a resolution, by a vote of 44 to 12, supporting the Authority's proposals and placing principal responsibility for the failure in evolving a Community solution on the Council.¹⁸⁴ German liberals and French Gaullists formed the nucleus of the opposition. Less than one-half of the representatives participated in the vote on a decision which placed the Assembly in open conflict with the Council on an important problem.

The Assembly's power under the two Rome Treaties to file a complaint in the Community Court against the Councils (or against the Commissions) whenever their failure to act constitutes a violation of the Treaty¹⁸⁵ is, perhaps, of theoretical interest only. In any

¹⁸⁰ Stein, *supra* note 94, at 250.

¹⁸¹ *Id.* at 249; also [1959] J'L OFF. 550.

¹⁸² Resolution of December 17, 1958, para. 17, [1959] J'L OFF. 16.

¹⁸³ Resolution of December 17, 1958, [1959] J'L OFF. 15.

^{183a} But see Assembly Resolution in [1959] J'L OFF. 1257.

¹⁸⁴ Resolution of April 16, 1959, [1959] J'L OFF. 560.

¹⁸⁵ E.E.C. Treaty art. 175; Euratom Treaty art. 148.

case it is impossible at this juncture to estimate its practical value. In cases brought before it under the Coal-Steel Treaty the Court has demonstrated no tendency to assert vigorous policy control over the Community of the kind encountered in judgments of the Supreme Court of the United States.

F. THE ASSEMBLY AND THE MEMBER GOVERNMENTS

The United States Congress has the power in the areas defined by the Constitution to determine policies binding upon the States of the Union. The decision-making institutions of the Communities may also determine policies, within the areas defined by the treaties, that have binding effect upon the Member States, but the Assembly's role in the decision-making process is extremely limited, and its powers over Member Governments are practically non-existent.

Despite the absence of any grant of authority by the treaties the representatives have not hesitated to discuss individual national policies which in their view could impair the functioning of the Communities. The Common Assembly had already asserted the right "to draw the attention of Member States by appropriate resolutions and after debate" to such harmful policies.¹⁸⁶ The Common Assembly had also claimed the right for itself, its committees, and its Secretariat to receive pertinent information from national administrations.

The six governments reserved to themselves under the treaties the important prerogative of appointing the "executive," leaving no role to the Assembly comparable to that played by the U.S. Senate in confirming executive appointments as required by the U.S. Constitution. The Assembly has, however, sought to influence the appointments by means of resolutions and informal contacts of its President, but concrete recognition of any Assembly role in this important area has not been forthcoming.¹⁸⁷

The principal complaint of the Assembly against the governments has related to their failure to select a seat for the Community's institutions as required in the Treaties.¹⁸⁸ The institutions are presently dispersed in Luxembourg, Brussels and Strasbourg.¹⁸⁹ The

¹⁸⁶ Doc. No. 5, ASSEMBLÉE COMMUNE, *Rapport fait au nom de la Commission des Affaires politiques et des relations extérieures de la Communauté sur les pouvoirs de contrôle de l'Assemblée Commune et leur exercice*, 17 para. 19 (Rapport Teitgen) (November 1954). This author's translation.

¹⁸⁷ Stein, *supra* note 94, at 250-51.

¹⁸⁸ E.E.C. Treaty art. 216, Euratom Treaty art. 189, E.C.S.C. Treaty art. 77.

¹⁸⁹ The High Authority had been located in Luxembourg, the E.E.C. and Euratom Commissions in Brussels. The Assembly's own work is dispersed between seven

dispersal of the institutions, requiring, as it does, excessive travel and hindering communication, causes time and energy to be wasted and creates morale problems among the staff. The annual expense resulting was estimated by the Assembly at \$2 million. Perhaps an even more important consideration is the fact that concentration of the institutions in "a European district" would provide further impetus for integration. Indeed, this may be one reason why some of the governments seek to delay a final decision on the location of the "single seat."

In response to a request for an opinion, the Assembly suggested in June, 1958 that the seat should be located—in order of preference—in Brussels, Strasbourg, or Milan,¹⁹⁰ and it endorsed the idea of a "European district" similar to the District of Columbia, the seat of the U.S. Government.¹⁹¹ This suggestion and numerous subsequent appeals by the Assembly have achieved no action by the governments. Because of this lack of progress, which is partly due to the French government's insistence on delay, the Assembly has threatened to select its own seat and to construct its permanent quarters, if the governments do not respond to the entreaties of a special Assembly delegation led by President Schuman.¹⁹²

Because the treaties rely to such considerable measure on the cooperation of the Member States, Assembly resolutions frequently contain more or less urgent appeals to the governments of the Member States to take specified action either singly or jointly with Community institutions.¹⁹³

The Assembly may also attempt to influence national governments through the national parliaments to which they are responsible. This avenue would seem particularly promising in view of the fact that the Assembly is composed of national parliamentarians who could very easily raise Community problems in their respective national parliaments by introducing bills or resolutions or by utilizing the government questioning procedure with a view to obtaining desired action. To date, however, the extent of the influence of the

buildings in the three cities and the fact that it must share the Maison d'Europe in Strasbourg for its plenary sessions with the Council of Europe causes further inconvenience. The Committees of the Assembly have been meeting in Brussels, Luxembourg, Strasbourg and even in Paris, and its staff must travel from Luxembourg to Strasbourg at meeting time. Similarly, the Commissions and the High Authority and their staffs must travel to Strasbourg from Brussels or Luxembourg.

¹⁹⁰ [1958] J'L OFF. 234.

¹⁹¹ Resolution of May 14, 1959, para. 4, [1959] J'L OFF. 678.

¹⁹² *Ibid.*

¹⁹³ *E.g.*, Resolution of January 15, 1959, para. E, [1959] J'L OFF. 163; Resolution of May 14, 1959, para. 2, [1959] J'L OFF. 674-75.

Strasbourg representatives does not appear to have been significant. Debates in Strasbourg and in the national parliaments are not coordinated,¹⁹⁴ and some of the Strasbourg delegations do not even report regularly to their national parliaments.¹⁹⁵ In recent Assembly debates and resolutions, exhortations to use the available means have been voiced,¹⁹⁶ since it is clear that the Assembly and the individual parliamentarians have not even come close to exhausting the possibilities of exerting influence over the governments through this channel.

VI. THE COURT OF JUSTICE

A Court of Justice is established to "ensure observance of law and justice in the interpretation of" the Treaty.¹⁹⁷ It is a common institution for all three Communities.¹⁹⁸ It has succeeded the Court of the Coal and Steel Community which existed from 1952 to 1958 and developed a sizeable body of jurisprudence. For most practical purposes, the new Court is a continuation of the Coal-Steel Community Court to which new jurisdictional powers have been given by the E.E.C. and Euratom Treaties.¹⁹⁹

A. COMPOSITION OF THE COURT: THE JUDGES AND ADVOCATES GENERAL

The Court is composed of seven judges who must be qualified to be judges of the highest courts of their respective states or "jurists of recognized competence."²⁰⁰ They are appointed "by the governments of Member States acting in common agreement" for a six-year term and are eligible for reappointment. This arrangement has been criticized by a distinguished writer because it results in practice in the unilateral appointment by each nation of as many judges as, by agree-

¹⁹⁴ Apparently only the Netherlands Parliament has debated the Coal and Steel Community problems annually. HAAS, *THE UNITING OF EUROPE* 407 (1958).

¹⁹⁵ LYON, *L'ASSEMBLÉE COMMUNE DE LA C.E.C.A.* 55 (1957).

¹⁹⁶ For instance, the Assembly urged its members to press for a solution of the problem of the seat for the Community institutions in their national parliaments. Resolution of May 14, 1959, *op. cit. supra* note 191, para. 5; see speech by Representative Kreyszig, *Parl. Debates* (No. 1, Jan. 8, 1959) 10 at 11.

¹⁹⁷ Art. 164.

¹⁹⁸ Convention Relating to Certain Institutions Common to the European Communities, arts. 3-4.

¹⁹⁹ The new Court was formally established on October 7, 1958. [1958] *J'L OFF.* 453. Its Rules of Procedure were published in [1959] *J'L OFF.* 350. Four of the seven judges sat on the E.C.S.C. Court. For a discussion of the question as to the extent to which the new Court is likely to draw on the jurisprudence of the E.C.S.C. Court, see Chapter VII *infra*.

²⁰⁰ Art. 167.

ment, are to be its nationals. This method of appointment and the relatively short term of office compare unfavorably with those of the International Court of Justice and perhaps attest to a desire on the part of the governments to preserve a degree of influence which may not be compatible with the independent status of the Court.²⁰¹

The treaties do not specify the nationality of the judges, but the present bench is composed of a national from each of the Six, the seventh judge being the second Italian national on the Court. The judges were drawn from national law faculties, benches and bars. The Chief Justice, a Dutch national, is just over 40 years of age.

The Court is assisted by two Court Advocates General, an institution originating in the French Conseil d'Etat. As institutionalized "amici curiae" they present to the Court independent opinions on the cases before it. They must have the same qualifications and are appointed in the same manner as the judges. Advocate General Roemer of German nationality has primarily private law background in the corporate field. The French Advocate General Lagrange held a high post in the Conseil d'Etat and served as a member of the French delegation in the negotiations concerning the Coal-Steel Community Treaty. The differing experience of these two men, who also served the Coal-Steel Community Court, is reflected in their differing approaches to the problems before the Court.

The discussions of law and the conclusions based on them of the Advocates General—for example, M. Lagrange's classic comparative analysis of the meaning of "*détournement de pouvoir*" (misapplication of power) as a ground for review of administrative acts²⁰²—are of great assistance to the Court. They acquire added significance in view of the fact that the Court works as a "collegiate body": it renders judgments without any indication of authorship and publishes neither votes nor dissenting opinions. On the other hand the conclusions of the Advocates General are published and, like dissenting opinions, frequently offer alternative solutions which may be of relevance for the development of law. The Court rarely indicates the sources of law on which it relies except to mention the relevant Treaty articles and its own earlier judgments. In this respect also the Advocates' discussions, drawing on a variety of the available sources of law, fill the gap somewhat and facilitate the understanding of the judgment as well as the development of law.

²⁰¹ Reuter, *Aspects de la Communauté Economique Européenne*, 1958 REVUE DU MARCHÉ COMMUN 311 (No. 6).

²⁰² Case 3-54, Sammlung der Rechtsprechung des Gerichtshofes, Vol. I, at 157-87, (1954-1955).

Unlike a common law court, the Community Court is not bound by precedent. Yet this Court, not unlike the common law courts, and particularly those of early periods, will have to play a vital role in the development of law of the Community.

B. THE JURISDICTION OF THE COURT

The Court's jurisdiction is varied and in some respects unique, defying categorization. For the purposes of illustration and at the admitted risk of drawing loose analogies, one might say that the Court's jurisdiction is analogous to the federal jurisdiction of the United States Supreme Court, to the "administrative" jurisdiction of the French Conseil d'Etat or the German Bundesverwaltungsgericht, and is at the same time a "civil" jurisdiction, and in a sense the jurisdiction of an international tribunal.²⁰³

The Court's jurisdiction is similar to that of a federal court in regard to controversies between Member States concerning the application of the Treaty—controversies similar to those between States of the Union which the U.S. Supreme Court is asked to resolve under the Federal Constitution or statutes.²⁰⁴ The Court's jurisdiction may also be viewed as "federal" in disputes between Member States and Community institutions, between the institutions themselves, and in cases where the Court decides whether proposed international agreements to be concluded by the Community are compatible with the Treaty.²⁰⁵ Finally, one might mention in this category the jurisdiction of the Court to rule on questions arising in national judicial proceedings which concern interpretation of the Treaty and the validity and interpretation of the acts of the institutions. National courts of last resort are bound to refer these "federal" questions to the Court for binding determination. This obligation on the part of the national courts has been substantially strengthened in the Rome Treaties as compared with the Coal-Steel Treaty.²⁰⁶

The Court's jurisdiction is "*administrative*" ("public municipal")

²⁰³ Cf. INSTITUT DES RELATIONS INTERNATIONALES (I.R.I.), LA C.E.C.A. 222 (1953). Bebr, *The Development of a Community Law by the Court of the E.C.S.C.*, 42 MINN. L. REV. 845, 850 (1958).

²⁰⁴ It has been argued that the Community Court's jurisdiction in such a case is one of international law. See JERUSALEM, *DAS RECHT DER MONTANUNION* 44-47 (1954); MATHIJSEN, *LE DROIT DE LA C.E.C.A.* 74 (1958); Hay, Book Review, 8 AM. J. COMP. L. 243-244 (1959).

²⁰⁵ Art. 228(1), para. 2.

²⁰⁶ Cf. Vedel in preface to CARTOU, *LE MARCHÉ COMMUN ET LE DROIT PUBLIC III* (1959). It would seem that the "municipal public law men" in the negotiating delegations for the new treaties prevailed over the "public international law men" who did not wish to press legal integration so far.

where it affords legal redress to individuals and enterprises praying that administrative acts of the Community institutions be annulled.²⁰⁷ The right of access of private parties to the Court—their governments need not intervene—is a necessary corollary to the power of the institutions to act with direct effect upon these parties. This right marks a radical departure from the conventional international tribunal, enables the Court to exercise its powers of control over the institutions and adds to the “public municipal” characteristics of the Communities.

The “*civil*” jurisdiction (in the common law sense) of the Court extends to cases in tort against the Community and on contracts to which the Community is a party. In contract cases the jurisdiction of the Court must have been stipulated.²⁰⁸

Finally, the jurisdiction of the Court may be said to resemble that of an *international* tribunal where the Court determines controversies between the Community and a non-member state arising out of an international agreement or possibly out of a contract in which the parties stipulated such jurisdiction.²⁰⁹

National authorities in the Member States are bound to execute money judgments of the Court against individuals and enterprises.

C. THE ROLE OF THE COURT

The Coal-Steel Community Court and the new Court have already decided well over fifty cases—all arising under the Coal-Steel Community Treaty, and most of which on appeals brought by enterprises praying for annulment of acts of the High Authority. Any new move by the High Authority to exercise its power in a manner affecting enterprises has almost invariably caused a flurry of such appeals. Some of these (particularly during the first years) were filed with a primary view to strengthening the hand of the enterprises involved in their negotiations with the Authority and were subsequently withdrawn. In January, 1960, sixty-four actions were pending before the Court, 60 under the Coal-Steel Community Treaty and four under the F.E.C. Treaty, which compares favorably with the work load of the International Court of Justice and of the U.S. Supreme Court in the first years of its existence.

²⁰⁷ Cf. I.R.I., *op. cit. supra* note 203, n. 7.

²⁰⁸ Arts. 178, 181, and 215. In at least some Member States certain cases in this group would be viewed as falling within the administrative type of jurisdiction. Complaints brought by Community employees against its institutions (Art. 179) would certainly be considered “administrative.” Pinay, *La Cour de Justice des Communautés Européennes*, 1959 REVUE DU MARCHÉ COMMUN 145 (No. 12).

²⁰⁹ Art. 181. See also art. 182 for jurisdiction over disputes between *Members* “in connection with the object of this Treaty” submitted to the Court by a “compromise.”

The exclusive power of review of Community acts and the controlling power of interpretation of the Community law enables the Court to assume an important role in the development of the Community law.

In its first judgment the Coal-Steel Community Court—feeling its way in its novel task—preferred to adhere to the letter of the Treaty. The case involved a decision of the High Authority seeking to support competition in the steel market. The High Authority had interpreted the Treaty obligation of the steel producers to publish their prices and adhere to the published price schedules as one allowing minor deviations from the prices published. Interpreting the Treaty literally, the Court struck down the High Authority's decision.²¹⁰ During the brief 1958 recession in the steel market, the ghost of this judgment returned to haunt the Authority. However, the tenor of subsequent judgments suggests that, if the same problem would come before the Court for the first time now, the outcome might be different.

In forty of the forty-eight cases brought against the High Authority the Court upheld the Authority, frequently justifying the Authority's policies by virtue of the spirit of the Treaty.²¹¹ In doing so, however, the Court has not been insensitive to the need of protecting enterprises. It has interpreted the right of appeal for annulment broadly²¹² and it has sought to assure "procedural due process" by forcing the High Authority to give sufficient reasons for its decisions.²¹³ In a case concerning scrap iron the Court protected an enterprise against what it considered excessive and unlawful delegation of power by the Authority to a subsidiary organ. Holding that such delegation would disturb the "balance of power" under the Treaty, the Court developed a constitutional concept of some importance.²¹⁴ On appeal from an enterprise in another case the Court struck down, on procedural grounds, certain High Authority decisions concerning the Ruhr coal which apparently had been taken under strong pressure from national authorities and in circumstances impairing the independent position of the Authority.²¹⁵

²¹⁰ Cases 1-54, 2-54, 3-54 and 4-54, *Sammlung der Rechtsprechung des Gerichtshofes* (hereinafter cited as *Sammlung*), Vol. 1, at 7, 79, 131, and 189, respectively. Cf. Stein, *The European Coal and Steel Community: The Beginning of Its Judicial Process*, 55 COL. L. REV. 985 (1955).

²¹¹ *E.g.*, Case 2-56, *Sammlung*, Vol. III, at 9. Stein, *The Court of Justice of the European Coal and Steel Community: 1954-1957*, 51 AM. J. INT'L L. 821 (1957).

²¹² *E.g.*, case 9-55, *Sammlung*, Vol. II, 331 at 365.

²¹³ Cases 9-56 and 10-56, *Sammlung*, Vol. IV, at 9 and 51.

²¹⁴ See Case 9-56, *supra* note 213.

²¹⁵ Case 18-57 of March 20, 1959, advance mimeographed text. For a more detailed discussion of the Court see Chapter VII *infra*.

VII. ENTERPRISES AND THE COMMUNITY INSTITUTIONS

A. EMERGENT PROBLEMS OF THE SCOPE OF THE "LAW-MAKING" POWER

Article 189 of the Treaty enumerates the various kinds of action which the Council and the Commission may take to accomplish their functions and defines the different legal effects of each. "Regulations," "directives" and "decisions" are legally binding according to Article 189 while "recommendations" and "opinions" have no binding effect on the Member State, individual or enterprise to whom they are addressed.

Two practical problems have already arisen, if in blurred outline only, concerning the scope of the authority of the Council and of the Commission, which are of direct interest to enterprises in the Community.

I. HOW MUCH IMPLIED AUTHORITY?

The first of these questions is whether the Commission may issue regulations, directives and decisions only where expressly authorized to do so by a specific provision of the Treaty or whether it may claim an implied authority to do so whenever necessary to the proper performance of a function entrusted to it by the Treaty.²¹⁶ For instance, although the Commission with some exceptions is specifically required in the Treaty only to study, issue opinions and consult with Member States on social affairs, may it also issue a regulation or a decision if it deems it necessary for the achievement of its tasks in this field? Again, where the Council has issued a regulation in accordance with a specific Treaty provision, may the Commission issue a more detailed implementing regulation without specific delegation by the Council and in the absence of any specific Treaty authorization?

This problem actually arose under the Euratom Treaty. The Euratom Commission is to publish production programs indicating targets for nuclear energy activities and types of investment required for their attainment. The purpose is to "stimulate the initiative of persons and enterprises and to facilitate coordinated development of investment." The industry is required under the

²¹⁶ The Commission clearly may issue *non-binding* recommendations and opinions without specific treaty authorization whenever it "considers it necessary." Art. 155 and corresponding Euratom Treaty art. 124.

Treaty to communicate investment projects in this field to the Commission before they are undertaken. The Commission is to discuss with "the persons or enterprises *all aspects* of any investment projects relating to the aims of this Treaty" and "communicate its views thereon to the Member State concerned." The Council, on a proposal of the Commission, is to establish "criteria" as to the "type and scope" of the projects which are to be communicated to the Commission.²¹⁷

After the Council had issued a regulation in accordance with these provisions, the Commission proceeded to enact a regulation of its own establishing an extensive and detailed questionnaire to be answered by the enterprises.²¹⁸ The legality of the Commission's regulation was questioned in some quarters on the ground that it was not authorized by any specific Treaty provision or by the Council's regulation,²¹⁹ and on the further ground that even if the Commission had an implied power to issue a regulation without specific authorization, the Commission had exceeded its power by extending the scope of the information required beyond the criteria of the Council. If allowed to stand, the argument went, the Commission's regulation would serve as a precedent permitting the Commission to broaden its powers considerably and thereby to upset the balance of powers carefully worked out in the Treaty.²²⁰ It was argued in support of the regulation that the Commission must have the power to specify with a binding effect the information required from the industry if it is to perform its task properly. A working group of the Euratom Council and Commission was appointed to explore possible solutions to this disagreement. Subsequently the Commission issued an interpretative statement under the heading "Application of Regulation No. 1 of the Commission,"²²¹ which provides

²¹⁷ Euratom Treaty, arts. 40-44.

²¹⁸ Euratom Commission Regulation No. 1, [1958] J'L OFF. 511; later renumbered to No 5, [1959] J'L OFF. 650; Euratom Council Regulation No. 4 [1958] J'L OFF. 417.

²¹⁹ Everling, *Die ersten Rechtsetzungsakte der Organe der Europäischen Gemeinschaften*, 14 DER BETRIEBS-BERATER 52 (1959); Meibom, *Die Rechtsetzung durch die Organe der Europäischen Gemeinschaften*, id. at 127. It was argued that the Treaty excludes the implied powers concept because under art. 203 Euratom Treaty (art. 235 E.E.C. Treaty), if any action by the Community appears necessary to achieve one of the aims of the Community, and the Treaty has not provided for the requisite powers, the Council may enact the appropriate provisions. The Euratom Commission relied upon arts. 41, 124 and 161 of the Euratom Treaty. Cf. Glaesner "Übertragung rechtsetzender Gewalt auf internationale Organisationen in der völkerrechtlichen Praxis," [1959] DIE ÖFFENTLICHE VERWALTUNG 653-58.

²²⁰ Cf. Haedrich, *Die ersten Euratom-Verordnungen: Investitionen und Sicherheitskontrolle*, 1959 (No. 6) ATOMWIRTSCHAFT 232, 233.

²²¹ [1959] J'L OFF. 571.

that the confidential nature of any communication will be safeguarded and states that if "in certain cases a detailed answer . . . cannot be given because of special circumstances in which a person or enterprise finds itself," the Commission will be able to accept supplementary information in a discussion between the Commission staff and the person or enterprise concerned. Since the Commission is to determine which aspects *must* be discussed, this statement does not seem to settle the question of how much information the Commission may require. Unquestionably a great deal will depend upon how the Commission applies this interpretation in practice. Although any Member State which considered the Commission regulation illegal or any enterprise which the Commission directed to reply to the questionnaire could have raised questions in the Community Court, none did, and the period for appeal against the regulation itself has lapsed. It was, indeed, probably wise not to bring the matter before the Community Court at this early state of the Community development.

In a subsequent regulation the Euratom Commission again prescribed the information which must be made available to it for purposes of control against diversion of nuclear materials. The Commission did so without any specific Treaty authorization, or in other words, clearly on the theory of implied powers.²²²

2. REGULATION OR DIRECTIVE?

The second problem concerning the authority of the Council and the Commission arises from the fact that in a number of instances Treaty provisions authorize the institutions to act by "regulations or directives," or are entirely silent with respect to the legal form which an authorized act may take.²²³ A "regulation," it will be recalled, modifies national law directly, while a "directive" imposes an obligation on a Member State to conform its national law to the rules contained in the directive by whatever means it desires to adopt in accordance with its own constitution. One view is that, because of the basic nature of the Community, its institutions should, in principle, rely on Member States to incorporate Community rules into national laws, and should therefore resort to regulation only where the act, in order to be effective, must directly accord rights to, or impose obligations on, individuals or enterprises. If this standard is the proper one, it could be said that several regulations is-

²²² [1959] J'L OFF. 298. The Commission relied on Euratom articles 77, 78, 124, 161,

²²³ *E.g.*, arts. 43(2), 49, 75, 127.

sued thus far should have taken the form of directives or decisions.²²⁴

Some German writers have discerned an inclination on the part of the institutions to favor regulations over other forms. One writer points out that, although the German Constitution sanctions the delegation of law-making powers to international organizations, such as the Community, it requires some measure of democratic control over the law-making process,²²⁵ and regulations—which have a direct effect on national law—are adopted by the Council or Commission without the participation of national parliaments. Moreover, the European Assembly, because of its limited powers (if not because of its composition) cannot today provide the type of parliamentary control required. Thus, the argument goes, excessive recourse to regulations might raise the question in Germany of the Treaty's constitutionality.²²⁶

On the other hand, the employment of "directives" obviously may raise practical difficulties where uniform rules are required promptly. Thus, when the Euratom Council adopted health and safety standards for nuclear installations by a directive, it was necessary for the European Assembly to urge the Members to adjust their national laws to conform to the directive—an indication of a

²²⁴ Thus, the identical Regulations No. 2 of the E.E.C. and Euratom Councils concerning identity cards for members of the European Parliamentary Assembly ([1958] J'L OFF. 387, 403, respectively) did not create substantive rights of immunity for the parliamentarians since those had already been given by a Protocol to the Treaty (Protocol on Privileges and Immunities art. 6); the form of the identity card could therefore have been established by a simple decision. Everling, *supra* note 219, at 53. Likewise, it is argued that Regulation No. 5 of the E.E.C. Council ([1958] J'L OFF. 681) concerning the manner of payment of the financial contributions of the Member States to the Development Fund does not create rights or obligations with regard to individuals and should therefore have been issued in the form of a directive. Everling, *supra* note 219, at 53; Meibom, *supra* note 219, at 130. In contrast to these two examples, the E.E.C. and Euratom Council Regulations No. 1 concerning the official languages of the Community ([1958] J'L OFF. 385, 401 respectively) and the E.E.C. Council Regulation No. 6 ([1958] J'L OFF. 686) were properly issued as regulations. In the former definite rights were given to individuals to be answered in their own language by the Community institutions, while the latter regulation establishes rules for the liability of the auditor and accountants of the Development Fund. *Ibid.* In between these two sets of regulations are the E.E.C. Regulations Nos. 3 and 4 concerning the social security benefits of migrant workers ([1958] J'L OFF. 561 and 597, respectively). Because of the far-reaching impact of these regulations on the national insurance systems, one writer (Everling, *supra* note 219, at 53) suggests that a directive to Member States would have been the wiser political course to follow, while another writer (Meibom, *supra* note 219, at 130) points out that this question of political expediency does not change the propriety of these acts as regulations since legal rights were conferred upon individuals.

²²⁵ Cf. art. 20 of the German Constitution; Everling, *supra* note 219, at 55.

²²⁶ Art. 24 of the German Constitution. The argument is that art. 24 of the German Constitution requires parliamentary control of *some* form. Everling, *supra* note 219, at 55.

problem of compliance which does not arise in this form when a regulation is issued.²²⁷

Finally, an analogous problem arises because the Council is "Janus-headed": it is both the Community organ authorized to adopt regulations and a conference of ministers who possess authority to enter into international understandings and agreements on behalf of the Member States, subject possibly to approval in national parliaments. In some instances the Treaty does not state clearly which of the two methods is to be employed. The Coal-Steel Community practice has already caused some obfuscation. E.E.C. Council Regulation No. 3 concerning social security of migrant workers was first embodied in a convention signed—but not ratified—by the six governments. When the Treaty came into effect, the six governments, instead of obtaining ratification by their parliaments, chose to have the Council of Ministers adopt Regulation No. 3 pursuant to Article 51 of the Treaty.²²⁸

B. LEGAL POSITION OF ENTERPRISES IN PROCEEDINGS BEFORE INSTITUTIONS

Basic to the conception of the Treaty are the relationships among governments and those between the institutions and governments. The E.E.C. Treaty contains substantially fewer rules directly applicable to enterprises, and fewer provisions envisaging direct action by the institutions with respect to enterprises than the Coal-Steel Community Treaty. Instances of both may, of course, increase to the extent that the Council with the Commission draw upon the broad potential powers conferred upon them by the Treaty and enact appropriate regulations. The question thus arises concerning the procedural rights which an enterprise may invoke for its protection in a "quasi-judicial" proceeding in which the Commission by a decision applies a general rule to an enterprise, as well as in cases where the Council or the Commission formulate general rules in the form of regulations or directives.

I. QUASI-JUDICIAL PROCEEDINGS BEFORE THE COMMISSION

The Treaty requires that all decisions be "supported by reason."²²⁹ A "reasoned" decision is specifically prescribed where the

²²⁷ See Resolution of January 15, 1959, para. (E), [1959] J'L OFF. 163.

²²⁸ REUTER, *COURS DE DROIT INTERNATIONAL PUBLIC* 128-132 (1958-1959). See also Meibom, *Zur rechtlichen Systematik der Beschlussfähigkeit der Organe der Europäischen Gemeinschaften*, 14 *DER BETRIEBS-BERATER* 584 (1959).

²²⁹ Art. 190.

Commission acts to "confirm the existence" of an infringement of the antitrust principles of the Treaty.²³⁰ No decision addressed to an enterprise takes effect until the enterprise is notified of it.²³¹ The enterprise may appeal to the Community Court for annulment of any decisions addressed to it on grounds specified in the Treaty, an important legal remedy discussed in some detail in the chapter on The New Legal Remedies of Enterprises. The appeal, however, has no staying effect unless the Court orders suspension.

Beyond this, however, the Treaty contains no code of procedural safeguards applicable in proceedings before the Commission, analogous for instance to the Administrative Procedure Act governing federal agencies in the U.S.²³² The Treaty contains, moreover, no provision requiring the Commission to give an enterprise an oral hearing, an opportunity to make written submissions, access to evidence, a right of rebuttal or the like. The Coal-Steel Community Treaty specifically authorizes the High Authority in a number of instances to impose penalties upon enterprises. Correspondingly, Article 36 of that treaty requires the Authority to give the interested enterprise "an opportunity to present its views" prior to imposing a penalty upon it. The E.E.C. Treaty contains no general provision analogous to Article 36, probably because penalties under the E.E.C. Treaty may be imposed *only* if prescribed by *Council regulations*. Where the Council prescribes penalties, it may also confer jurisdiction upon the Community Court to impose them.²³³ In a proceeding before the Court the defendant enterprise would receive the basic protection of procedural safeguards including, of course, full hearing. However, the Treaty may be interpreted as empowering the Council to charge the Commission as well with the imposition of penalties.²³⁴ In that case there is no specific Treaty provision for a hearing before the Commission, but the hearing could be prescribed in the Council regulation. In any event the enterprise would, of course, be free to request the Community Court to review and annul the Commission decision imposing the penalty. It is interesting that the Treaty does require the Commission to grant to a Member State charged with a violation of its Treaty obligation an opportunity for "comments" in written or oral form. The Treaty also prescribes consultations with, or notice to, Mem-

²³⁰ Art. 89(2).

²³¹ Art. 191, para. 2.

²³² Administrative Procedure Act, 5 U.S.C. § 1009 (1952).

²³³ Art. 172. Cf. art. 87(2)(a).

²³⁴ See Chapter VII *infra*.

ber States before certain decisions are taken including some decisions which may affect enterprises.²³⁵

In the absence of Treaty provisions assuring an enterprise the opportunity to present its case to the Commission, the burden of developing minimum procedural safeguards lies, in the first place, upon the Council and the Commission and, secondly, upon the Community Court. As is suggested in the chapter on The New Legal Remedies of Enterprises, there is a basis in the Treaty for the Community Court to establish such safeguards in its jurisprudence by striking down any decision brought before it for review if the decision was adopted in disregard of these safeguards. The French Conseil d'Etat, despite the absence of a statutory requirement, has progressively imposed procedural safeguards on lower administrative authorities. Moreover, there is substantial support for such a course in the legislation and jurisprudence governing administrative procedures in the other Member States of the Community, even though national systems differ somewhat in the emphasis placed, for instance, on the requirement of an oral hearing.²³⁶ As indicated earlier in this chapter, the Community Court has already begun the development of some minimal safeguards. For this purpose the Court has drawn principally upon the rules recognized by the legislation, principles of law, and judicial decisions in Member States.²³⁷

2. "LAW-MAKING" PROCEEDINGS

The Treaty provides that regulations of the Council and of the Commission must be published in the Official Journal of the European Communities and that they become effective 20 days thereafter unless the regulations themselves otherwise provide. The Journal, an official publication of all three Communities, is published in the four "official" languages.²³⁸ From the viewpoint of the national legal systems, publication in the Journal has the same effect as publication in national official journals as required by national law.²³⁹

²³⁵ Arts. 169, 170, 79(4), 80(2), 93(2).

²³⁶ An international group of experts which recently considered this problem from the viewpoint of procedures for the enforcement of the antitrust provisions in the Treaty prepared a brief survey of national procedures and suggested specific principles for the Commission's guidance. See Nebolsine *et al.*, *The "Right of Defense" in the Control of Restrictive Practices under the European Community Treaties*, 8 AM. J. COMP. LAW 433 (1959).

²³⁷ Cf. Joint Cases 7-56 and 3-57 to 7-57, *Sammlung der Rechtsprechung des Gerichtshofes*, Vol. III (1957), 3 at 118 and 127.

²³⁸ Dutch, French, German, Italian. E.E.C. Regulation No. 1, [1958] J'L OFF. 385.

²³⁹ See Reuter, *Aspects de la Communauté Economique Européenne*, 1958 REVUE DU MARCHÉ COMMUN 161, 168 (No. 3).

Nevertheless, in Germany, for example, regulations are also published in the German official journal (*Bundesgesetzblatt*, Part II) but such publication has only a declaratory effect. Addressee Member States must be notified of directives, and they take effect upon such notification.²⁴⁰ Directives (and for that matter decisions also) are published in the Official Journal of the Communities for information purposes if the issuing institution so decides, which as a rule has been the case.²⁴¹ Again, regulations and directives must be supported by reasons stated therein.²⁴²

Depending on their substantive content, regulations may be compared to federal statutes or administrative regulations in the United States. In the United States, legislative hearings before congressional committees offer enterprises an opportunity to present their views on contemplated legislation. The purpose of the hearings is to ensure that the legislator has all the relevant facts necessary to the formulation of legislation. Federal rule-making procedures in administrative agencies also provide ample opportunities for interested enterprises to submit their views, even where private rights may not be directly affected. Such a procedure is apparently not part of legislative or administrative "law-making" on the Continent, and the Treaty provides no analogous procedures. Nor does it contain a provision like that in Article 71 of the United Nations Charter authorizing the Economic and Social Council (composed of instructed government representatives) to consult directly with important non-governmental groups, national and international, which are given for this purpose a special status in relation to the Council.²⁴³ Instead, the Treaty allows and even requires the Council and the Commission to consult with a variety of advisory bodies some of which are so composed as to reflect the various economic interests within the Community.²⁴⁴ Where the Treaty requires consultation with an advisory body as a prerequisite to the adoption of

²⁴⁰ As to the question of what constitutes notification, the E.C.S.C. Court has held that a party is deemed to have notice of a letter when it has come "within the internal sphere of the addressee." Case 8-56, *Sammlung der Rechtsprechung des Gerichtshofes*, Vol. III, 189 at 200.

²⁴¹ In Germany, decisions are published either in the *Bundesgesetzblatt*, Part II, or in the *Bundesanzeiger*, but according to Meibom, the need for publishing "directives" has not been determined as yet. Meibom, *Die Rechtsetzung durch die Organe der Europäischen Gemeinschaften*, 14 *DER BETRIEBS-BERATER* 127, 128-29 (1959).

²⁴² Art. 190.

²⁴³ These groups have the right to propose matters for inclusion in the Council's agenda and to present their views formally. ECOSOC Rules of Procedure, arts. 9, 77-79, U.N. ECOSOC OFF. REC. 8th Sess. Annex, 142 at 147, 168-170 (E/1130) (1952).

²⁴⁴ See PART IV *supra*.

a regulation, directive or decision, any such act must expressly refer to the opinion obtained in such consultation under the penalty of annulment by the Court for a defect in form. The opinion of the advisory body is not, of course, binding on the institution which requested it.

Consultations with advisory bodies such as the Economic and Social Committee (and, in a sense, consultations with the Assembly) provide an organizational structure within which interchanges of views between the institutions and private interests can take place, and of course, the national governments will take private interests into account in instructing their Ministers in the Council to the extent that considerations of policy or national laws so dictate.

C. ORGANIZING FOR COMMUNITY ACTION

I. COMMUNITY LEVEL ORGANIZATIONS OF INDUSTRY AND COMMERCE

The organizational foundation for cooperation of European industries with the emerging international organizations was laid by the creation of the Council of Industrial Federations of Europe (C.I.F.E.) in 1949. The Council, established at the initiative of the Organization for European Economic Cooperation (O.E.E.C.), embraces national industrial federations of the 17 member countries of the organization.²⁴⁵ The Council's "Steering Committee for Information and Cooperation with the O.E.E.C." has worked with the O.E.E.C. "Group for Liaison with Non-Governmental Organizations." A permanent Secretariat has functioned in Paris and the Assembly of members has met periodically. A number of expert working groups have studied special problems, such as economic co-existence with the Communist world, the coordination of European transportation systems, sources of energy, the influencing public opinion through mass media and, more recently, the problems of a free trade area in Western Europe.

When the Coal-Steel Community became reality, a special Union of Industries of the Six Nations was organized as a special group within the Council. In February 1958, after the Rome Treaties became effective, 10 national federations of industries in the six Member States formed an independent "Union of Industries of the European Community" (U.N.I.C.E.). All but two of these federations are also members of the Council of Industrial Federations of

²⁴⁵ Spain joined O.E.E.C. as the eighteenth member in 1959.

Europe (C.I.F.E.).²⁴⁶ According to its charter the purposes of the Union are "to stimulate the elaboration of industrial policy in the European spirit" and to act as the authorized spokesman of the industries before the Community institutions "on all problems of general interest or affecting questions of principle relating to the common policy" of the member federations. For these purposes the Union is to assure "permanent liaison" with the institutions, to undertake studies, to coordinate positions and action (*démarches*) of the member federations, and to foster "common attitudes" of industrial representatives in international organizations. Of particular interest is the undertaking by the member federations to keep the Secretary General of the Union informed and to consult with each other prior to taking a position before Community institutions. The organs of the Union are: the President, the Council of Presidents of the member federations (which is the policy-making body), a Secretary General, a Committee of Permanent Delegates and various special committees and committees of experts. The Council of Presidents has been meeting in Brussels under the Presidency of Mr. L. A. Bekaert of the Federation of Belgian Industries, to examine Common Market problems, particularly those under consideration by the institutions. This examination of problems is reported to have covered policies concerning prices and government controls of prices, commercial policy problems, discrimination in transportation, industrial property, harmonization of indirect taxes and the like.²⁴⁷ The primary purpose is to establish common positions on matters with which the Community institutions are concerned. Only rarely are such common positions made public.²⁴⁸

Special commissions and expert working groups have been organized to deal with problems of cartels, taxation, social questions, harmonization of national legislations, financial and monetary questions, freeing of capital, economic trends, investments and tariffs and quotas.

The Chambers of Commerce in the six Member States created no new organization comparable to U.N.I.C.E. Instead, they organized a "Permanent Conference of the Chambers of Commerce of the European Economic Community." Each chamber designates up to six delegates (supported by a certain number of experts) who meet every three months in one of the six Member Countries. Re-

²⁴⁶ On U.N.I.C.E., see Nagels, *Die Zusammenarbeit der industriellen Spitzenverbände in Europa*, I EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT 444 (No. 22) (1958).

²⁴⁷ 418 EUROPE, item 2477 (May 26, 1959); 422 EUROPE, item 2685 (June 23, 1959).

²⁴⁸ *E.g.*, a memorandum, *Le Problème des Transports dans le cadre de la Communauté Economique Européenne* (July 19, 1958).

ports, prepared on the basis of replies to questionnaires by the individual chambers, and draft resolutions are studied by experts before they are submitted to a General Assembly. The Conference, in meetings held in Strasbourg, Brussels, Berlin, Milan, and Paris, has dealt with such matters as the troublesome distinction between fiscal and "economic" duties, certain items of the future common external tariff, right of establishment, transport organization, and labor costs.²⁴⁹

In addition to these Community-level organizations comprising all national industries, an impressive number of industrial and trade groups have formed new Community-level associations in their own specialized fields. Other groups have established autonomous sections of their international or all-European federations, or created permanent committees, "congresses," liaison offices, or study and working parties to deal with Common Market problems, or at least held special meetings to consider these problems. A number of these new associations and committees plan to employ liaison secretariats at the seat of the institutions; some have already established offices in Brussels.²⁵⁰ Where new specialized associations are formed on the level of the six Member States, liaison is established with corresponding associations of broader European or international membership and with U.N.I.C.E.²⁵¹ Some of the new industrial associations, although formed because the E.E.C. Treaty has gone into effect, include industrial groups in other European states, such as the United Kingdom, Austria, and Switzerland, in addition to those in the six Member States.

The new Community-level organizations of the various branches

²⁴⁹ See *La Conférence Permanente des Chambres de Commerce de la C.E.E.*, 1959 REVUE DU MARCHÉ COMMUN 238-239 (No. 15).

²⁵⁰ A partial list of the new E.E.C. level organizations is contained in 1959 REVUE DU MARCHÉ COMMUN 309-311 (No. 17). This list includes some 28 organizations in the field of industry (wood-working, paper, rubber, shoes, clothing, construction, agriculture and food processing, flax, dairy products, fodder, vinegar, beer brewing, malt, fruit juices, sugar, mustard, flour milling, pasta, margarine, edible oil, powdered milk, meat packing, chocolate, vegetable canning), and some 38 organizations in the field of commerce. The Bulletin EUROPE lists the new organizations as they come into being (*e.g.*, Feb. 16, Mar. 3, 10, Apr. 6, 22, 23, May 25, June 26, 1959). See also the list of permanent representatives of producers, users and transporters of coal and steel at the E.C.S.C. in Luxembourg in ANNUAIRE-MANUEL DE L'ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE (1958-1959) 241-43. Dr. F. Nagels of the Federation of German Industries lists Community-level organizations among the following industries: chemical, metal workings, non-ferrous metals, clothing, iron producing, food, coal mining, sugar manufacturing, wood working, shoe, beer brewing and construction. Nagels, *supra* note 246.

²⁵¹ Thus, COLIME, representing the Metal, Mechanical and Electrical Industries on the level of the Six, maintains close liaison with ORGALIME—the federation of these industries on the level of the 17 (later 18) O.E.E.C. countries—and with U.N.I.C.E. 290 EUROPE, item 1435 (Dec. 12, 1958).

of industry and other European industrial organizations will no doubt wish to represent the interests of their specific industries before the institutions in Brussels. The liaison committee of U.N.I.C.E.—it has been suggested—will have to make certain that where the interests of several branches of industry or of Community industry generally are involved, a uniform position is presented to the Community institutions which would have the support of the national general federations. If conflicting positions were taken, it was said, the institutions would “have the choice of picking from the bouquet of positions presented the most agreeable one.”²⁵²

In a sense, this organizational surge transcending national frontiers is a corollary to the intensive drive toward concentration and specialization effected by means of agreements among Community enterprises—which is perhaps the most noticeable economic effect of the E.E.C. thus far. The view was expressed in some labor circles that the primary purpose of the new organizational arrangements was to facilitate agreements among Community enterprises, some of which may not be compatible with the Treaty rules governing competition.

2. COMMUNITY-LEVEL ORGANIZATIONS OF LABOR

It is not surprising that labor has not lagged behind in the drive toward Community-level organization, particularly in view of the fact that, with perhaps one exception, all major non-Communist labor unions in the six Member States have been among the most consistent supporters of European integration. All three leading international labor organizations responded promptly to the Rome Treaties.

The mammoth International Confederation of Free Trade Unions (I.C.F.T.U.) with headquarters in Brussels, which comprises some 55 million non-Communist workers on both sides of the Atlantic (including the American AFL-CIO) has maintained a Regional European Organization (O.R.E.) since 1950. In 1958, the I.C.F.T.U. established a new Community-level organization under an executive committee composed of representatives of the national confederations in the Community States which are associated with I.C.F.T.U. The Secretary General of O.R.E. also sits on the executive committee. Two standing committees, one for the Coal-Steel

²⁵² Nagels, *supra* note 246, at 446.

Community and the other for the E.E.C. and Euratom, and a number of other committees have been established. The General Assembly of the new organization meets bi-annually and its Secretariat is located in Brussels. An I.C.F.T.U. office to effect liaison with the Coal-Steel Community operates in Luxembourg. Several committees of craft unions affiliated with the I.C.F.T.U. coordinate their activities within the six Member States in such fields as agriculture, transport and the construction trades.²⁵³

The International Confederation of Christian Trade Unions (I.C.C.T.U.) of some 5 million workers draws its European membership principally from the six Member States. In 1955 it organized a Federation of Christian Trade Unions of the Coal-Steel Community countries. In 1958 it established a European organization under an executive committee composed of representatives of national I.C.C.T.U. confederations in Europe and in the African areas associated with the Community. On Community matters only the representatives from the Six and from the associated African areas have the right to vote. This committee coordinates I.C.C.T.U. activities in all European organizations including the Council of Europe, O.E.E.C., United Nations Economic Commission for Europe, as well as in the Communities. A number of subcommittees have been appointed. The Secretary General has his office in Brussels. An advisory European conference of representatives of national confederations and craft federations meets annually.

In these organizational arrangements one may discern an effort—stemming perhaps from the relative weakness of labor unions in some of the Community countries—to avoid weakening unduly the ties with the powerful trade unions elsewhere in Europe, particularly in the United Kingdom.²⁵⁴

The Communist-dominated World Federation of Trade Unions (W.F.T.U.) which claims a membership of 93 million (with three-fourths in the Soviet Union) established in 1958 a “coordination and action committee” which includes representatives of its national federations in Italy, France, Netherlands, Luxembourg and in Africa. Reflecting the position of the Communist parties (and of the Soviet Union) this group is opposed to the Communities; it sees in the Common Market an effort of “monopolistic capital” to

²⁵³ ANNUAIRE-MANUEL DE L'ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE 1958-1959, at 244-47.

²⁵⁴ Cf. Rapport du Secretariat à la Deuxième Assemblée générale des Syndicats Libres des Etats Membres des Communautés Européennes, Oct. 12, 1959.

strengthen its "grip over the working people" and calls for a united action by the people.²⁵⁵

D. EFFECTIVE CONTACT POINTS BETWEEN INSTITUTIONS AND PRIVATE GROUPS

One logical function of the secretariats of the private groups at the seat of the institutions is to serve as listening posts for their organizations, and to receive, digest, and disseminate to their members the documentation published by the institutions. Some of the reports²⁵⁶ are of considerable value both to industry and labor as a source of economic, social, technical, and other information.²⁵⁷ Another function is the representation of the views of their organizations before the appropriate bodies and officials in the institutions.

I. CONTACTS WITH THE COMMISSION

While the Euratom Treaty provides for contacts and consultations between the Commission and the enterprises particularly for the purpose of coordinating investment and research, the E.E.C. Treaty contains no comparable provisions.²⁵⁸ The E.E.C. Commission has the right "[F] or the performance of the tasks entrusted to it, to collect any information and verify any matters" but only "within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty."²⁵⁹

The Commission has not developed any regular, formalized procedure for dealing with non-governmental groups, and occasionally complaints are heard from both labor and industry that their views have not been obtained on matters of interest to them.²⁶⁰ The Com-

²⁵⁵ Tessier, *L'Organisation du Syndicalisme Ouvrier dans le Cadre Européen*, 1959 REVUE DU MARCHÉ COMMUN 242 (No. 15). Rosenberg, *Zusammenarbeit und Organisation der Gewerkschaften West-Europas*, 2 EUROPÄISCHE WIRTSCHAFT 165 (No. 7) (1959).

²⁵⁶ *E.g.*, E.C.S.C.: *Les Régimes de Sécurité Sociale*, 2 vols. (1957-1958); the bi-monthly Bulletin Statistique; the periodic trade analyses Commerce extérieur de la Communauté.

E.E.C.: *L'évolution récente de la situation économique (1958)*; Document de travail sur la situation de l'agriculture dans la Communauté (1958).

Euratom: Report on the Position of Nuclear Industries in the Community (1958).

²⁵⁷ The public information services of the three Communities have been consolidated into a "common service," but each "executive" has its own official spokesman. See E.E.C. COMMISSION, FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 28-30 (1958); SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 17 (1959).

²⁵⁸ *E.g.*, Euratom, arts. 5, 40, 41.

²⁵⁹ Art. 213.

²⁶⁰ 359 EUROPE, items 1976-77 (March 11, 1959).

mission's avowed attitude, however, was announced in the First General Report on the Activities of the Community:

9. While the common institutions and the Governments of Member States have a special responsibility for the attainment of the objectives of the Community, it will not be possible to attain them without the cooperation and help of the men who exercise leading functions in all fields, and in the last resort, of the active support of public opinion.

It is for these reasons that the Commission has decided to let its actions be fully known to the public, *keeping in the picture the representatives of those economic and social groups concerned, consulting them, advising them, even associating them with the work where possible*. In this connection the Commission attaches great value to the advice it will have to ask from the Economic and Social Committee. In its endeavours to take account of all legitimate interests, *the Commission will listen to the opinions and comments submitted to it by the representatives of these interests, whether organizations or individuals*.

This Commission also notes with pleasure the many endeavors that have already been made to arrange for the exchange of ideas among those responsible for the various fields of activity in the six countries or for a better understanding of the objectives of the Community; in the firm belief that such action will further the realization of the objectives of the Treaty and will develop a sense of community, the Commission gives them its unstinted support.²⁶¹

In a recent statement before an industrial group, President Hallstein reportedly confirmed that the Commission has been in constant contact with representatives of industry; he welcomed the fact that politicians who make decisions affecting the European idea are subjected to increasing pressures from interested groups.²⁶² Similarly, in Assembly debates Commission members have declared that they will consult interested groups, for instance, in investment matters.²⁶³ As could be expected, the Assembly has encouraged the Commission to establish direct contact with both labor and industry particularly in the social field.²⁶⁴

²⁶¹ E.E.C. COMMISSION, FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 14-15 (1958). Italics added.

²⁶² 456 EUROPE, item 2805 (July 9, 1959); Resolutions of the Assemblée générale des Syndicats C.I.S.L., Nov. 5 and 6, 1959, Brussels.

²⁶³ Speech by E.E.C. Vice-President Marjolin, Parl. Debates (No. 2, Jan. 9, 1959) 67 at 70, referring to a statement by Representative Van Campen, *id.*, No. 5B, 210 at 213.

²⁶⁴ Resolution of January 15, 1959, para. 16, [1959] J'L OFF. 167.

The Commission is reported to have consulted representatives of agricultural producers and labor in developing its proposals for a common agricultural policy.²⁶⁵ It also has announced that it will seek the advice of industry and labor groups in drafting the Rules for the Social Fund.²⁶⁶ In fact, consultations are reported to have taken place on the basis of a Commission draft with the two non-Communist labor groups (I.C.F.T.U. and I.C.C.T.U.) as well as with U.N.I.C.E., simultaneously with the Commission's discussions with government officials from national labor and finance ministries.²⁶⁷ These consultations were in addition to those with the Economic and Social Committee which are required by the Treaty.

In response to a request by the unions, a Vice-President of the Commission and members of its staff are reported to have met in an "economic round table" with leaders of the two labor groups for a general discussion of major Community problems, and suggestions were made in labor quarters to make "round table" sessions of this type a regular feature.²⁶⁸ The belief prevails in union circles that labor has not been given as much voice and representation in the institutions of the new Communities as it has in the Coal-Steel Community. Union efforts for closer contact are directed not only at the Commission, but also at the governmental expert groups working with the Commission. Specific suggestions have been urged by the unions upon the Commission, such as the appointment of an African as the head of the Department of Overseas Territories.²⁶⁹

2. CONTACTS WITH ADVISORY COMMITTEES OF THE COMMUNITY

Where the Community advisory committees comprise individuals selected from industry, labor and other such sectors of society, private interest groups will naturally seek contacts with their respective spokesmen. This tendency has already been particularly evident as far as the Economic and Social Committee and the Committee on

²⁶⁵ The Committee of Agricultural Associations of the Community (C.O.P.A.) is reported to have been asked for comments on specific memoranda prepared by the Commission staff. 411 EUROPE, item 2412 (May 16, 1959); 448 *id.*, item 2733 (June 30, 1959); 455 *id.*, item 2792 (July 8, 1959).

²⁶⁶ E.E.C. COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 114 (1959).

²⁶⁷ 377 EUROPE, item 2110 (April 3, 1959); 451 *id.*, item 2757 (July 3, 1959).

²⁶⁸ 455 EUROPE, item 2793 (July 8, 1959).

²⁶⁹ 337 EUROPE, item 1794 (Feb. 13, 1959).

The Euratom Commission will of course be in increasingly close contacts with private enterprises and groups, particularly with the public utilities participating in the construction of nuclear power plants under the EURATOM-U.S. program.

the Social Fund are concerned. Some feel, however, that although the Economic and Social Committee may be suitable for general debates on policy matters and on important aspects of policy implementation, it is not effective for purposes of continuing consultation. The general criticism of some that government officials play an excessive role in certain of these committees—the Transportation Committee, for example—has already been mentioned.²⁷⁰ Similarly, some members of the Economic and Social Committee have reportedly complained that the Administrative Committee on Social Security for Migrant Workers should not have been composed only of government officials,²⁷¹ and both the transportation industry and labor spokesmen have criticized the composition of the Transportation Committee.²⁷²

3. CONTACTS WITH PERMANENT REPRESENTATIVES, THE COUNCIL AND THE ASSEMBLY

The Permanent Representatives of the national governments in Brussels offer another avenue of contact. Their position is somewhat analogous to that of permanent missions to the United Nations in New York—the United States Mission, for example, which holds regular briefings for American non-governmental organizations particularly during General Assembly sessions. The role of the Permanent Representatives is of importance not only because they prepare documents for the Council of Ministers, but also because of their influence on the Commission as spokesmen for national governments. An important labor group has reported, however, that it has been difficult to establish relations with the Council because not only Ministers of Foreign Affairs but other ministers as well are involved in the Council's work. Moreover, ministers have tended to consult national employer and labor organizations in their respective countries and to rely on the Permanent Representatives of the six governments in Brussels to work out the problems. "We are categorically opposed to this tendency," this labor group reported, "because we do not want to lose on the European level what we had gained on the national level in terms of consultation and co-determination."²⁷³

The Council appointed a special Committee to assist the Commission in future tariff negotiations with third countries. This Com-

²⁷⁰ Cf. parliamentary question by Representative Müller-Hermann, [1959] J'L OFF. 818-19.

²⁷¹ 376 EUROPE, item 2015 (April 2, 1959).

²⁷² 317 EUROPE, item 1615 (Jan. 19, 1959).

²⁷³ Rapport, *supra* note 254.

mittee is composed of governmental representatives, and there are no indications that it or the Commission will seek the views of interested private groups by means of public hearings like those conducted by the United States Committee on Reciprocity Information in connection with tariff negotiations or by any other organized means. However, the Commission, through its Department of External Relations, is reported to have been consulting informally on tariff problems with the representatives of U.N.I.C.E.²⁷⁴

A number of European Assembly members have cooperated closely with labor union representatives in Brussels.

If the role of the Assembly in the Community increases, pressures might develop to increase the number and scope of informal hearings of private interest representatives before the standing committees of the Assembly.²⁷⁵ Individuals and enterprises have at present the right to address petitions to the Assembly on matters falling within the scope of activities of the Communities, but no such petitions appear to have been received thus far.²⁷⁶

4. CONTACTS VIA NATIONAL GOVERNMENTS

Because of the important role they play in making the policy decisions of the Community, the executive branches of the national governments remain, of course, the most important avenue of contact for private interests. The Minister of Foreign Affairs who sits on the Council, his ministry, and other ministries concerned, the national experts assigned by the ministries to work with the Commission, and finally the Permanent Representatives and their staffs may all be helpful. A Community enterprise also has access to its parliamentary representatives who may raise questions in the national parliament directed at the Minister concerned. If a given representative is also a member of the European Assembly, he may take similar action in that body and in addition encourage the adoption of positions in the standing committees of the Assembly favored by his constituents. Membership in the Assembly does not thus far seem to have significantly increased the election appeal of parliamentarians running in national elections. However, their service in the Assembly has marked them as experts in the various areas of Com-

²⁷⁴ 454 EUROPE, item 2780 (July 7, 1959).

²⁷⁵ Some recent instances were the consultations in the Agriculture Committee, mentioned by Representative Torsi in Parl. Debates, (No. 7, June 1958) (mimeo.) 276 at 278, and in the Social Committee, mentioned by Representative Sabatini, Parl. Debates (No. 4, Jan. 12, 1959) 128.

²⁷⁶ Rules of Procedure, art. 42 [1958] J'L OFF. 231; HEIDELBERGER, DAS EUROPÄISCHE PARLIAMENT 37 (1959).

munity work (such as agriculture, social affairs, transportation), and this fact has measurably strengthened their positions in their own political parties. Political parties have a major, if not determining, influence on individual political careers—a substantially greater influence, for example, than political parties in the United States. With growing electorate interest in Community matters, an Assembly membership may become increasingly desirable for national politicians who, in turn, may become more sensitive to the views of their constituents on Community matters.

5. A CASE OF INTER-ACTION

An interesting instance of inter-action between private enterprise groups, national governments, and Community institutions arose in connection with a recent acute scarcity of untreated hides which was due in part to extensive purchases by Eastern European countries and which caused a spectacular rise in prices. The affected leather-processing industries demanded export controls, and, in fact, export limitations in varying degrees were imposed by national governments. They were directed not only at exports to third countries but also at exports to other Member States. The industry is reported to have approached formally both the Commission and the Council, but the Permanent Representatives decided to defer submission of the matter to the Council pending consideration by the Commission. In obvious response to a request by the industry, a French liberal member of the European Assembly addressed a parliamentary question to the Commission implicitly presenting the industry position. In its answer the Commission pointed to the undesirable differences among the national export controls and called for an examination of the over-all situation.²⁷⁷ Shortly thereafter the Commission convened a meeting of national governmental experts and Commission staff in which the suggestions of the industry were considered. It is reported that an agreement was reached on a harmonization of national measures which would decrease the undesirable features affecting industries in other Member States. Subsequently, a Dutch socialist representative addressed another parliamentary question to the Commission. He inquired what measures the Commission proposed to take to prevent what he considered violations of the Treaty resulting from Belgian and French prohibitions of the export of hides.²⁷⁸ The Commission replied that the French measures

²⁷⁷ Parliamentary question by Representative Rochereau and answer of the E.E.C. Commission, [1959] J'L OFF. 709-10.

²⁷⁸ [1959] J'L OFF. 1097.

did not constitute a Treaty violation and that the Belgian government had lifted its export prohibitions in response to recommendations of the Commission.

VIII. CONCLUSIONS

In the institutional framework of the Community the Council possesses the power of final decision concerning questions of Community legislation and policy. As the transitional period progresses the number of instances in which the Council cannot act without unanimous agreement of all national governments will be reduced; to that extent at least the control of the individual governments will be loosened somewhat. Surrounded by an extensive Secretariat and served also by the Permanent Representatives of the governments, with their large national staffs in Brussels, the Council has as a rule considered questions only after agreement had already been reached among national administrations or a deadlock had developed in the negotiations which could be resolved by political decision only. A number of important matters relating to Community policy—for instance, in the field of transport and agriculture—are explored outside the Council in informal sessions of national ministers whose departments are directly concerned with the questions under consideration. This development, which is not contemplated by the Treaty, may well advance the policy formation in the Community but obviously detracts from the central role of the Council.²⁷⁹

Experience in the O.E.E.C. and in other organizations has shown that where important national interests are involved governments represented by their Ministers find it difficult to agree. The Commission has been established on the theory that, as an independent "executive," supported by an independent expert staff of civil servants and acting by simple majority vote, it will be able to agree on policy proposals for the Council, thus facilitating the Council's policy decisions. The Commission has also been given supervisory and implementing functions. In the exercise of its tasks the Commission has relied heavily on negotiations with national governments on all levels. This has been required where the Treaty calls for negotiations on matters not resolved by the Treaty itself. Moreover, in these and in other matters national administrations have been the obvious and principal source of factual data required by the

²⁷⁹ La Communauté à l'épreuve des faits, I-La Commission et les gouvernements, 1959 REVUE DE MARCHÉ COMMUN, 425 at 426 (No. 20).

Commission. National governments have responded with varying degrees of readiness to the Commission's requests for information and to its suggestions, frequently insisting on a clear indication of the specific Treaty provision under which the request was made. Some concern was expressed that if the Commission should seek agreement of national governments in all cases before making its proposals to the Council it would dilute its independent position and its right of initiative. Considering the fact that a Commission's proposal cannot become law without the Council's decision, it is not surprising, however, that the Commission wants to avoid rejections of its proposals by seeking to obtain the support of national governments before submitting them to the Council.

In several instances where national governments disagreed the Commission has stepped into the breach and have offered compromises reflecting its own views which have eventually been accepted by the Council. This was essentially the case in the important negotiations for a wider free trade area, in which the French government, finding itself in a minority position in the Council, tended to rely on the Commission despite the opposition in principle on the part of the French government to a strong Commission. Whatever success the Commission has achieved in these instances has been due in a significant measure to the personal ability of its present members, a factor not to be underestimated in the institutional picture. It may well be that in the future the Commission's approach in controversial matters will be first to persuade at least the required majority of the Council members to accept a proposal and then to rely on the European Assembly and on public opinion generally to generate pressures on the national governments forcing favorable action in the Council. Such a plan of action assumes, of course, the existence of an informed and active public opinion and that the Assembly has real political influence, two indispensable factors if the Commission is to play its part successfully as the driving force of the Community.

The fact that both the Council and the Commission have had to devote so much time and energy to the problem of Community relationships with non-member countries explains in part the relative slowness of progress in other areas of Community activities, particularly in the development of common policies. On the other hand the pressures exerted on the Community by the contracting parties of the General Agreement on Tariffs and Trade, by the United Kingdom and by other O.E.E.C. countries particularly during the

unsuccessful negotiations for a free trade area association, have proved a strong unifying factor.

The Court of Justice and the Assembly—the two institutions common to all three Communities—have shown considerable sensitivity to the need for a balanced development of the institutions. The desire to assure to enterprises the broadest possible access to the Court and the incipient tendency to interpret the treaties as constitutions are of particular interest in the judgments of the Court.

The deputies from the six national parliaments to the Assembly have been seated by political affiliation rather than nationality—a historical innovation in international assemblies. The Assembly has, moreover, been remarkably successful in establishing practices and procedures which not only facilitate cooperation with the High Authority and the E.E.C. and Euratom Commissions, but also provide a basis for a measure of control over these executive bodies. It is impossible, however, to state at this juncture that the Assembly has in fact succeeded in influencing or controlling the activities of the “executives” in any significant fashion.

The Assembly has developed fairly successful techniques to bring its views before the Councils. However, evidence of any significant influence, not to speak of control, over the Ministers, remains nonexistent. Decisive power in the Communities remains in the hands of the Councils and, to a substantially lesser degree, in the hands of the “executives.” For those who consider parliamentary or popular control an essential component of democratic government, this is a matter of great concern, since the treaties will very likely lead to a substantial concentration of executive-administrative power both on national and Community levels.

On the national level officials of national administrations form the staff of the Permanent Representatives in Brussels, and national official experts are called in to work with the staff of the “executives.” These same officials advise their respective Ministers on the Councils as well as their own governments generally. The staffs of the Commission and of the other “executives” as well as the staff of the Councils’ Secretariat have been recruited to a large measure from national administrations. Some former Ministers have become members of one of the “executives,” and former representatives in the Assembly have become Ministers or members of an “executive.” This interplay of national and Community administrations, the growing expertise and the development of vested interests of Com-

munity officials will inevitably increase the influence of a compact bureaucracy.

Under the scheme of the treaties, executive branches of the governments in the Member States, acting through their Ministers in the Councils, will be able to assume important obligations in matters heretofore within the scope of parliamentary control without participation by their national parliaments. The Councils may, it will be recalled, adopt regulations directly modifying national laws and enter into international agreements with third parties of the type normally subject to parliamentary approval. Each Minister is, of course, responsible to his national parliament as a member of his government for what he does in the Council and must follow national law. There is some question, however, as to the effectiveness of this responsibility considering particularly the fact that a Minister can be outvoted in the Council. These implications may seriously impair support for the Communities in the Member States. During the recent coal crisis the French Minister explained in the Council his opposition to the exercise by the High Authority of direct control over French coal production on the ground that the French government and not the High Authority would be responsible for the social and political consequences of such controls. Again, the concern of the German Parliament is reflected in the German statute approving the Rome Treaties. This statute requires the German government to advise the parliament before action is taken in the Councils affecting German law.²⁸⁰ This requirement apparently has been interpreted so broadly as to require parliamentary approval even to conduct factual surveys proposed by the Commission.²⁸¹ A general trend in this direction would seem to contain seeds of serious difficulty for the Communities.

In these circumstances the case for a strengthening of the European Assembly as a chosen instrument of democratic control over the Community institutions is quite impressive. This control in regard to the "executives" may be in the process of development, but, the influence of the Assembly would increase substantially if it were given a meaningful role in the selection of the members of the "executives." The Assembly has carried its efforts to assert some influence over the Councils about as far as is possible within the

²⁸⁰ Gesetz zu den Verträgen vom 25. März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft, art. 2, [1957] Bundesgesetzblatt II, 753.

²⁸¹ See Commission's answer to written question No. 28, [1959] J'L. OFF. 851.

present legal framework. If it is to go further it must have a true "power of the purse," at least over the administrative expenses of the Communities, if not over the operational programs of the various Funds. A logical concomitant would be to give the Assembly a decisive voice in determining the size of the tax presently levied by the High Authority upon coal and steel producers. This raises the question of assuring a similar independent source of revenue to the other two Communities, subject to the control of the Assembly²⁸²—a system of financing which would replace that of annual contributions by the Member States.

Again, under present provisions the Councils are required to consult the Assembly on specified matters but no such consultation is required on a number of important decisions such as those relating to overseas territories. Moreover, even where consultation is required the Councils are free to disregard the Assembly's advice. It could be provided that decisions on all important policy matters would require approval not only in the Council but also in the Assembly.²⁸³ This change, which would require an amendment of the Treaty, would in a sense elevate the Assembly to a position comparable to the lower chamber of a bicameral legislature in which the Council would play the role of the upper chamber.

There is some question whether the Member States are willing at this time to countenance a significant increase in the role of the Assembly. The De Gaulle government, it will be recalled, has opposed any effort on the part of the French National Assembly to increase its powers in relation to the national executive beyond the strict letter of the new Constitution.²⁸⁴ One reason for the opposition to such an increase of the European Assembly's power may be the fact that the Assembly has discussed rather freely steps toward further integration.²⁸⁵ Nevertheless, the Assembly it-

²⁸² The Rome Treaties envisage that the expenses of the two Communities will eventually be financed from their own resources, *e.g.*, for the E.E.C. from the revenue from the customs duties collected on the basis of the common external tariffs (E.E.C. Treaty, art. 201) and for the Euratom from the revenue from Community levies in the Member States (Euratom treaty, art. 173). The Assembly asked the Commissions to accelerate their studies on this subject. Resolution IV of Nov. 24, 1959, [1959] J'L OFF. 1261.

²⁸³ M. Marjolin, Vice-President of the Commission supported a similar proposition in his interview with *Le Monde* of Sept. 22, 1959.

²⁸⁴ Cf. *N.Y. Times*, April 29, 1959; cf. also the decision by the Constitutional Council, as reported in *N.Y. Times*, July 2, 1959.

²⁸⁵ *E.g.*, the proposal that the three Communities enter into an agreement for closer formal integration among themselves under E.E.C. Treaty art. 238, and Euratom Treaty art. 206. DOC. NO. 14 ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE (June 1958), *Rapport fait au nom de la Commission des affaires politiques et des questions institu-*

self appears determined to press at least in one direction. All three treaties envisage direct elections of Assembly representatives by universal suffrage of the people of the Member States.²⁸⁶ The Assembly working party has reported progress on a plan which might make such elections possible in 1962 or 1963.²⁸⁷ In order to conduct such elections the political parties would have to organize themselves on a Community level. An Assembly so elected would not have the direct access to national parliaments which the present Assembly enjoys.²⁸⁸ On the other hand, if the understanding and support of the public opinion develops sufficiently to permit a meaningful election (and some doubts have been expressed on that score), the new Assembly may constitute an important further step toward integration. Moreover, the increase of its powers might well prove more acceptable if linked with direct elections.

As seen by General de Gaulle, "the realities of Europe" require the cooperation of sovereign states through organized consultations of governments rather than "extranational" institutions with policy-making powers.²⁸⁹ If this concept prevails, the Community institutions will remain technical agencies for the execution of policies determined by national governments.

tionelles sur la coordination des trois Communautés Européennes, para. 18 at 22. See also speech by Representative Van der Goes van Naters, Parl. Debates (No. 8, June, 1958) (mimeo.) 11-12.

²⁸⁶ E.C.S.C. treaty, art. 21, para. 3, as amended by the Convention Relating to Certain Institutions Common to the European Communities, art. 2(2); E.E.C. Treaty art. 138(3), Euratom Treaty art. 108(3). The original version of the E.C.S.C. treaty art. 21 did not contain the requirement of a "uniform procedure in all Member States" which was added by the Rome Treaties and the Convention. The added requirement may make the speedy adoption of a scheme for direct elections more difficult. Spitaels, *Les Elections Directes Européennes*, 8 LES CAHIERS DE BRUGES 23, 26-27 (1958) No. 1.

The Assembly appointed a working party within its Committee on Political Affairs and Institutional Questions to study the problem. Its composition is given in [1959] J'L OFF. 794.

²⁸⁷ See statement by Representative Dehousse, Chairman of the Working Party, 416 EUROPE, item 2465 (May 23, 1959).

²⁸⁸ It has been suggested that during a transitional period only a portion of the representatives should be elected directly. DOC. 22 ASSEMBLÉE PARLEMENTAIRE EUROPÉENNE, DOCUMENTS DE SÉANCE 1960-1961, APRIL 30, 1960. *Rapport . . . sur l'élection de l'Assemblée parlementaire Européenne au Suffrage universel direct par MM. Battista, Dehousse, Faure, Schuijt, Metzger*.

²⁸⁹ Ambassade de France, Service de presse et d'information, Speeches and Press Conferences No. 152, Full text of President De Gaulle's third press conference in Paris on September 5, 1960, at 8.

APPENDIX

*List of Selected Acts of the
E.E.C. Council and Commission Issued
During the First 18 Months of the Community's Existence*

*Regulations**Regulation No. 1 (Council)*

The official languages are French, German, Italian and Dutch. A Member State and an individual or an enterprise have the right to choose any official language when corresponding with the institutions. The institutions must employ the language of the addressee. [1958] J'L. OFF. 385.

Regulation No. 2 (Council)

An identity card (*laissez-passer*) is made available for members of the European Parliamentary Assembly under Art. 6 of the Protocol on Privileges and Immunities. [1958] J'L. OFF. 387.

Regulation No. 3 (Council)

This regulation concerning the social security of migrant workers was issued under Arts. 51 and 227, par. 2 E.E.C. Treaty. The regulation covers sickness, maternity, invalidism, old age, accident, death, unemployment, and other benefits. The purpose of the regulation is to assure that migrant workers do not suffer prejudice with respect to their social security benefits as a result of their employment in different Member States. For this purpose the regulation lists in the annex relevant national laws under which migrant workers will acquire the benefits and lays down which of these laws are applicable for the purpose of determining benefits in a given case. The burden of payment is apportioned according to various formulae between the state of origin and the state of residence.

An Administrative Commission promotes cooperation among Member States and acts as a liaison agency and as administrative tribunal in resolving differences arising from the application of the regulation and interpreting its provisions.

The regulation does not provide any direct recourse by individuals to the Community institutions. If a Member State fails to extend its social security benefits to a migrant worker, the latter will have to avail himself of the legal remedies provided by the national law. The case will, however, reach the Community Court on a reference from the national court if a "prejudicial question" is involved (Art. 177 of the Treaty). [1958] J'L. OFF. 561.

Regulation No. 4 (Council)

This regulation supplements and contains implementing provisions for Regulation No. 3 (e.g. it determines which national authorities are competent, how to "add" the periods of insurance, etc.). [1958] J'L. OFF. 597.

Regulation No. 5 (Council)

This regulation contains provisions with respect to calling for and transferring financial contributions, budgeting, and administration of resources of the Development Fund for the overseas countries. (See Art. 6 Implementing Convention). [1958] J'L. OFF. 681.

Provisional Regulation No. 6 (Council)

Supplementing Regulation No. 5, this regulation defines the responsibilities of the auditor and accountants of the Development Fund. [1958] J'L. OFF. 686.

Regulation No. 7 (Commission)

In accordance with the Council's instruction under Regulation No. 5, the Commission establishes the "réglement organique" of the Development Fund. [1959] J'L. OFF. 241.

Directives

None.

Some Published Decisions

- 1) Council Decision establishing the *Journal Officiel*. [1958] J'L. OFF. 390.
- 2) Commission Decision concerning the use of a certificate for goods coming from non-member countries under arts. 9 and 10. E.E.C. Treaty (libre pratique). [1958] J'L. OFF. 688.
- 3) Commission Decision containing provisions applicable, as regards trade between Member States, to goods originating in another Member State in whose manufacture products were used on which customs duties were not levied or which benefited from drawbacks on such duties. (Cf. Art. 10 par. 2 E.E.C. Treaty) [1958] J'L. OFF. 694.
- 4) Decision of the Administrative Commission prescribing the first series of forms to be used in the application of Regulations Nos. 3 and 4 on the social security of migrant workers. [1959] J'L. OFF. 37.
- 5) See No. 4, supra: Decision prescribing the second series of forms. [1959] J'L. OFF. 58.
- 6) Council Decision directing the E.E.C. Commission to function as the secretariat of the Administrative Commission established by Regulation No. 3 supra. [1959] J'L. OFF. 703.
- 7) Council Decision apportioning funds of the Development Fund to social and economic projects. [1959] J'L. OFF. 864.
- 8) Council Decision approving special aid to Madagascar from the Development Fund. [1959] J'L. OFF. 865.
- 9) Council Decision allowing certain exceptions from Regulation No. 5. [1959] J'L. OFF. 866.

Miscellaneous (examples)

- 1) "Statut" (charter) of the Monetary Committee. [1958] J'L. OFF. 390.
- 2) "Statut" (charter) of the Transport Committee. [1958] J'L. OFF. 509.
- 3) "Réglement Interieur" (Rules of Procedure) of the Economic and Social Committee. [1959] J'L. OFF. 493.
- 4) "Statut" (charter) of the control committee of auditors established by Art. 206 E.E.C. Treaty and Art. 180 Euratom Treaty. [1959] J'L. OFF. 861.

Agreements

- 1) Agreement of Cooperation with the International Labor Organization. [1959] J'L. OFF. 521.

Chapter III

The Establishment of the Customs Union

Marc Ouin *

I. INTRODUCTION

The European Economic Community is, above all else, a customs union. The provisions of the Treaty establishing it which directly relate to the customs union make up, it is true, only forty-odd of its two hundred and forty eight articles. Nevertheless, the point of departure of the Treaty doubtless was and remains the establishment of a customs union.

A customs union groups countries each having a national geographic and economic area generally protected at the outset by customs barriers and, with regard to certain products, by import quotas vis-à-vis the rest of the world. These countries agree to eliminate among themselves customs duties and quotas, and thereby to form a single territory within which goods may circulate wholly without obstacles, regulation or limitation. Commercial unification of such a group of countries also involves agreement to enforce, within the newly-unified territory, a single tariff schedule which, vis-à-vis the rest of the world, replaces national tariffs. This common external tariff must at the same time be combined with a common commercial policy vis-à-vis non-member countries.

The elimination of the obstacles to trade among the countries which thus form a customs union, and the establishment of an external tariff common to its members necessitate a series of progressive steps. The importance of a step-by-step progression is increased whenever differences among the points of departure of member countries are pronounced.

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In the case of the European Economic Community, the problem is to establish a customs union among the following:

1) *The three Benelux countries* (Belgium, the Netherlands, and Luxembourg), who have already established a customs union among themselves, which has been in existence since 1950. In that year these three countries abolished customs duties among themselves at a single stroke and adopted a common external tariff. On the other hand, the elimination of quotas on their mutual trade (even today there still exist a few) and the creation of a single list of liberated goods in regard to imports from member countries of the Organization for European Cooperation (O.E.E.C.) and from the rest of the world required several years. A list of liberated goods was established in 1956 valid for imports from O.E.E.C. countries, but no similar list is yet in force in regard to imports from certain non-O.E.E.C. countries. The general level of tariff protection in the Benelux countries is quite low, although their duties on certain manufactured products are relatively high. These countries are poor in raw materials and to a large extent have traditionally depended for economic survival upon foreign commerce. Their imports per capita average \$450.00 annually and their exports \$400.00.

2) *Germany*, a country whose tariffs in the past have been fairly high. In keeping, however, with Professor Erhard's policy of freeing its economy from controls, Germany has, since 1955, reduced its tariffs of its own accord, and is therefore considered today as having relatively low tariffs. Germany is characterized by its highly dynamic policy of commercial expansion. Per capita imports attain a yearly average of \$200.00, and exports of \$250.00. Germany's quota policy is also a very liberal one. Because her balance of payments is flourishing and her exchange reserves are considerable, she has progressively eliminated almost all quotas on imports from countries of the non-communist world.

3) *Italy*, whose foreign commerce represents a smaller share of national income—per capita imports averaging \$80.00 yearly and exports \$80. Italy has, however, systematically developed her foreign trade, especially since the war, to a point where she is emerging as a great commercial country. She very early adopted a remarkably liberal policy in regard to quotas on imports from European countries. In fact, she has since 1950 removed almost all quotas on imports of goods produced in the member states of the O.E.E.C. Her restrictions on goods from other countries are stricter, but these

are now being progressively removed. Italy is considered to be a high-tariff country, even though she has unilaterally suspended duties in a very substantial degree.

4) *France*, which, because of traditionally protectionist attitudes and balance-of-payments difficulties, maintains both a very rigid system of import quotas and high tariffs. Foreign commerce generates a relatively small portion of France's national income, imports averaging \$180.00 per capita annually and exports \$170.00. Since the end of 1958, however, France has pursued a policy of progressive elimination of quotas on imports from O.E.E.C. countries, a policy which will in the future be applied to imports from other countries.

Among countries whose situations are so disparate at the outset, unusual efforts are required to achieve the elimination of obstacles to the exchange of goods and the establishment of a common external tariff as well as of a common commercial policy vis-à-vis third countries. The economies of these countries can be subjected only progressively to foreign competition. More abrupt changes in competitive conditions would create the risk that economic activity (which in one of the Six had always been protected either by high tariffs or quotas or both against foreign competition, including the competition of its new partners within the Community) would be endangered by the competition of similar activity of the other members of the Six. The goals of the Common Market, it is true, are to stimulate a better division of labor among the Six, to increase productivity and the like, but the sudden disappearance of any significant economic activity within a Member Country would create economic, financial, and social problems which the Community would not survive.

This emphasizes the necessity of proceeding slowly in order to extend the impact of the consequences of coordination of the industries of the Six over a period of time. Clearly this necessity is more imperative for those countries of the Six which at the beginning enjoyed the protection of the highest tariffs and quotas. To the Benelux countries, which enforced few quotas and low tariffs and were therefore accustomed to world competition (with the exception of a few Benelux industries which enjoy greater than average protection), the deliberation with which the Community will be created is less important than to France.

A "transitional period" of twelve to fifteen years beginning on

January 1, 1958, was therefore agreed to in the course of which the customs union is to be progressively created. During this transitional period, the Six are to undertake to:

- 1) abolish altogether tariffs among themselves,
- 2) abolish all import and export quotas on trade among themselves,
- 3) establish a common external tariff,
- 4) establish a single list of quota-free imports from non-member countries and, as to products which are not free from quotas, adopt a common quota policy.

In addition and concurrently, other more technical measures must be taken. For instance, methods of applying customs duties are to be unified: a common tariff is not adequate if methods of evaluation in Hamburg, Rotterdam, Marseilles, and Genoa differ. It is therefore appropriate not only to fix common tariffs but also to establish common rules for the application of such tariffs. In short, customs rules and regulations in their entirety must be unified.

But the solution of tariff and quota problems requires contemporaneous settlement of a great number of other questions as well. The problem of coordinating basic economic policies aside, steps closely connected with the elimination of tariffs among members of the Six include the establishment and enforcement of equitable rules of competition, and the harmonization of fiscal legislation affecting imported products. These problems, all of foremost importance, are in part treated elsewhere in this book. These remarks are merely intended to emphasize the fact that, even though the rules directly relating to the customs union constitute only forty or so of the two hundred and forty-eight articles of the Treaty, the majority of the other provisions contribute to its creation.

A direct connection has, moreover, been established between the progressive formation of the customs union and the other steps which are related to it. This connection is a characteristic of each of the stages of the transitional period.

The Treaty provides that the Common Market shall be established in the course of a transitional period of twelve years divided into three stages of four years each.¹ It further provides that, "to each stage there shall be allotted a group of actions which shall be undertaken and pursued concurrently." This provision ensures the necessary contemporaneity between the creation of the customs

¹ European Economic Community Treaty art. 8. The E.E.C. Treaty is generally referred to herein as "the Treaty."

union in the strict sense of that term and other measures, like harmonization of fiscal legislation, to which reference has already been made. In addition the Treaty provides that a condition of the progression from the first to the second stage of four years shall be confirmation that the purposes envisaged for the first stage have in their essentials been achieved and that the obligations incurred by the Member States in accordance with the terms of the Treaty have been fulfilled.² These objectives and obligations are, of course, those related to the initial creation of the customs union, but they also include those not specifically related to tariffs and quotas.

At the end of the first stage a statement shall, subject to the unanimous agreement of the six Member States, be issued that the objectives have been reached and the obligations fulfilled. If unanimity cannot be achieved, the first stage shall automatically be extended for a period of one year. At the end of this year (the fifth after the coming into force of the Treaty) the Six shall again seek a unanimous vote that the obligations fixed by the Treaty have been effectively fulfilled. If unanimity still cannot be achieved, the first stage shall be extended for a further period of one year (the sixth). At the end of this further year the vote of a majority of the Member States shall decide. If no majority can be obtained, the Member States shall designate an arbitration board to determine whether the required statement should issue. Its decision shall bind the Member States.

What would result if the arbitration board decided that the obligations had not been fulfilled? The Treaty is silent on this question. Clearly, however, in such a case the extremely serious political situation resulting would bring about either a complete failure of the Treaty, or the Member States, on the highest governmental level, would be forced to take political measures to save the situation.

If, as a result of a unanimous vote at the end of the fourth or the fifth year, or of a majority vote at the beginning of the sixth year, or of a decision by the arbitration board, the statement is issued that the objectives of the first stage have been attained, the Member States must proceed with the execution of the second stage. The Treaty is silent on the transition from the second to the third stage; therefore it is to be assumed that this transition is automatic. The Treaty also provides that the second or the third stages may not be extended or curtailed, except pursuant to a unanimous decision of the Council.

² *Ibid.*

The Treaty further declares that the provisions which may permit the extension of the first stage in the manner described, or those which permit modification of the duration of the second and third stages, shall not have the effect of extending the transitional period beyond fifteen years. Consequently, the customs union among the Six should become a reality in all particulars in the period between December 31, 1969, and December 31, 1972.

Obligations arising from the Treaty do not excuse the Six from meeting outstanding national obligations which individual Member States may owe to other countries.³ The substance of these obligations is contained in the General Agreement on Tariffs and Trade (G.A.T.T.) of which each of the Six is a signatory. This Agreement, to which about forty countries on six continents are parties, establishes a number of rules which bind the signatories in fixing commercial policy. The basic philosophy of the Agreement is that reflected by most-favored-nation clauses. If certain countries decide to abolish tariffs among themselves, without extending such benefits to the other signatory countries, the most-favored-nation principle is obviously not respected with regard to those countries. The G.A.T.T., however, authorizes the formation of customs unions, but it stipulates specific conditions with a view to giving certain guarantees to those contracting parties of the General Agreement who are not to be union participants. The Six must respect those conditions in establishing the Common Market, and these same conditions will govern, to a large extent, the commercial policy of the new Community towards the rest of the world.

The two categories of actions to be taken by the Six—those designed to abolish the obstacles to trade among themselves, and those designed to establish a common external tariff and a common commercial policy—conveniently define an outline of a study of their customs union. Part II of this chapter will therefore be devoted to relations of the Six with one another and Part III to the relations of the Six with third countries. Agricultural and food products will not be considered. Although it is true that basic principles are the same whether these or industrial products are at issue, the means of giving effect to such principles where agricultural and food products are concerned differ somewhat. The measures envisaged are, moreover, not so clearly defined as those in the area of industrial products since the Treaty generally leaves them to be spelled out and implemented by decisions of the Community institutions.

³ Treaty art. 234.

II. RELATIONS AMONG THE SIX

A. ABOLITION OF TARIFFS

The Treaty provides that tariffs shall be frozen as of the date of the entry into force of the Treaty.⁴ Consequently, since January, 1958, the Six have no longer had the right to raise their tariffs vis-à-vis each other.

1. THE BASIC CUSTOMS DUTIES TO WHICH THE TREATY RULES APPLY

The tariffs to which the rules governing the abolition of tariffs are to be applied are precisely defined.⁵ The Treaty calls these tariffs "basic duties," and provides that the basic duties which are subject to successive reductions are those applied on January 1, 1957. This means that the "freeze" applies to duties actually in force on January 1, 1957. More precisely, if a country had increased its customs duties between January 1, 1957, and the date of the first tariff reduction (January 1, 1959), it was obliged at that date to revert to the level in force on January 1, 1957, and to use this level as the basis for the reductions provided for by the Treaty.

This rule is all the more strict since the basic duty is the one that was in fact applied on January 1, 1957. If, at that date, a country had temporarily suspended, either in whole or in part, a customs duty previously obtaining, the basic duty would be the tariff actually collected on merchandise on January 1, 1957, taking into account the suspension, and not the tariff which would have been applicable had there been no suspension. This interpretation of the provisions of the Treaty has been confirmed in particular by the ruling of the Commission directed at France, which in 1958 had re-established a customs duty on paper pulp which she had suspended in 1957. The Commission ruled that France must abolish the re-established duty.

2. THE TIMING OF THE PROGRESSIVE ABOLITION OF CUSTOMS DUTIES

The timing of the progressive abolition of customs duties among the countries of the Community is determined as follows:⁶

1) In the course of the first stage of four years, the first reduction

⁴ Treaty art. 12.

⁵ Treaty art. 14.

⁶ *Ibid.*

was to be made one year after the date of the entry into force of the Treaty (that is, on January 1, 1959); the second reduction is to be made eighteen months later (on July 1, 1960); the third reduction is to be made at the end of the fourth year (on January 1, 1962).

2) In the course of the second stage (which may begin either immediately after the first stage, or one or two years later, or even a little later) ⁷ a reduction is to be made eighteen months after the beginning of the second stage, a second reduction eighteen months later, and a third reduction one year later. If it is assumed that the second stage will begin immediately after the end of the first stage, the reductions of the second stage will occur on July 1, 1963, January 1, 1965, and January 1, 1966, respectively.

3) The reductions which still remain to be made at the end of the second stage are to be carried out in the course of the third stage, according to a time-table to be determined by a majority of the Council of Ministers of the Community.

The amount of the tariff reductions is determined in the following manner: ⁸

1) At the time of the first reduction (which was effected on January 1, 1959) all tariffs (i.e., the basic duties) between Member States of the Community were to be reduced by 10%.

2) At the time of each subsequent reduction, each Member State is to reduce the total of its customs duties towards its partners in the Community in such a way that its "total customs receipts" will be reduced 10%, it being understood that the reduction of duty on each item shall be equal to at least 5% of the basic duty.

The "total customs receipts" are to be calculated by multiplying the value of the imports of each Member State from other Member States during the year 1956 by the basic duties.⁹ The "total customs receipts" provide a basic point of reference which remains unchanged throughout the period during which the Treaty is in effect. Each country within the Community has therefore established this figure by applying to a table of its imports for the year 1956 the relevant customs duty in effect on January 1, 1957 (basic duty). The sum of the products of the multiplication of these two elements is the "total customs receipts." With each reduction pursuant to the Treaty, each country must reduce customs duties in this table to the extent necessary to ensure that the application of the new duties will result in a 10% reduction of the "total customs re-

⁷ See text at note 2 *supra* and discussion thereafter.

⁸ Treaty art. 14.

⁹ *Ibid.*

ceipts." The new duties thus arrived at are to be applied to imports of 1960, 1961, and so forth.

3. FLEXIBILITY OF THE RULES ABOLISHING INTERNAL TARIFFS

The first reduction—that which took place on January 1, 1959—is therefore the only one which involves a diminution of 10% of each customs duty. A reduction of 5% of each customs duty is thereafter obligatory each time reductions are to be made, but each country remains free to choose those duties which will be reduced more drastically in order to achieve a reduction of total customs receipts of 10%. It would seem, however, that the Six plan an equal all-round reduction on July 1, 1960. The freedom thus given to Member States exemplifies the flexibility of the Treaty system of tariff reductions. In effect it permits each country to maintain for as long a period as possible customs protection of products with regard to which it most fears the competition of other Member States. In the course of the first two stages six reductions are thus contemplated which are to reduce the total customs receipts by 60% as compared with the duties in force on January 1, 1957. A country can, by applying the minimum reductions to a given product, that is 10% at the first reduction, and 5% at each of the five subsequent reductions, keep reduction of tariff protection of that product to a minimum 35% as of the end of the second stage. This means of course, on the one hand, that it shall have applied a reduction as to other products which exceeds 60% in order that the over-all reduction of total customs receipts shall equal 60%, and on the other hand, that the efforts to be made in the course of the third stage with regard to products enjoying the greatest amount of protection during the first two stages will be greater.

Consequently, at the end of the second stage, and solely on the basis of the rules described above, the level of over-all tariff protection of each Member State will have been reduced to one which is 40% of the initial level. With regard to certain products, however, the level may still be as high as 65% of the initial level, the level with regard to other products being, correspondingly, less than 40% of the initial level.

4. SAFEGUARDS AGAINST EXCESSIVE FLEXIBILITY

To avoid, however, the situation which might result at the end of the second stage—namely, that the Member States will have maintained a degree of tariff protection which cannot be abolished

in the third stage without creating serious difficulties—the rules elaborated above are supplemented by three provisions:

1) On the one hand, it is provided that duties exceeding 30% at the time of any reduction must be reduced at least 10%. Therefore any duty remaining above 30% is deprived of the benefits of the rules creating flexibility. If, as a result of any reduction, the duty falls below 30%, the rules creating flexibility are then applicable to it and the minimum reduction is thereafter 5%.¹⁰

2) On the other hand, goals are established for Community countries. They must endeavor to arrive at a reduction of the duties on each product amounting to at least 25% of the basic duty at the end of the first stage, and at least 50% at the end of the second stage. The Commission may make recommendations to Member States to encourage them to achieve these goals.¹¹

3) Finally, the Member States, having declared their willingness to reduce tariffs among themselves more rapidly than provided for in the rules—if general economic conditions and the situation of the industrial sector concerned so permit—the Commission may, with this end in view, make recommendations to the Member States.¹²

As suggested,¹³ the timing of reductions remaining to be achieved at the end of the second stage is not fixed by the Treaty. The Council must determine such timing at the appropriate moment. In principle, only the timing itself should thus be defined, the system of reduction continuing to be as flexible as it is in the first two stages (the first reduction of the first stage apart). But it must be emphasized that the Member States have incurred an unconditional obligation to abolish completely customs duties among themselves by the end of the third stage.¹⁴ Even though there is a right, therefore, to invoke the rules creating flexibility as a matter of law, this right will become more and more illusory in fact. For instance, if a country has, with regard to a given product, made full use of the flexibility of the system in the course of the first two stages, and maintains on that product at the beginning of the third stage a duty which is 65% of the basic duty which obtained on January 1, 1957, it will necessarily be obligated to eliminate this 65% within the four years of the third stage.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Treaty art. 15.

¹³ See note 7 *supra*.

¹⁴ Treaty art. 13.

5. METHODS OF IMPLEMENTATION ON JANUARY 1, 1959, OF THE RULES ABOLISHING INTERNAL TARIFFS

The uniform 10% reduction on January 1, 1959, of customs duties among Member States pursuant to the Treaty caused no difficulties. In fact, implementation proved to be remarkably simple. Implementation of the Treaty rules in subsequent stages will be complicated to the extent that Member Countries, seeking to postpone the day when certain sectors of their economies must forego tariff protection, invoke the rules creating flexibility. Obviously special interest groups in each country may try to convince their governments that their economic activities, more than any others, need the maximum protection permissible and for as long a period as possible. On the other hand, many industries—having strenuously prepared to meet new competition in the Common Market, and having invested heavily to this end—are now interested in speeding up the removal of economic frontiers so that they may more rapidly obtain access to a larger market and a return on their investments.

On January 1, 1959, each Member State effected, then, a 10% reduction of its tariffs vis-à-vis other Community countries. Because of Germany's unusually favorable balance of payments and in keeping with the liberal policies pursued by Dr. Erhard, during 1957 she unilaterally reduced tariffs on a substantial number of imports from the rest of the world. Given the fact that the basic duty of the Treaty is the duty in force on January 1, 1957, Germany was under no obligation to reduce tariffs on imports from other Member Countries on January 1, 1959, where it had already reduced them more than 10% of the basic duty during 1957. As a result, Germany was obliged to reduce customs duties on January 1, 1959, only on a few products, notably those on textiles and leather.¹⁵

6. TECHNICAL PROBLEMS OF THE IMPLEMENTATION OF THE RULES ABOLISHING INTERNAL TARIFFS

The Treaty also provides ¹⁶ that taxes having an effect equivalent to that of customs duties shall be progressively abolished during the transitional period. No definition of such taxes is given, however. The Commission is to define them, and to determine the means and

¹⁵ The difficulties encountered by France arising from the fact that it had not correctly determined its basic duty on paper pulp have already been mentioned.

¹⁶ Treaty art. 13.

timing of their abolition; in doing so it is to be guided by the Treaty rules governing the abolition of customs duties. The Commission has not yet collected the necessary information from industry with regard to taxes which have an effect equivalent to that of customs duties and which may be in effect in Community countries. No specific measures have been taken, therefore, with respect to taxes.

In connection with the relations of the Six to one another, one problem arises which has so far been only rarely discussed: that of customs evaluation. When products are to be imported, the customs authorities examine the documents which the importer (or his agent) produces to establish the price of the products. When the authorities decide, on the basis of these documents, that the declared price is reasonable, was freely negotiated by the buyer and the seller, and has been correctly declared, they accept it and calculate the duty with that price as a base. In all Community countries customs authorities enjoy, however, a very large measure of discretionary power. They may decide—virtually without being required to give any justification therefor—that the declared price is too low, and they may themselves fix another price as the basis upon which the duty to be paid is determined. By systematically increasing prices declared by importers, customs authorities could, therefore, partially annul the effects of customs reductions to be achieved in keeping with the Treaty. Given the customs laws presently in force in the Six, importers would have few ways of combating such arbitrary action, even though international conventions, and in particular those elaborated by the Council of Customs Cooperation, have established certain rules concerning the calculation of values for customs purposes. Customs authorities do not, however, appear to have misused their powers up until now, and no complaint seems to have been voiced by any of the Community countries. It should also be noted that as the customs reductions increase with the passing of the years, increases in customs evaluation would be less and less effective as a means of defeating the intended effects of the Treaty.

Such is the rather complex system created by the Treaty for the abolition of tariffs among the Six. It has the advantage of being flexible enough to permit each country to maintain protection of its most vulnerable industries for longer periods of time. The obvious disadvantage of this flexibility is that, if the Member States take full advantage of it, final tariff reductions will be particularly difficult for industries which continue to enjoy protection unless the

respective countries also take advantage of the first years of the transition period to reorganize or convert them effectively.

B. THE ABOLITION OF QUOTAS

I. THE RULES OF THE ORGANIZATION FOR EUROPEAN ECONOMIC COOPERATION

Since its creation in 1948 the Organization for European Economic Cooperation (O.E.E.C.) has endeavored to abolish import quotas among the seventeen member countries of Western Europe. The obligations of these countries, which O.E.E.C. imposed with a view to abolishing quotas, have taken the form of "percentages of liberalization." A "year of reference," the year 1948, was chosen, and each country agreed to abolish, on specified dates, quotas on a given list of products. This list was to be determined according to the following formula: the volume of 1948 imports of the products included in the list from other Member States (and their territories) must at least have equalled a determined percentage of the total volume of all products imported by the country in question in 1948 from the other Member States (and their overseas territories). Having fixed this minimum percentage at 50% in 1949, 60% in 1950, 75% in 1951, the O.E.E.C. raised it to 90% in 1955.

The Six are all members of the O.E.E.C. and as such they have been—and remain—subject to these rules. With the exception of France, each of the Six has of its own accord adopted, and even gone far beyond, the minimum percentages of liberalization established by the O.E.E.C. Germany had thereby achieved liberation of 91.8% of her intra-European trade, the Benelux countries 95.6%, and Italy 98.4%. France, on the other hand, was forced to invoke, in June, 1957, the safeguard clauses to which O.E.E.C. obligations are subject; until December 1958, she therefore applied a global quota on imports from O.E.E.C. countries, including those from Community countries. In December 1958, in conjunction with the return to partial convertibility of European currencies, and as a result of the program to achieve sound economy and finance initiated by the government of General de Gaulle, France also liberalized 90% (based on 1948) of its imports originating from other O.E.E.C. countries.

On January 1, 1959, therefore, only a relatively small percentage of imports from one of the Six were subject to quotas in another of the Six. This percentage varied, however, from country to country,

and the kinds of goods involved varied greatly. Generally the imports still subject to quotas were those which, in the view of the governments concerned, would have endangered domestic production of similar products if no quotas had existed.

Germany, the Benelux countries, and Italy maintained quotas only on a limited number of imports of industrial products. On the other hand, France, even though she had liberalized more than 90% of her imports compared with 1948, applied quotas to a large list of products. If quotas on these goods had been removed, imports would doubtless have increased greatly and would have represented much more than 10% of French imports. These facts explain the rules of the Treaty concerning the abolition of import quotas. As will become clear in the following discussion, developments have proved that the authors of the Treaty were, in this regard, overly pessimistic.

2. THE RULES OF THE TREATY

As is true in the case of tariffs, the Treaty provides, first of all, that quotas be frozen as of the effective date of the Treaty.¹⁷ This measure takes two forms:

- 1) on the one hand, the reinstatement of quotas which had been abolished as of January 1, 1958, is prohibited, and
- 2) on the other hand, a quota may not be made more restrictive—in other words, the level of imports envisaged by the quota may at no time be reduced.¹⁸

These rules apply, of course, only among Member States. Each country is perfectly free to reinstate quotas vis-à-vis third countries, or to make them more restrictive.

The Treaty provides, moreover, that quotas are to be totally abolished by the end of the transitional period.¹⁹ To this end, the Treaty provides that:

- 1) each Member State shall, one year after the Treaty takes effect, convert bilateral quotas into global quotas open, without discrimination, to all other Member States.²⁰ European countries which maintain quotas on given products generally do not, in fact, fix them unilaterally. Quotas are negotiated with each European supplier country, and each negotiating party attempts to gain as great an advantage as possible for its exports to the markets of the other

¹⁷ *I.e.*, January 1, 1958. Treaty art. 31.

¹⁸ Treaty art. 32.

¹⁹ *Ibid.*

²⁰ *Ibid.*

while increasing as little as possible quotas on the sales of the other's goods in its own markets. Accordingly, if the quid pro quo which country A receives from country B is larger than that from country C, country A will open a larger quota to country B's goods than to those of country C. Discrimination exists as between countries B and C in the market of country A, therefore. The globalization of quotas or, in other words, the transformation of bilateral quotas on the same product, each of which is open to one country, into a single quota open to all will put an end to such bargaining, abolish bilateral negotiations, and assure, in principle, non-discrimination.

2) The global quota must at least equal the sum of the bilateral quotas previously applicable to that product. Moreover, when each state has globalized its bilateral quotas, it must increase the total of its global quotas to such an extent that their total value as compared with the preceding year is increased not less than 20%, it being further understood that the global quota for each product must be increased by not less than 10%.

3) The global quotas must be increased each year in accordance with the same rules and in the same proportions (20% of the total value of the preceding year's global quotas and a minimum of 10% per quota).

4) The fourth increase of the quotas shall take place at the end of the fourth year after the Treaty becomes effective, and, taking account of the problem of the transition from the first to the second stage of the transitional period, the Treaty further provides that the fifth increase shall take place one year after the beginning of the second stage. Therefore, if the first stage is extended, as is permitted,²¹ there will be no increase of quotas during the period of the extension.

3. FLEXIBILITY OF THE TREATY RULES AND THE SAFEGUARDS AGAINST EXCESSIVE FLEXIBILITY

As is true of the rules concerning tariffs, the rules in regard to the elimination of quotas are flexible. This results from the fact that each country, although obligated to increase by 20% each year the total volume of its quotas, may limit the increase to 10% in connection with goods of its own industries which have reason to fear a too-rapid growth of foreign competition. If a Member State does so, however, it must increase to a greater extent its remaining quotas

²¹ See note 7 *supra*.

in order to attain the required over-all increase of 20% of its quotas.

It became evident, however, that these rules might not prove adequate to bring about a total liberalization by the end of the transitional period. It was, in fact, difficult to measure the degree of restrictiveness of any particular quota and to say whether its annual increase by 20% over the preceding year for a period of twelve years would certainly result in the total liberation of the product from quotas by the end of the transition period. For this reason these rules have been supplemented by a number of other provisions.

In the first place, special rules have been established for low or nonexistent quotas.²² The Treaty provides that if, for a product which cannot be freely imported, the global quota does not amount to 3% of the national production of the nation concerned, a quota equal to not less than 3% of such production shall be established one year after the date of the entry into force of the Treaty (that is, on January 1, 1959). This quota is to be raised to 4% at the end of the second year (i.e., on January 1, 1960), and to 5% at the end of the third year (i.e., on January 1, 1961). Thereafter, the State concerned must increase the quota by not less than 15% annually. The Treaty also indicates that in the case where there is no national production, the Commission must fix an appropriate quota.

By these special procedures, the drafters of the Treaty intended to establish quotas at relatively high levels at the outset in the hope that at the end of the transitional period there would be every chance that the affected products could be freed of quotas or that such liberation would create no problems. The establishment of such points of departure was obviously necessary in the case of certain countries which today, in effect, prohibit the importation of certain products. For such products the annual global increase of 20% and the 10% increase per quota would not have sufficed to assure liberalization after the twelve quota increases.

In the second place, the Treaty provides that, at the end of the tenth year of the transitional period, each quota shall be equal to not less than 20% of the national output of the product in question.²³ This rule strengthens even further the rules concerning low or nonexistent quotas,²⁴ since, the application of the other rules relating to them would not normally raise quotas higher than 13.3% of the national production at the end of the tenth year of the transitional period.

²² Treaty art. 33.

²³ *Ibid.*

²⁴ See note 22 *supra*.

In the third place, the Treaty contemplates that, if in the light of experience, the Commission finds that the rules concerning the progressive abolition of quotas, and in particular the rules relating to percentages, do not assure the complete abolition of import quotas at the end of the transitional period, the Council may, pursuant to a proposal of the Commission, modify these rules and, specifically, may raise the percentages. Decisions of the Council must be made by a unanimous vote during the first stage, and thereafter by a majority vote.

Finally, as is true of the abolition of tariffs, the Member States have declared their willingness to abolish import quotas, in relation to other Member States, more rapidly than is provided for by Treaty rules if general economic conditions and those relevant to the economic sector concerned so permit.²⁵

Another quite interesting rule concerning the abolition of quotas should be mentioned.²⁶ It provides that, in case the Commission finds that in the course of two successive years the imports of any product have been below the level of the quota fixed for it, this quota may not be taken into consideration for the purpose of calculating the total value of global quotas. In such a case, the interested country must liberate the product in question. If no such rule existed, a country could, in order to achieve the 20% over-all annual increase of quotas for which the Treaty provides, effect a considerable increase in the quota on a product for which it knows that the domestic demand is small with the certainty that no imports of consequence would result. This would avoid the necessity of increasing quotas on products for which a strong domestic demand exists—increases which would result in a larger volume of imports. It is a rule which, in a sense, is designed to prevent fraudulent calculations of quota increases.

4. IMPLEMENTATION OF THE RULES ELIMINATING QUOTAS ON JANUARY 1, 1959

The application of these rules on January 1, 1959, created a great number of difficulties and a great number of problems had to be resolved in order to give them effect. At first they did not seem to have been observed in all countries to everyone's satisfaction, and complaints were fairly frequent. The net result, however, of the initial application of these rules has been definite progress. More-

²⁵ Treaty art. 35.

²⁶ Treaty art. 33.

over, the return of European currencies to convertibility, as will become clear, set off a much faster movement towards the elimination of quotas, which has made the problem far less acute, not only among the Six, but also between them and the rest of the world.

Each country had, at the outset, to establish a "quota framework"—a list of products still subject to quotas in the country concerned. Opposite each of the products on this list the country indicated the bilateral quotas it had granted to other Community countries in the course of 1958, as well as, for each product, the global quota that was to be established in the course of 1959, pursuant to the provisions of the Treaty.

For the purpose of calculating the quota for 1959, the rules of the Treaty were applied in the following manner:

1) In the first place each country increased by 10% on each product the total of the quotas granted to other Community countries in the course of 1958.

2) With regard to those products on which no quota had been opened in the course of 1958, or on which the quotas opened in 1958 were, in sum, inferior to 3% of the national production of the product in question, the country fixed a quota equal to 3% of its national output. Generally, this resulted in quotas far higher than 10% of the total of comparable quotas opened in 1958.

3) The country in question then compared, with reference to the total volume of products under quota, the total of the quotas opened in 1958 with the total of the quotas opened in 1959, taking into consideration the rules cited in paragraphs 1) and 2) above. If the sum total of the quotas of 1959 was higher by at least 20% than the sum total of the quotas of 1958, the country was considered as having accomplished its obligations within the terms of the Treaty. If the sum total of the quotas of 1959 was not higher by 20% than the sum total of the quotas for 1958, the country, in order to fulfil its Treaty obligation to effect a 20% over-all increase, had to increase some quotas. Each country was free to choose those products whose quotas were to be increased.

The application of these rules, and especially of the 3% rule, has, in fact, led two countries of the Community to increase by much more than 20% its aggregate quotas of 1958. France, whose 1958 quotas reached the sum total of one hundred billion francs, increased its quotas in 1959 to two hundred-fifteen billion francs, or by 115%. Italy increased them to twenty-eight billion lire in 1959, compared with the eight billion lire in 1958, an increase of 250%.

The application of the 3% rule had noteworthy results with regard to certain products, for instance, passenger cars. The national production of cars in Italy and France is substantial, and until 1958 both pursued a very restrictive import policy. As a consequence of the 3% rule, France increased the quotas open to other Community countries from four-and-a-half billion francs in 1958 to seven billion in 1959, and Italy her quotas from three-and-a-half billion lire in 1958 to five billion in 1959. In the Benelux countries and Germany which, in general, followed liberal policies in regard to industrial imports even before the Treaty came into force, the rule of 3% has been only rarely applied, and the increases of 1959 quotas over those of 1958 were not much higher than the 20% fixed by the Treaty, at least they were not in connection with industrial products.

No decisions have been reached in regard to products of which there is no national production and in connection with which the Commission therefore must fix quotas.

5. TECHNICAL PROBLEMS OF THE IMPLEMENTATION OF THE RULES ELIMINATING QUOTAS

The application of the quota rules caused great difficulties, and protests of producers, importers, and exporters of the Community against the manner in which given countries implemented the rules, either in whole or in part, were frequent early in 1959. Criticisms were directed particularly at the conditions under which the 3% rule was applied and against the way in which global quotas were handled.

With respect to the rule of 3%, the difficulty obviously lies in determining national production. Certain countries demonstrated a strong tendency to make use of every available means of reducing the valuation of their national production with a view to reducing the amount of the 3% quotas. Long discussions have been conducted within the Community in an effort to determine the following:

1) Should the production be calculated by quantity or by value, calculation by value generally permitting more arbitrary figures than calculation by quantity?

2) Is that part of the production of a given product not utilized as such, but incorporated as a component part of another product, deductible? For instance, should the quota to be opened be 3% of the entire national output of car tires or should it be 3% of car tire production marketed as such, deducting that part of tire production which is mounted on new cars, since the latter have obviously been

figured in the calculation of car production and its corresponding quota?

3) May a country deduct from the value of its national production the amount of customs duties which would have been paid with respect to such products had they been imported instead of being produced within the country? The reason for this question is the fact that the comparison between national production and imports should take into account the disparity in costs of goods produced domestically and of those produced abroad which results from the duties payable by the latter. The Commission decided to authorize a fixed reduction of a maximum of 20% of the value of national production in order to take this factor into account.

4) In calculating the value of production, should deductions be made for all indirect taxes?

The result of the various methods used in certain countries to achieve a systematic reduction of national production values was that the quotas opened in 1959 on certain products were less than half what they would have been had the calculation been based on quantities.

A particular problem resulting from the devaluation of the French franc in December 1958 must be noted. France calculated her quotas in French francs, and this, in view of the devaluation, had the result of reducing by 15% the value of authorized imports calculated in foreign currencies.

The administration of global quotas also created difficulties—for example the issuance of licenses was delayed or limitations were placed on the periods of time within which they may be used. Some importers feared that licenses which had not been used as of December 31, 1959, would be annulled, even though their issuance was so delayed that it would have been materially impossible to effect the relevant imports within the period of time for which the licenses were valid. Moreover, even though distribution of licenses should be non-discriminatory, complaints have occasionally been heard that, within given quota categories, a large proportion of the total value of the licenses issued was for products having only a few potential buyers (for example, luxury passenger cars), while the total value of licenses in the same quota categories for products which are much in demand (for example, popularly-priced passenger cars) was very low.

These difficulties are fairly serious. Nevertheless, in general the application of the Treaty clearly has initiated an irreversible move-

ment towards the abolition of quotas among the countries of the Community. Community authorities have made every effort to carry out the provisions of the Treaty as faithfully as possible, but at the same time they have been relatively tolerant in those instances where certain provisions of the Treaty, especially the 3% rule, in fact imposed an extremely heavy burden on the importing country because of the risk of serious difficulties for its industries. The country concerned could in such cases invoke the safeguard clauses,²⁷ but, for fairly evident psychological and political reasons, partisans of the Treaty wished from the outset to avoid crises which might justify resort to these clauses. The initial implementation of the Treaty was greeted with some enthusiasm in Europe, and it would be extremely regrettable if this enthusiasm were dampened by social or other crises. Prudence is therefore advisable during the early stages.

Moreover, it should be noted that, as mentioned above, the provisions of the Treaty concerning the abolition of quotas will gradually lose their *raison d'être* as trade is progressively liberalized on a world-wide scale, notably under the stimulus of the International Monetary Fund and the G.A.T.T. This aspect of the problem will be dealt with in the second part of this chapter.

C. THE MEANING OF "LIBRE PRATIQUE" UNDER THE TREATY

In regard to relations among Member States the important question of which products are to benefit from the tariff and quota advantages mutually available in accordance with the Treaty required resolution. This question has been resolved by a Treaty provision according to which the benefiting products shall be:²⁸

- 1) those originating in Member States,
- 2) those coming from third countries which are deemed to be in *libre pratique* in the Member States.

The Treaty declares²⁹ that products in *libre pratique* are those products coming from third countries in regard to which, in any Member State, import formalities have been complied with, customs duties collected, and no total or partial drawbacks (rebates) granted.

The interpretation and the implementation of these provisions have created practical problems which the Commission must solve. To this end, the Commission introduced a certificate of *libre*

²⁷ See *infra* Part II, Subsection D.

²⁸ Treaty art. 9.

²⁹ Treaty art. 10.

pratique which must accompany all goods circulating among Member States and which are to benefit from the advantages of the Common Market. The certificate serves to indicate that:

- 1) the goods originated in one of the Member States; or
- 2) the goods have been imported from a third country, and that the Member State which first imported them has actually collected the usual customs duties in accordance with its tariff schedules; or
- 3) the goods in question were imported from a third country, but have been transformed or finished in a Member State, and that the appropriate custom duties on the constituent parts imported from third countries into the transforming Member State were collected either upon entry into the territory of the Member State, or, in certain cases, upon their leaving the transforming Member State destined for another Member State.

The principle is, therefore, that to be deemed free to circulate within the Community, a product must be free to circulate within one of the Member States. The customs duties on the product must have been collected in that Member State, and the product must not have benefited from customs drawbacks, as products so often do in Europe upon being exported. The product also must not have been admitted temporarily.

This apparently simple system nevertheless may cause difficulties until the common external tariff of the Community has been established. At the end of the transitional period all merchandise coming from abroad will pay the same duties, irrespective of its point of entry, whether this be one of the Benelux countries, Germany, Italy, or France. Meanwhile, however, as long as the common external tariff is not in force, merchandise coming from abroad will pay different duties depending on the country of entry into the Community. Therefore, exporters in third countries could bring their goods into the Community through that member of the Six which at a given moment applies the lowest tariffs vis-à-vis third countries, or the least restrictive quotas, thereby creating risks of trade diversion and diversion of other commercial activity within the Community.

In fact, however, these risks are limited by Community rules:

- 1) In the first place, the fact that drawbacks of customs duties are prohibited on a product which is imported by a Member State from a third country and re-exported, either in its original form or transformed, to another Member State, results in two duties being

paid on it—that of the first importing state, and that of the second importing state. This second customs duty is, it is true, lower than the duty which would have been levied on the product had it been directly imported from a third country to the second Member State. The difference is, however, minimal during the first years of the transitional period and it is, in the majority of cases, made up by the duty of the first importing country. It is even certain that, at the beginning of the transitional period, it will be worthwhile in many cases of products manufactured in one of the Member States, incorporating materials imported from a third country, not to ask for a certificate of *libre pratique*, but rather to request a drawback.³⁰

³⁰ This is all the more true since, on January 1, 1959, the Member States made, as to a great number of products, the first tariff reduction of 10% applicable to imports from non-member countries, and there are as yet no substantial tariff preferences extended by the Member States to each other. In order to make clear how this works take the following example: an importer of Member Country A buys \$100 worth of raw material in a non-member country on which there is a 20% duty on entry into Member Country A; he therefore pays \$20 import duty to Member Country A. With this raw material he manufactures a product of which the ultimate total cost is \$300. He exports this product to Member Country B. On entry into B this finished product would have been subject to a duty of 30% before the Treaty went into effect. During the transitional period the manufacturer-exporter of country A has the choice, when he exports the finished product to country B, between two solutions:

(a) either not to request that the product be considered in "libre pratique," to benefit in this case from the drawback of the duty collected on the raw material and to pay the full tariff (30%) on the finished product when it enters country B; or

(b) to demand a certificate of "libre pratique," not to request a drawback of the duty paid on the raw material and to pay the preferential tariff of the Community on the finished product when it enters country B. Obviously this choice will be dictated by the desire to sell his product at the lowest possible price in Member Country B.

If the manufacturer-exporter chooses solution (a), he receives a drawback of the duty paid on the raw material of \$20. His product therefore costs only \$280, and this is the basis for the calculation of the duty owed upon entry of the finished product into Country B. The cost of the product upon being imported into Country B is therefore

$$280 + \frac{280 \times 30}{100} = \$364.$$

If he chooses solution (b), he does not ask for a drawback, and the cost of the final product after it has been imported into Country B is

$$300 + \frac{300 \times 30}{100} = \$390.$$

After the first tariff reduction of 10% pursuant to the Treaty the tariff in Member Country B on the finished product will be 27% instead of 30%. The product can therefore be brought into Country B at

$$300 + \frac{300 \times 27}{100} = \$381.$$

Since this is a higher cost than that of solution (a) the manufacturer-exporter will still have no reason to ask for the benefit of a certificate of "libre pratique."

After the second reduction of 10% the tariff of Country B will be 24%. The product can then be delivered in Country B for

$$300 + \frac{300 \times 24}{100} = \$372$$

—still higher than the cost of solution (a).

After the third reduction of 10%, however, the tariff of Country B will be 21% and the product can be delivered in Country B for:

$$300 + \frac{300 \times 21}{100} = \$363.$$

Thus after the third tariff reduction, but only then, solution (b) will be more advantageous than solution (a).

Of course as the Member States reduce tariffs among themselves without making such reductions available to third countries, the difference between the tariff that one Member State will apply towards third countries and the tariff that it will apply to other Community countries will be increased to the point where it will be economically beneficial, despite the prohibition against drawbacks, to effect the diversions of traffic described.

2) In the second place, another factor which will compensate for these risks is the mechanism of the first stages of the establishment of the common external tariff. This mechanism³¹ will reduce the differences in the external tariffs of the Member States, increasing the tariffs on imports from third countries of Member States with the lowest duties, and decreasing the corresponding tariffs in Community countries where they are highest. Combined with the drawback prohibition, this reduction of the differences among tariff rates towards third countries will abolish the possible profits which merchants could otherwise obtain by trade-flow diversions. The differences between intra-Community tariffs and Community country tariffs vis-à-vis third countries will, of course, increase as the Six grant each other progressively increasing tariff preferences during the transitional period.

3) Thirdly, in cases where, despite these factors, trade diversions occur which prejudice the interests of certain Member States, the Commission must take all necessary steps to eliminate them.³² The nature of permissible Commission action is not defined by the Treaty, but the Treaty provides that such action should cause the least possible disturbance in the functioning of the Common Market and should take into account the necessity of advancing, whenever possible, the establishment of the common tariff. If these diversions of traffic occur as a result of the disparities between intra-Community tariffs and tariffs of Member States on goods from third countries, the best curative measure would logically be a more rapid establishment of the common external tariff.

Other measures are also conceivable, however. For instance, a Member State might refuse to consider a product in *libre pratique* which had been imported from a third country by another Member State. Such national measures would prove extremely serious because they would impose obstacles to the free circulation of goods within the Community. Some Member States, although they do not

³¹ See Part III of this chapter.

³² Treaty art. 115.

go so far, do, in fact, require for imported products, which may have originated in and been imported from a third country, a certificate of origin as well as a certificate of *libre pratique*. If this certificate of origin shows that the product in question does, in fact, come from a third country, the Member State reserves the right to refuse to grant to this product the quota and tariff advantages of the Treaty and the right to treat the product as if it had been imported directly from a non-Community country. Until now measures designed to achieve this kind of protection have generally not been directed against diversions of commercial traffic due to the differences in tariffs, but against diversions due to differences among quota policies vis-à-vis third countries. These measures are directed notably at commerce in goods finished in the Community but originating in non-Community low wage countries, countries with multiple exchange rates, or countries of which foreign commerce is a state monopoly (Japan, Uruguay, and the countries of the East). The particular industrial products affected are natural and fabricated textiles, photographic and movie equipment, and the like. In fact, taking into account the low prices at which such products are sold by the producing country, some Member Countries can protect their own industries only by recourse to a quota system or to an absolute prohibition of imports. If such products could enter under cover of a certificate of *libre pratique* issued by another Member State whose import policy is less restrictive with regard to third countries, the more restrictive policies of the first country would be frustrated. Finally, and again with a view to avoiding diversions of traffic, the Commission envisages the imposition of advance charges in lieu of customs duties on products originating in third countries when they pass from one Member State into another Member State, but there is as yet little information available in this regard.

The free circulation of goods within the Community will remain a serious problem so long as the common external tariff of the Community is not in force and the countries of the Community have not adopted a common quota policy towards third countries. In order to avoid the rather complex formalities, which could obstruct intra-Community trade, the drafters of the Treaty refused to provide a means for checking on the origins of goods. Protectionist reflexes are quasi-automatic, however, and ultimately the certificate of origin will reappear in acute cases. Community countries will no doubt be forced to make considerable efforts to rid themselves effectively of red-tape and of the useless nuisances which, either by force of habit

or under the pressure of protectionists, national governments tend to multiply.

D. CLAUSES PROVIDING SAFEGUARDS AGAINST DIFFICULTIES RESULTING FROM THE ELIMINATION OF QUOTAS

The Treaty provides safeguard clauses permitting a Member State, when difficulties arise, to take protective measures with a view to limiting the volume of its imports. These are:

- 1) a clause which may be invoked in case of balance-of-payments difficulties; and
- 2) a clause which may be invoked in case of special difficulties in a given sector of its economy.

I. THE CLAUSE PROVIDING SAFEGUARDS AGAINST BALANCE-OF-PAYMENTS DIFFICULTIES

The clause concerning balance of payments is similar to the usual clauses included in all international trade agreements. To prevent Member States from invoking it too often, however, the Treaty imposes very strict conditions on its applicability.

In the first place, the Treaty envisages a procedure which is, in a sense, preventive. The economic, financial, and monetary policies of each Member State are kept under constant review in order to avoid disequilibriums in the balance of payments.³³ Each Member State must therefore pursue economic policies which will ensure equilibrium of its over-all balance of payments, maintain confidence in its currency, and at the same time ensure a high level of employment and stable price levels. In order to facilitate the attainment of these objectives, the Member States are to coordinate their economic and monetary policies. The institutions of the Community, and notably the Commission, a special consultative committee, and the Monetary Committee are to formulate opinions for the Member States concerning the policies which they should follow to assure normal functioning of their economies as well as of the economy of the Community as a whole. Obviously constant supervision of the evolution of the economy and of financial, economic, and monetary policies constitutes the best means of avoiding disequilibriums.

Secondly, if despite supervision and coordination of current policies of the Member States, disequilibrium in balances of payments occur, the consultations for which the Treaty provides must take place. The Treaty describes disequilibrium as difficulties or serious threats

³³ Treaty arts. 103-105.

of difficulties as regards a Member State's balance of payments resulting either from an "over-all disequilibrium of the balance of payments or of the kinds of currency at its disposal and where such difficulties are likely, in particular, to prejudice the functioning of the Common Market or the progressive establishment of the common commercial policy. . . ." ³⁴ The Treaty takes into account, then, such disequilibriums as might constitute a threat for the internal functioning of the Common Market—that is, which might impel a country to re-establish protective measures with regard to imports originating in other Member States—or a threat to the common commercial policy—that is, which might bring a Member State to follow, in regard to third countries, a different policy than that of other Community countries. An accentuation of policy differences in regard to third countries would in fact create the risk of larger trade diversions and, as a consequence, of reinforcement of controls on the circulation of goods among Member States.

The procedures contemplated in these cases do not permit the country in question to re-establish protective measures in regard to imports. The Treaty provides that the Commission shall, without delay, proceed to an examination of the situation of the country in question, as well as of the measures that country has taken or may take in order to bring its economy into balance. The Commission shall make recommendations with these ends in mind. Even though the Treaty does not say so explicitly, it is clear that at this stage the recommendations of the Commission are to be directed at reform of the internal economic and financial policies of the country involved (reduction of public expenses, reduction of credit to private enterprises, increase of taxes, higher discount rates or, even, monetary revaluation) but not at the direct or quantitative control of its imports.

The procedure contemplates that, if these measures prove inadequate, the Commission thereafter shall recommend to the Council that it institute the mutual assistance measures for which the Treaty provides, subject to a majority vote of the Council. The essence of the notion of mutual assistance is its Community character. Mutual assistance signifies that the associated countries of a country in difficulties are obliged to aid it in overcoming them, thereby emphasizing the interdependence of the Six.

The Treaty contemplates that mutual assistance may take the following forms:

1) Concerted action within such international organizations as

³⁴ Treaty art. 108.

may be asked for help by the countries of the Community—that is, within those organizations which can grant credits in foreign currencies to the country in difficulty.

2) Action to avoid trade diversions when the country in difficulties maintains or re-establishes quotas on goods imported from third countries. The country in difficulties will not always be authorized at this stage to re-establish restrictions vis-à-vis other Community countries, although it can vis-à-vis third countries. The aim of such restrictions may well be defeated, however, if other Member States continue unrestricted importation from third countries of the products subjected to quotas by the country in difficulties, since the entry of such products, accompanied by a certificate of *libre pratique* from another Member State cannot be restricted. Because this is true, the other Member States must, in such cases, take the necessary steps to prevent the products in question from being re-exported to the Member State which finds itself in difficulties.

3) The grant of credits by other Member States, if they agree this is indicated.

4) Finally, and during the transitional period, a recommendation by the Commission to the other Member States to reduce tariffs more rapidly or effect larger quota increases in order to facilitate the increase of exports from the country in difficulties to them, thereby permitting it to increase its foreign exchange receipts.

If mutual assistance recommended by the Commission is not granted by the Council, or if mutual assistance is granted but the measures taken are insufficient to mitigate the difficulties of the country concerned, the Commission is to authorize the country in difficulties to take protective action with regard to exports of the other Community countries. The Commission must define the conditions applicable to such measures, their timing and the like, but the Treaty does not indicate the form which they are to take. It is likely, however, that, during the transitional period, they may, for example, delay the elimination of obstacles to trade (i.e., of tariffs and quotas) or even reverse the process, and that they might, before anything else, introduce quantitative restrictions on imports during the decisive period.

The process thus described is obviously quite long and complex. The Treaty expressly provides that the country in difficulties may initiate no protective measures without prior authorization of the Commission. The time required for the Commission to intervene

may be unduly long if a sudden crisis in the balance of payments occurs, however.³⁵ In this case the Member State concerned may take the necessary steps without preliminary authorization—but purely to prevent the situation from deteriorating. The Treaty provides that these steps shall cause the least possible disturbance in the functioning of the Common Market and shall not be more extensive than is absolutely indispensable in order to remedy the sudden difficulties which have arisen. Even after these steps have been taken, the Commission may recommend that the Council grant mutual assistance, which in turn may lead the country in difficulties to suspend its own protective measures. In this regard the Treaty provides that by majority approval of an opinion of the Commission the Council may require the country in difficulties to modify, suspend, or abolish its safeguard measures.

The safeguard against continuing balance-of-payments difficulties may be invoked during or after the transitional period. Because of the interpenetration of the economies of the Member States—which will be increasingly significant as the transitional period expires—and because of ever-closer economic, financial, and monetary cooperation, the likelihood that balance-of-payments crises will be Community-wide rather than national in scope will approach inevitability.

2. THE CLAUSE PROVIDING SAFEGUARDS AGAINST DIFFICULTIES IN PARTICULAR SECTORS OF THE NATIONAL ECONOMIES

The safeguards against difficulties in particular areas of economic activity are only applicable during the transitional period.³⁶ The reason for this is that during this period the progressive abolition of obstacles to trade and the resultant competition among economic activities of the various Member States may create “serious difficulties which are likely to persist in . . . [a] sector of economic activity or difficulties which may seriously impair the economic situation . . . [of a] region.” Such difficulties might manifest themselves by a decrease in the activity of enterprises in a given sector of the economy, by unemployment, or by substantial economic stagnation or retrogression of a given region.

Obvious problems result, but it is also obvious that recourse to safeguards must be viewed with a certain reserve. No government

³⁵ Treaty art. 109.

³⁶ Treaty art. 226.

may remain unmoved in the face of a deteriorating situation in a sector of its economy or of a depression in a region of the country, especially where either seems to be caused by foreign competition. If it took no action, the public reaction would be violent. But, on the other hand, if the goal of the Common Market is better distribution of labor among the Six, and the elimination of uneconomic activity in one country in favor of more efficient activity in another (and thereby, the attainment of a higher level of productivity for the Common Market as a whole), then it is inevitable that certain enterprises will disappear in some countries because they are subject to economic, financial, technical, geographical, or natural conditions which prevent them from meeting the competition of enterprises capable of increasing productivity. A balance is, then, to be sought, which will permit progressive elimination throughout the Common Market of inefficient enterprises, and will, at the same time, avoid violent economic disruptions which could provoke serious social or even political crises.

The entire structure of the Treaty was, moreover, determined by the need to maintain this balance as is indicated by:

- 1) the duration of the transitional period,
- 2) the flexibility of the program of progressive abolition of tariffs and quotas among Member States,
- 3) the provisions relative to the harmonization of legislation,
- 4) the creation of the European Investment Bank, and
- 5) the creation of the European Social Fund.

It is evident, however, that implementation of the Treaty is conditioned, not only on these provisions, but also, and above all, on economic stability and a continually developing prosperity both in Europe and throughout the world. Only under these conditions can the Community countries accept the disappearance of some of their enterprises for it is only under such conditions that their highly-developed economic structures will be flexible enough to permit the people affected to re-establish themselves in other pursuits without too much difficulty.

Nevertheless, a safeguard clause remains necessary where, in spite of the flexibility of the provisions of the Treaty and the steps which each country is obligated to take to adapt itself in order to allow enterprises in their turn to adjust themselves to foreign competition, a grave crisis develops. For the reasons already indicated, recourse to this clause is, however, strictly regulated.

The government concerned may not invoke this safeguard clause

unilaterally, but must request authorization from the Commission, and its purpose must be to "restore the situation and adapt the sector concerned to the Common Market economy." Moreover, the Commission itself must determine the measures of safeguard which it deems necessary, stating precisely the conditions, the means, and the duration of their application. These measures, and their duration, may be only such as are absolutely necessary to permit restoration of the situation. Finally, the Treaty provides that priority should be given in the choice of measures to those which will least disturb the functioning of the Common Market.

The Treaty does not specify the measures which the Commission may decide to authorize, but leaves the Commission absolutely free to determine them. Nevertheless, it seems entirely likely that, in the case of activities which—once reorganized—give every indication that they will be able to survive, the Commission will elect measures which will both assure that the reorganization will take place as rapidly as possible and will afford the activity more and longer-lasting protection. Thus protected, the reorganization will take place—perhaps with the aid of subsidies or of the continuation of quotas or tariffs on the importation of the products concerned or other such aids. If, however, the activities concerned ought to disappear because, for one reason or another, it is impossible to improve their productivity sufficiently to make them reasonably profitable, the Commission will probably elect measures permitting as gradual a disappearance as possible. At the same time, of course, steps must be taken to find employment for workers losing jobs and to develop in the region in question economic activity better adapted to the conditions obtaining.

III. THE RELATIONS OF THE SIX WITH THIRD COUNTRIES

The problem of the relations of the Community with the rest of the world are of extreme importance to both. The Community is, after all, the world's second largest commercial power (in 1957, the U.S. share of world trade was 17.6%, that of the Community 17.4%, and that of the United Kingdom 11.2%); and yet this vital problem is far from solved. The Treaty creates some rules directed at the Community relationship with third countries, but it leaves a great number of questions to be resolved during the transitional period by an interplay of the various political and economic forces

which will confront each other both within the Community and without it.

The most debated question today is whether the Community will be turned in upon itself or outwardly oriented—that is, whether the Community will develop a protectionist or liberal commercial character. No attempt to answer that question will be made in this chapter. At this juncture one can only describe the context within which this question arises—that is, describe the Treaty rules regarding the tariff and foreign commercial policies of the Community, the way they have been applied to date, and the place of the Community in the European and world setting, taking into account the factors which, for the last two years, have influenced its relations with the rest of the world (the free trade area and the Dillon proposals).

A. THE ESTABLISHMENT OF THE COMMON EXTERNAL TARIFF

I. METHODS OF DETERMINING THE TARIFF

The General Agreement on Tariffs and Trade, of which the Six are members, excepts customs unions in applying the most-favored-nation principle to tariffs.³⁷ In order to qualify for this exception, a customs union must conform to a certain number of conditions fixed by the G.A.T.T., however. One condition is that the incidence of the external tariff of the union should not, taken as a whole, be greater than that of the national tariffs replaced.

By virtue of this condition, the Treaty, as a general rule, envisaged a tariff corresponding roughly to the arithmetical average of the tariffs of the four constituent customs territories.³⁸ (Luxembourg, the Netherlands, and Belgium, having for the last ten years been part of a customs union, are considered as a single customs territory.)

The question of whether or not the arithmetical average of the tariffs of the four territories conforms to the rules of G.A.T.T. has long been debated. Within as well as outside the Community, it has been argued that a weighted average which would take into account not only the present level of tariffs of each of the four territories, but also the value of goods imported by these territories would more nearly conform to the spirit of G.A.T.T. Those in favor of this thesis calculate that on the basis of a weighted average the external

³⁷ See Introduction at note 3 *supra*.

³⁸ Treaty art. 19.

tariff of the Community would be, on the whole, lower than that resulting from the arithmetical average, given the fact that the two largest importers of the Community, Germany and the Benelux countries, are also the territories with the lowest tariffs. This would, of course, be true only of the external tariff viewed as a whole, since as to certain products a tariff based on a weighted average would be higher than one based on the arithmetical average. Discussions in G.A.T.T. of the choice between the two methods of averaging have not yet resulted in a decision.

As in the case of the abolition of tariffs among countries of the Community, January 1, 1957, was chosen as the date for determination of the tariff levels to which the Treaty rules would apply.³⁹

Italy, however, has for the last ten years or so, in fact, applied a tariff which is generally 10% lower than the tariff for which her laws provide. The Treaty provides that in calculating the arithmetical average, the legal tariff (consequently the higher of the two) is to be used.

Although they adopted the arithmetical average in principle, the drafters of the Treaty also wished to establish certain ceilings on the results which the calculation of such an average could produce. The Treaty therefore provides that the common external tariff shall not exceed:

1) 3% on some products of which the most important among industrial products are: iron pyrites, raw graphite, calcium phosphate, flax, arsenic sulphur, natural gas, tar, bitumen, sodium nitrate, raw rubber, raw furs, wools, wool linters, combed cotton, cotton linters, etc. (List B).

2) 10% on other products of which the most important among the industrial products are: glycerine, resin, petroleum bitumen, tannins, coloring matters of vegetable origin, essential oils, liquid resin, colophene; sheets and leaves of natural or synthetic rubber; leather and hides of cattle, sheep, and goats; newsprint in rolls, wool yarn (not yet finished for retail sale), linen, ramie, hemp, cotton, jute; iron and steel, iron bars and sheets, sheet iron, iron wire; bars, sections, and wire of brass, nickel, aluminum, lead, and zinc (List C).

3) 15% on other products of which the most important among industrial products are: alkaline metals, mercury, ammonia, zinc oxide (List D).

4) 25% on another list of products of which the industrials are:

³⁹ *Ibid.*

organic chemical products, synthetic organic coloring matter, artificial plastics, with the exception of products manufactured from plastic (List E). It should be added, however, that where, on January 1, 1957, the Benelux countries applied to the respective products a duty lower than 3%, this duty is, according to the Treaty, to be raised to 12% in calculating the arithmetical average. The result is plainly an attempt—at the same time that a ceiling of 25% on the external tariff of the Community is fixed—to avoid establishing too low a tariff on these products by increasing the amounts upon which the calculation of the average is based.

On the other hand, for specified products the Treaty fixes a list of duties which France must take into consideration in calculating the arithmetical average. These duties are higher than those in fact applied by France on January 1, 1957 (List A).

With regard to other products, the common tariff is fixed by the Treaty itself (List F), and is, in some instances lower, and in others higher, than the duty which would have been obtained had the arithmetical average been calculated. List F products are predominantly agricultural, but some are industrial, such as phosphorus, iron-oxides, sheets of veneer, and veneered panels, on all of which the tariff will be high, and some basic textiles (cotton, hemp, jute) and minerals (brass, zinc) on which Community tariff will be non-existent.

Finally, the Community tariff on a last category of products will not be determined according to the arithmetical average, but by negotiation among the Member States. These products are found in the much-discussed list G.⁴⁰

2. MEANS OF IMPLEMENTATION OF THE PROVISIONS CONCERNING THE COMMON EXTERNAL TARIFF

Once the Community tariff is determined, Member States must progressively put it into effect. Since in toto it corresponds to the arithmetical average of the tariffs in force on January 1, 1957, in the four customs territories of the Community, some countries will have to increase, and others to decrease, duties in order to arrive at the common tariff. These changes are to be made during the transitional period so that at its end the common tariff will be in force. They are not to be initiated, however, until December 31, 1961, a

⁴⁰ See text of this Part III, Section A at Subsection 4.

date which, absent extension of the first stage, will also mark the end of that stage. At that time ⁴¹ Member States must, in cases where the duties applied on January 1, 1957, differed no more than 15% in either direction from the common tariff, put the common tariff into effect. Each Member State will have fulfilled its entire Treaty obligation as far as products thereby affected are concerned. In respect to products on which the difference in either direction is greater than 15%, the state in question must, on December 31, 1961, reduce this difference by 30%. A second reduction of 30% of the difference is to be made at the end of the second stage.

The Treaty does not indicate when and how the difference still existing after the second reduction is to be eliminated. It specifies, however, that the common tariff is to be in force in its entirety at the end of the transitional period, which means that each country must, one way or another, eliminate during the third stage the remaining differences.

An example with figures makes it easier to understand how the system works. Given a product to which the Benelux countries applied (on January 1, 1957) an import duty of 11%, Germany a duty of 17%, France a duty of 23%, and Italy a duty of 29%, the arithmetical average would be: $\frac{11 + 17 + 23 + 29}{4} = 20\%$. Since the German and French duties of 17 and 23% respectively differ by 15% from the common tariff of 20%, Germany and France will put the common tariff into effect on December 31, 1961. The Benelux countries, on the other hand, will reduce by 30% the difference between the 11% duty in effect on January 1, 1957, and the 20% common tariff. The Benelux duty will therefore become 14%. By virtue of the same rule, Italy will reduce her duty to 26%. At the end of the second stage Benelux will raise its duty to 17%, and Italy will reduce hers to 23%. In the course of the third stage, both Benelux and Italy will attain the 20% rate.

The Treaty also provides ⁴² for the case where some duties of the common tariff—those which have to be negotiated by the Member States (List G)—are still unknown at the end of the first stage of the transitional period. In this case the rules described above are to be applied six months after the date these duties are established.

⁴¹ Treaty art. 23. In the spring of 1960 the feasibility of advancing the Dec. 31, 1961, date was, however, being discussed. See also Chapter I *supra*.

⁴² Treaty art. 20.

The Treaty also provides that the Member States shall be free, in order to align their duties with the common customs tariff, to modify these duties more rapidly than indicated above.⁴³

3. TECHNICAL PROBLEMS OF IMPLEMENTATION OF THE RULES ESTABLISHING THE EXTERNAL TARIFF

If the Member States are to adopt duties which conform with the external common tariff, they must, of course, know the amount of the latter. The determination of this tariff raises a great number of technical problems, however, and the Treaty is of little help in resolving them. The Commission is to suggest solutions to the Council⁴⁴ and reference must therefore be made to the work of the Commission since the Treaty went into effect to know the context within which these problems are to be progressively solved.

In the first place, a comparison of national tariff schedules must be made in order to define the bases upon which the arithmetical average is to be calculated. Present schedules, in fact, differ from one another. For instance, in one schedule duties are levied on cars in accordance with their weight, whereas in another the number of cylinders is determinative. One of the first tasks therefore was the juxtaposition of the various customs headings of the four tariffs of the Community: the result was the elaboration of a list comprising 20,000 headings, whereas an average tariff list rarely includes more than 5,000.

In the second place, a single tariff schedule must be established for the Community which will give a basis upon which the common tariff can be established. This schedule should normally comprise about 5,000 headings. Obviously this will entail choices, in the sense that, to return to the example cited above, it must be decided whether for passenger cars tariffs are to be calculated according to weight or according to the number of cylinders.

Thirdly, a "table of concordance" between the headings of the Community schedule and those of the national schedules must be created. Such a table will make calculation of the arithmetical average possible and, at the same time, will provide a basis for determination of the tariffs which each Member State will have to increase or decrease in the course of the successive stages of tariff equalization. Determination of these tariffs obviously raises another delicate

⁴³ Treaty art. 24.

⁴⁴ Treaty art. 21.

technical problem, since certain Member States levy an *ad valorem*, and others a specific,⁴⁵ duty on the same product.

However, the calculation of the arithmetical average under these conditions may bring to light internal disequilibriums in national tariff structures. Indeed, a rational tariff structure should provide higher and higher tariffs on goods as they are subjected, beginning with the raw material, to progressively greater degrees of transformation. For example, there should be a progression in the amount of duties levied on raw wool, carded wool, wool yarn, wool cloth, and wool clothing. Application of the arithmetical average could, as far as the common external tariff is concerned, result, however, in the application of a duty to wool yarn which is lower than that applicable to carded wool. An equilibrium must therefore be established within tariff schedules which will take account of the degree to which various goods have been finished.

The work begun with this end in view almost two years ago by groups of customs experts was virtually completed by the beginning of 1960. It was, in fact, indispensable that the tariff of the Community be known by this time to permit G.A.T.T. tariff negotiations to begin.⁴⁶

4. LIST G: EXTERNAL TARIFF ITEMS YET TO BE NEGOTIATED AMONG THE SIX

In the course of the Treaty negotiations, it was impossible for the Member States to agree on the application of the rule of the arithmetical average, or on a maximum ceiling, or on a common duty with regard to several products. These products are enumerated in list G which was annexed to the Treaty. This list includes, most importantly, raw materials on which certain countries of the Community levy very high duties and others very low ones. Those states which apply high duties do so because the cost of their national production is in general much higher than the average world price. If a lower duty were put in effect, these countries would have to cease production, since they are unable to produce competitively. Serious economic, financial, and above all, social consequences would result. But should the external tariff of the Community be fixed at the level of the higher tariffs, the transforming industries of those countries

⁴⁵ A specific duty is one which takes into account the nature only and not the value of the product imported: for example, regardless of its value a given raw material is subjected to a duty of \$1 per pound or a given electrical appliance to a duty of \$1 per appliance.

⁴⁶ See text of this Part III, Section E at Subsection 5.

which levy a low, or even no, duty would be forced to procure the raw materials affected at a higher price than the present—that is, the world market—price. Their ability to compete in the sale on world markets of goods manufactured from these raw materials would be correspondingly diminished.

The conflict among the Member States concerning list G exemplifies a more general problem which the Community as a whole faces. If the Community is to be a world commercial power, capable of exporting at competitive prices, its industries must procure raw materials at the most advantageous prices, which is to say, at world market prices. If these prices are to be increased by heavy duties, the export position of the interested industries will be worsened. If, on the other hand, the Community protects the raw materials it produces with high tariffs, it will encourage their exploitation even though they can only be sold at higher than world prices, and it will run the risk of developing tendencies toward autarky.

Because the products in list G are, with regard to the determination of the common external tariff, subject to a special procedure, special Treaty rules were provided for them.⁴⁷ The Treaty provides that the Commission shall take the appropriate steps to ensure that negotiations among the Member States will be undertaken before the end of 1959, and concluded before the end of 1961 (that is, before the initiation of the first changes in the tariffs of the Member States directed at the establishment of the common external tariff). If, however, in the case of any product no agreement has been reached by that date, the Commission is to submit proposals to the Council recommending the duty to be levied. The Council is to accept or reject the proposals of the Commission by means of a unanimous vote during the second stage, and by means of a majority vote during the third stage.

In any case, duties on products in list G must be determined by the end of the transition period at the latest. If problems are then still outstanding, political decisions will obviously be necessary to resolve them. The conclusion seems justified even now that the requisite compromises will, in one way or another, be achieved.

Consequently, as long as the customs duties of list G were unknown, the Member States could take no steps to reduce differences among the tariffs that each levied on these products—which, by definition, varied greatly from one another. For this reason they created the greatest risks that trade diversions would occur. On the

⁴⁷ Treaty art. 20.

other hand, since these products are generally of considerable importance in world commerce, and since some third countries have a vital interest in exporting them, the uncertainty was particularly resented. This explains the lively criticism of list G within G.A.T.T. Finally, the lack of information on list G tariffs complicated the G.A.T.T. tariff negotiations initiated pursuant to the Dillon proposal.⁴⁸

Because of these several difficulties the Commission did not wait until the end of 1959 to bring pressure on the Member States to begin negotiations. As a result of the Commission's initiative, negotiations were in fact begun at the beginning of 1959. Working groups composed of the representatives of the Commission and of the governments of the Member States have met together on several occasions. Discussions of these groups involved—it may be added—a profound examination of the situation of each product on the list: production, imports, exports, prices, capital invested in the producing enterprises of the Community, labor expended, perspectives of development, possibilities for the increase of productivity, and the like. Ultimately, in March, 1960, the Six reached agreement on the tariffs of list G (with the exception of those on petroleum products). Their successful compromises in this sensitive area indicate their political determination to proceed with the establishment of the Common Market.

B. THE LIBERALIZATION OF TRADE WITH THIRD COUNTRIES

Strictly speaking the Treaty imposes no precise obligations on the Member States concerning quotas on imports from third countries. It merely indicates in general terms that the Member States shall coordinate their commercial relations with third countries in such a way as to bring into existence, not later than the expiration of the transitional period, the conditions necessary for the implementation of a common policy with regard to foreign commerce.⁴⁹ It adds that the Commission shall submit to the Council proposals regarding the procedure to be followed in the course of the transitional period to coordinate action, and to achieve a uniform commercial policy. The Council shall accept these proposals by unanimous vote during the two first stages of the transitional period, and thereafter by majority vote. Finally, the Treaty establishes, as a goal for the

⁴⁸ See note 46 *supra*.

⁴⁹ Treaty art. III.

Member States, uniform lists of third-country products not subject to quotas which are as inclusive as possible. To further this aim the Commission shall make appropriate recommendations to them.

The relative vagueness of these provisions, if compared with those which regulate the relations among the Member States and those relative to the common external tariff, may seem astonishing. It has in fact both legal and factual justification.

One fact which justifies this vagueness is the extraordinary complexity of the problem. The points of departure of the Member States were, in fact, very different when the E.E.C. Treaty was negotiated. On the one hand, the lists of liberated third-country products of each Member State differed among themselves and still differ. Germany's lists of liberated products imported from her partners in the O.E.E.C. differ from those of products imported from the dollar area, and neither is the same as that of products imported from countries which belong neither to O.E.E.C. zone nor to the dollar area. Italy has different lists for these areas, but, in addition, has lists in regard to products of countries which belong neither to the O.E.E.C. nor to the dollar area which differ among themselves. Moreover the differences in these lists in regard to a given area are differences in scope as well as of composition. The situations are even more disparate in regard to the relations between each of the Six and those countries which do not belong either to the dollar area or to the area of the O.E.E.C.—and this remark relates only to over-all percentages. If one examines the lists of products, a comparison becomes practically impossible.

Firm obligations to unify lists of liberated products would create inextricable problems from a practical standpoint and have grave consequences with regard to commercial policy. In fact, if these lists were harmonized on the basis of the lowest common denominator, some Member Countries would be forced to retrogress and to re-establish quotas on a great number of products. They are not prepared to do so, and moreover, as will be clear from the following discussion, to do so would be to violate international obligations imposed by O.E.E.C. and the G.A.T.T. If the lists were harmonized at the most liberal level, some Member Countries would be forced to make efforts which, either because of their balances of payments, or for reasons of national commercial policy, they are not in position to make immediately or soon. If the mean between the two were chosen, it would be practically impossible to determine it. Each Member State has, moreover, bilateral commercial agreements with

most third countries in each area, fixing quotas on the imports of goods from them. In exchange for the import concessions involved, these third countries grant concessions in regard to Member State exports. The counter concessions obviously are different for the various Member States and also vary according to the third country granting them. If the lists of Member States of liberated products from third countries were made uniform, coordination of the bilateral negotiations between the Six on the one hand and each of the third countries on the other should be a consequence. This would create complex problems which neither the Member States nor the third countries are now prepared to face. One of the avowed objectives of the Community is, of course, to achieve complete uniformity at the end of the transitional period. But the fact remains that it was not possible to write into the Treaty specific obligations of the Member States as to the steps to be taken in this direction during the transitional period.

To these factual considerations must be added legal ones. The Six are members of the International Monetary Fund (I.M.F.) of G.A.T.T. and of the O.E.E.C. Each of these international organizations has rules regarding quotas on commercial imports which increase the difficulties of achieving uniform lists of liberated products—at least as things stand at present. G.A.T.T. is an international agreement to which approximately forty countries are parties and which has as its object the creation of something like a code of good conduct in international commercial relations and thereby a world as free of obstacles to trade as possible. Based on national-treatment and most-favored-nation clauses, G.A.T.T. hopes to achieve its ends by outright prohibition of import quotas (except in cases of balance-of-payments difficulties) and by the reduction of tariff barriers through negotiation.

Sixty-eight nations participate in the International Monetary Fund. Its purpose is to make possible the liberation of financial transactions on a world-wide and non-discriminatory basis and to create a better equilibrium of international financial relations, specifically by means of realistic exchange rates. It has important resources at its disposal to aid countries suffering from temporary balance-of-payments difficulties. Because these difficulties are often due to the internal management of the finances of member countries, it also has certain powers of inspection and recommendation.

These two organizations were created at the end of the last war. Because of reconstruction needs and the situation which obtained

generally at the time of their creation—which made it impossible to apply their rules without reservation—these rules were to become effective only gradually during periods of transition. The time is now coming when the end of these transition periods can be foreseen.

O.E.E.C. imposes upon its members a level of liberalization at least equal to 90% of their 1948 intra-European imports. At the time the Rome Treaty was negotiated, all Member States, with the exception of France, had effectively reached, and even largely surpassed, this level. But France was far from doing so. Indeed, after the Treaty was signed difficulties in her balance of payments forced France (in June, 1958) to re-establish quotas on all imports. Thus, even if France—pointing to her difficulties and invoking the safeguard clause provided for this purpose by the rules of the O.E.E.C.—could suspend liberalization within the O.E.E.C., other Community countries, having no balance-of-payments difficulties, could not have invoked the same clause for the same purpose even if they had wished to do so. In December 1958, on the eve of the effective date (January 1, 1959) of the first measures affecting commerce contemplated by the Treaty, France had—as to O.E.E.C. countries—achieved the 90% level. Since then she has gone even further, and has now reached 94%. Since each country is, according to O.E.E.C. rules, free to choose the products on which it abolishes quotas (provided it attains the obligatory percentages) the lists of liberated products within O.E.E.C. of the respective Common Market countries differ from one another, to the point that unification of these lists would:

1) either force certain Member States to re-establish quotas on certain products and to fall below the 90% liberalization level without being able to invoke the safeguard clause to justify this regression; or

2) force other Member States to liberalize immediately certain products within the O.E.E.C.—which they are not now ready to do. Because, moreover, immediate liberation of these products would in their opinion create serious difficulties, even within the Community, the Treaty drafters established the rules for a progressive increase in quotas.⁵⁰

In relation to the G.A.T.T., the question is even more delicate, and its present development particularly interesting. The G.A.T.T. prohibits absolutely quantitative restrictions on imports, recognizing only tariffs as legitimate means of protection. This is its basic

⁵⁰ See Part II *supra*.

principle, and only one exception is recognized: difficulties in balances of payments. Moreover, the G.A.T.T. categorically affirms the principle of non-discrimination in the administration of quantitative restrictions maintained or newly established by a country which is suffering from balance-of-payments difficulties. It recognized derogations from this principle only to the extent that the International Monetary Fund also permits differences in treatment with regard to the restrictions on foreign exchange.

In the post-war years, G.A.T.T. applied these two principles with a great deal of flexibility. Because of their reconstruction and development needs, most of the European countries had balance-of-payments difficulties. Moreover, because of the absolute separation introduced before, during, and after the war among the monetary systems of countries, and the fact that transactions were effected according to bilateral agreements—in short, because of non-transferability among currencies—G.A.T.T. accepted the maintenance of quantitative restrictions and their discriminatory application. It even went so far as to close its eyes to the intra-European liberalization which the O.E.E.C. had introduced among its members, and which was in essence discriminatory in regard to the other contracting parties to the G.A.T.T. since the O.E.E.C. countries abolished quotas among themselves without according, necessarily, the same treatment to other G.A.T.T. members. This tolerance on G.A.T.T.'s part was obviously motivated by the fact that the O.E.E.C. countries had made their currencies transferable among themselves by virtue of the creation of the European Payments Union, which also comprised a system of automatic credits among its members.

However, as balances of payments of the countries of Europe improved, G.A.T.T. exercised an increasing pressure on them to liberalize their imports with respect to countries outside Europe. Indeed, the O.E.E.C. had itself contributed to this geographical extension of liberalization by urging its members to abolish quotas on their imports, notably those from Canada and the United States. With the disappearance of the European Payments Union, and the advent of external convertibility of most European currencies in December 1958, the pressure of the G.A.T.T. and of the International Monetary Fund for integral and non-discriminatory liberalization strongly increased.

The result of the liberalization of their imports on a worldwide scale, which is gradually being achieved by the Six, is that the practical difficulties of a common quota policy are becoming greater and

greater. In fact, although the G.A.T.T. envisages the possibility that a customs union may create a preferential tariff system among its members, it apparently envisages nothing of the kind concerning quotas. The result is that, as things now stand, each country of the Community (as is true of the other countries of G.A.T.T.) is examined individually by the International Monetary Fund and G.A.T.T., and is encouraged to liberalize its imports towards all of the other countries of G.A.T.T. and of the International Monetary Fund, in accordance with the state of its individual balance of payments. Since the decisions of G.A.T.T. are directed at individual countries, it may be that it will consider that one country of the Community should free all of its imports vis-à-vis the rest of the world but that another is justified in maintaining certain quotas provisionally—with the understanding that in conformity with the basic principle of the G.A.T.T. and the Monetary Fund, it must administer these quotas in a non-discriminatory manner as to all G.A.T.T. and I.M.F. members. This means that no preferential treatment shall be accorded to Community members.

The legal and factual elements of the common-quota-policy problem which deserve emphasis are:

1) the virtual impossibility of establishing a common policy of the Member States in regard to import restrictions, the only point on which, theoretically, coordination may be achieved in conformity with the obligations of these countries to G.A.T.T. and I.M.F. being a complete liberalization of imports from all G.A.T.T. and I.M.F. members;

2) the gradual desuetude of those rules of the Treaty which relate to the progressive increase of quotas among the Member States of the Community. It is evident that if, under the pressure of non-member states united within G.A.T.T. and the Monetary Fund, each Member State is led to abolish import quotas on industrial products originating in G.A.T.T. and I.M.F. countries, the complex rules of the Treaty concerning the progressive relaxation of quotas among its Members will lose their justification. Naturally, each country of the Community, in removing quotas on imports from G.A.T.T. countries, will also remove them on goods from Community Countries, because Community Countries are members of G.A.T.T., and because the Treaty provides in Article III that, "if Member States abolish or reduce quantitative restrictions in regard to third countries, they . . . shall accord identical treatment to the other Member States."

This is the current legal and factual context of the problem of

liberalization vis-à-vis the rest of the world of the imports of Member States. Three additional comments are appropriate.

1) The legal situation described applies to the relations between the Member States of the Community and the countries of the O.E.E.C. and G.A.T.T. It does not apply to relations with those countries which do not belong to these organizations, meaning, largely, the countries behind the Iron Curtain.

2) The situation has also been described on the assumption that in the years to come it will in fact be possible to apply in full the rules of G.A.T.T. and of the Monetary Fund.⁵¹

3) Safeguard clauses must also be considered.

C. SAFEGUARD CLAUSES

There are, strictly speaking, no safeguard clauses in the Treaty which relate specifically to the establishment of an external tariff and lists of liberated goods. The sole provision of any relevance is Article 26 of the Treaty, which provides: "The Commission may authorize any Member State encountering special difficulties to postpone the lowering or the raising, in accordance with the provisions of Article 23, of the duties on certain headings of its tariff." But the freedom of the Commission in this connection is limited by what follows in Article 26: "Such authorization may only be granted for a limited period and for tariff headings which together represent for such State not more than five percent of the value of its total imports coming from third countries in the course of the latest year for which statistical data are available." Obviously these provisions could come into play if one of the Member States should encounter difficulties in lowering a customs duty vis-à-vis third countries which, initially, was higher than the future common external tariff. These difficulties might result from the fact that some third country was in a particularly strong competitive position with regard to a product to which that duty was applicable. But if the Member State's domestic industry cannot withstand the competition of third-country industries—even with continued customs protection—there is every chance that it is not in a position to withstand the competition of the corresponding industries of other Member States whose products will not, ultimately, have to cross customs barriers. Recourse to Article 26 is therefore more or less tied to recourse to Article 226.⁵²

⁵¹ At the moment, this is disputed, and the underlying theory of the work pursued within the Community for the elaboration of a common external commercial policy assumes non-application of G.A.T.T. rules.

⁵² See text at note 36 *supra*.

But the most interesting problem is the one which balance-of-payments difficulties of a Member State could create, given the obligations of that state to the Monetary Fund and G.A.T.T. One aim of the rules of the Treaty is to avoid, or failing that, to delay as long as possible, situations in which one Member State will be forced, by balance-of-payments difficulties, to adopt protective measures in regard to its imports from Community countries. The first action envisaged for the Community will, it is true, be designed to allow the country in question to maintain as liberal an import policy, vis-à-vis non-Community countries, as possible. Specifically, the first measure envisaged⁵³ consists in concerted action with those international organizations to which Member States may have recourse. Should one of these organizations, for example, grant credits to the country in difficulties, that country would have to follow the organization's recommendations concerning its commercial policy towards non-Community participants of the organization.

If such steps prove inadequate, the Treaty provides other means to prevent trade diversions when the country in difficulties maintains or re-establishes quotas on products from non-Community countries. This implies that the country in question will be able to re-establish quotas on non-Community products but that it will not do so on Community products, particularly if Community countries grant mutual assistance. Only in the absence of mutual assistance, or in case of its inadequacy, could the Commission authorize the country in question to re-establish quotas on Community goods. Even here the implication of the Treaty's spirit is that quotas on Community goods should be less rigorous than those applicable to non-Community goods.

One may well wonder, however, whether these provision can be given effect in their entirety, in view of the obligations of the Community countries towards I.M.F. and G.A.T.T. now that European currencies have become convertible. If it is true that, on the one hand, the rules of the G.A.T.T. relating to customs unions do not contemplate the possibility of preferential treatment within the union in regard to import quotas,⁵⁴ and on the other hand, that the import quotas applied by countries subject to balance-of-payments difficulties must be applied in a non-discriminatory way, it is legally impossible for a Member State to impose quotas on non-Community goods and not on goods originating in other Community countries.

⁵³ See text at note 35 and following paragraphs.

⁵⁴ See pp. 142-44 *supra*.

From a legal viewpoint it would seem that this will continue to be true so long as the Member States have separate currencies and separate quotas in the eyes of I.M.F.

These are legal conclusions, and it is not absolutely certain that the Six would agree with the interpretations of G.A.T.T. here suggested. It is quite possible, however, that events will obviate the need to consider such problems, for at present both the Six and the other industrial countries of Europe are moving towards as complete and rapid an elimination, on a non-discriminatory basis, of the whole quota system as is possible.

D. THE PRINCIPLES OF THE COMMON COMMERCIAL POLICY

In establishing their customs union, the Six of course had to take into account its repercussions on their commerce with third countries. This preoccupation became more and more central as the months passed, and it is now the major one of the Community and of its European and non-European associates.

A number of Treaty articles define the Community position in regard to the important international commercial problems raised. Article 18 provides: "Member States hereby declare their willingness to contribute to the development of international commerce and the reduction of barriers to trade by entering into reciprocal and mutually advantageous arrangements directed to the reduction of customs duties below the general level which they could claim as a result of the establishment of a customs union between themselves." Pursuant to this article the Community can negotiate reductions of its common external tariff in exchange for similar reductions by third countries. The G.A.T.T. negotiations in 1960 pursuant to the Dillon proposal will be undertaken in accordance with Article 18.

Similarly, Article 29—the last in the section of the Treaty dealing with the common external tariff—states that in carrying out the tasks entrusted to it, the Commission shall be guided by:

- (a) the need for promoting commercial exchanges between the Member States and third countries;
- (b) the development of competitive conditions within the Community to the extent to which such development will result in the increase of the competitive capacity of the [sic] enterprises.

Allusion to the competitive capacity of Community enterprises recurs in Article 110, which reads as follows:

By establishing a customs union between themselves the Member States intend to contribute, in conformity with the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international exchanges and the lowering of customs barriers.

The common commercial policy shall take into account the favourable incidence which the abolition of customs duties as between Member States may have on the increase of the competitive strength of the enterprises in those States.

If the over-all result of the creation of the Community is an increase of the productivity of Community enterprises as a whole, they will in fact need less tariff and quota protection against non-Community competition than they now enjoy or even than that which the establishment of a common external customs tariff based on the arithmetical average of present tariffs will afford.

In addition to these declarations of principle, the Treaty provides procedures for the adoption of a common policy and for establishing relations with third countries. Article 111 provides that the Member States shall coordinate their commercial relations with third countries in such a way as to create, by the end of the transitional period, the conditions necessary for a common foreign commercial policy. The Commission must submit to the Council proposals concerning the procedure to be followed during the transitional period to ensure common action and the unification of commercial policy. The Commission is also to submit to the Council recommendations concerning tariff negotiations with third countries affecting the common tariff. These negotiations are to be conducted by the Commission in consultation with a special committee designated by the Council to assist the Commission. Finally, Article 111 provides that the Member States shall, in consultation with the Commission, take all necessary measures to adjust prevailing tariff agreements with third countries in order that the common external tariff may be put into effect without delay.⁵⁵

Finally, the Treaty makes clear that the Member States must, in respect to all matters of particular interest to the Common Market, act in common in international economic organizations (I.M.F., G.A.T.T., O.E.E.C., Food and Agriculture Organization, the U.N. Economic and Social Council, and international groups concerned

⁵⁵ This problem, which relates to rights already vested, is treated in this Part III, Section E in Subsection 5 dealing with the Dillon proposal.

with basic raw materials).⁵⁶ During the transitional period, Member States are to consult with each other in order to coordinate their action and, as far as possible, to adopt common positions.

The provisions contained in these articles of the Treaty require no special comment. They make abundantly clear that the objective of the Treaty is, in regard to questions of commercial policy, to make of six states one. The following section of this chapter, dealing with the history from its inception of the relations of the Community with third countries, illustrates how these provisions have worked until now and what problems Community and non-Community countries face under existing circumstances.

E. THE EXTERNAL COMMERCIAL POLICY OF THE COMMUNITY SINCE ITS CREATION

I. NEGOTIATIONS WITH REGARD TO A EUROPEAN FREE TRADE AREA

The problem of the relations of the Community with other European countries arose before the Treaty was signed (March 1957). In July 1956, the Council of the O.E.E.C. decided to study the possibilities of creating in Europe a free trade zone associating, on a multilateral basis, the customs union envisaged by the Six and the other countries of the O.E.E.C., who would not belong to the union. An expert report published by the O.E.E.C. in January 1957,⁵⁷ concluded that the establishment of such an area was a practical possibility.

In a free trade area, as is true of a customs union, all barriers to trade—notably, customs duties and quotas—are abolished in regard to goods from the countries which compose the area. In contrast to a customs union, the free trade area does not involve the establishment of an external tariff common to the countries of the area. Each member state continues to set its own tariffs on goods originating outside the area.

If the free trade area had been established, the result would have been a vast European area, including the Six, within which goods would have circulated freely. The Six would, at the end of the transitional period, have applied the same tariff to goods originating outside the area as they now will—the tariff of the Community—

⁵⁶ Treaty art. 116.

⁵⁷ Report on the Possibility of Creating a Free Trade Area in Europe. O.E.E.C., Paris, January, 1957.

while each of the other countries would have applied its national tariffs.

Why did O.E.E.C. envisage the creation of a free trade area rather than the formation of a customs union among its members, that is, rather than a geographical extension of the union contemplated by the Six at that time? The reasons were both political and economic. The European Economic Community is not merely a customs union, and its aims include political unification of Europe in forms which prevent the association of several European countries for various reasons (for instance, Austria, Sweden, and Switzerland for reasons of neutrality).

Moreover, several European countries are low-tariff countries. Should they become members of the Community, they would be forced to raise their tariffs to the level of the future common external tariff of the Member States. This they are not ready to do. Finally, the United Kingdom for obvious reasons could not relinquish the preferential system of the Commonwealth—which she feared would be necessary in order to join the Community.

The choice of a free trade area as the vehicle for unification was imposed by G.A.T.T. rules. As to tariff questions, G.A.T.T. is based on the principle of the most-favored-nation clauses. This principle prohibits new tariff preferences, with the exception of customs unions (which the Six chose) and areas of free trade. These O.E.E.C. countries which are not part of the Community could not agree to form a customs union and had, therefore, only one choice—the free trade area.

The maintenance within a free trade area of different external tariffs in each country of the area obviously raises an important problem which is nonexistent in a customs union once its common external tariff is effective. Since this common external tariff is the same for all customs union countries, all goods originating outside the union pay the same duties regardless of the country of entry into the union. Consequently, such goods may pass from country to country of the union, either in their original form, or after transformation, without the necessity of establishing their origin, since they will have paid—at whatever point of entry into the union—the duty contemplated by the common external tariff.

In a free trade area this would not be the case. The countries of the area maintain autonomy over external tariffs. Some of these countries would necessarily apply lower tariffs to given goods imported from outside the area than would others. As obstacles to

free trade within the area are abolished, goods coming from outside the area might enter through the country with the lowest tariffs, or with none at all, passing thereafter into the other countries of the area, and arriving therein at a lower cost than they would have paid had they entered directly.

Where this is possible, the creation of a free trade area could entail abnormal upheavals within the commercial structure. To avoid this, a mechanism is necessary which will permit determination of those products which are absolved from paying duties when traded within the area (such products being considered as having originated in the area) and those which continue to pay duties when they pass from one country of the area to another (these products being considered as having originated outside the area).

Within a customs union then, all products will circulate freely at the end of the transitional period, whereas, within the free trade area, customs barriers will be maintained indefinitely between the various countries of the area in order

- 1) to determine the origin of goods, and
- 2) to collect duties on those goods which are not considered to have originated within the area.

The situation within the customs union during the transitional period is analogous to that which obtains permanently in a free trade area. The Six have solved these problems by the rules relative to *libre pratique*, but, as has been indicated,⁵⁸ the countries of the Community have found it difficult to resist the temptation to verify the origin of goods. It must be emphasized, however, that the problem is transitory in a customs union and permanent in a free trade area.

Initiated as early as July 1956 (before the Treaty was signed), pursued in other forms in the spring of 1957 (after the signing of the Treaty), taken up again in the fall of 1957 (after the ratification of the Treaty by the Parliaments of the Six), the negotiations relating to a European free trade area, including the Six, were finally suspended in December 1958. The fundamental reasons for this failure cannot be examined in detail here. One, among others, was the opposition of France, which had strongly criticized the very concept of a free trade area, viewing with a jaundiced eye the possibility of subjecting her industry not only to the competition of the other five Member States but also to that of other European countries. Moreover, the creation of a free trade area including the

⁵⁸ See p. 125 *supra*.

customs union of the Six would have, in the view of some, weakened the Community to the point where it would have lost its special character, thereby compromising the realization of those political objectives which it is also pursuing.

More significantly, however, the European countries were unable to agree on a system of definition and determination of the origin of goods. Moreover, it ultimately became clear that this problem is directly related to the problem of the freedom of the countries of the area to modify, during the existence of the area, their commercial policies vis-à-vis third countries. A system of origin definition designed to avoid diversions of trade, and taking account of tariff levels of the respective countries of the area, might well become ineffective if these countries were to preserve absolute freedom to alter tariff levels vis-à-vis third countries.

Assume, for example, that one country of the zone applies a duty of 20% and another a duty of 30% to imports of a given raw material from countries outside the area. If, according to the rules of the area, products manufactured from this raw material will be considered to have originated in the area if their value is double that of the raw material, the difference in customs costs incorporated in the finished product will be $\frac{30\% - 20\%}{2}$ or 5%. At the outset this difference may not be thought to falsify competitive conditions, because transportation costs and levels of productivity may compensate, and the difference can therefore be absorbed. If the country which applied a duty of 20% now reduces it to zero, the difference in customs costs becomes $\frac{30\%}{2}$ or 15%, which represents a substantial difference in the cost of bringing the product to market. This difference could cause diversions of trade and other commercial activity, and the only way to alleviate its effect would be to change the rules concerning the determination of origin—for example, by providing that a finished product cannot be considered to have originated in the area unless its value is five or six times that of the imported raw material which it contains. In order to avoid the necessity of constant modification of the rules for determining origin and to keep countries from abusing their freedom to modify tariffs at a moment's notice, that freedom must be limited.

All of the European countries were ready to agree that freedom in this area should be limited by controls or sanctions, but they were unable to agree on the scope of the limitations to be imposed. Some

wanted a rule that no member could alter its tariffs on goods from non-members without prior agreement of the other members. Others, rejecting controls of this kind, suggested that it should be possible to change the rules concerning definition of origin if a country were to change tariffs vis-à-vis third countries to an extent which would create trade diversions within the area. In such a case, it would be possible to deny to the relevant goods the customs benefits otherwise granted by members of the area to goods of the others.

The suspension of the free-trade-area negotiations created certain difficulties in Europe, and no one yet knows how they can be resolved. After the negotiations had been broken off, seven countries of Europe which do not belong to the Community (Austria, Denmark, Norway, Portugal, Sweden, Switzerland, United Kingdom) discussed the possibility of creating among themselves a free trade area which would be independent of the Community,⁵⁹ and the Community found itself confronted by a new situation which brought it to adopt concrete measures with regard to third countries, and to take up the general problem of its relations to non-Community countries with a particular sense of urgency.

2. SPECIFIC MEASURES TAKEN ON JANUARY 1, 1959, WITH REGARD TO THIRD COUNTRIES

The halting of the free-trade-area negotiations, the European crisis which resulted, the accusations of discrimination brought against the Community, and the fact that it was considered guilty by many of provoking a split of Europe into two groups—all motivated the Community to take certain measures vis-à-vis non-Community countries on January 1, 1959. On that date—it should be recalled—the Six were required, as among themselves, to

- 1) lower their customs duties by 10% and
- 2) increase import quotas by 20% on Community goods (having first combined those applying to goods from the other five into single global quotas).

By a decision dated December 3, 1958, the Council ruled that the Member States should, on January 1, 1959, reduce by 10% duties on industrial products with a rate higher than that of the future common external tariff but not to a level below that of the common external tariff. This reduction was effected in regard to O.E.E.C. members, G.A.T.T. members and non-members of G.A.T.T. who have most-favored-nation treaties with Member States of the Com-

⁵⁹ An appendix to this chapter examines the European Free Trade Association (E.F.T.A.) organized by these seven countries.

munity. The decision of December 3 provided that, subject to the reciprocal grant of like benefits, Community countries should increase quotas on industrial products from O.E.E.C. countries by an amount equal to 20% of the total value of quotas of each of the Six in favor of other O.E.E.C. countries. Within the framework of this over-all increase, it was required that each quota should be increased at least 10%. The second instalment of 10% was not necessarily to be applied to each quota, but could be used for products of special interest to the country in question and in particular for those products which are subject to insignificant quotas or in regard to which no quotas have been opened.

These measures meant—as far as tariffs were concerned—that:

1) by decreasing duties on imports from non-Community countries by 10% (as they had in regard to Community goods), the Member States avoided discrimination against non-Community countries in implementing the E.E.C. Treaty;

2) by limiting this decrease to duties on those products which were subject to a higher duty than that of the future common external tariff of the Community, they took the first step, as of January 1, 1959, towards the creation of a common external tariff (although the Treaty provides only that the first decrease of external tariffs should take place on December 31, 1961), thereby anticipating by three years—and on their own initiative—the Treaty schedule, although nothing required them to do so; and

3) by restricting the decrease to duties which were higher than the duties of the future common external tariff, the Member States have nevertheless introduced differences of treatment of Community and non-Community countries since they also reduced by 10% duties on Community goods which were inferior to the common external tariff without extending this reduction to third-country goods. It would, of course, have been foolish to extend this reduction to third-country goods since such a reduction would have affected duties which, on December 31, 1961, would have to be raised again in order to progress towards the level of the future common external tariff.

These tariff measures affecting third-country goods, having been thus determined, were duly put into effect on January 1, 1959, at the same time that the tariff reductions on Community goods were effected. In fact, however, their implementation in some sectors has been retarded, because the future external tariff of the Community was not yet known. This forced the Member States to fix approxi-

mate duties, choosing levels which seemed likely to be higher than those of the future common external tariff. A special difference in treatment resulted in certain cases from the fact that as to a few products some of the Member States took as a base the duties applied on December 31, 1958, whereas these duties had been partially or totally suspended on January 1, 1957, the determinative date of basic duties under the Treaty. Since the duties to which the 10% reduction was applied were different, the result was, of course, that lower duties were put into effect on Community goods than on non-Community goods.

Country by country, the situation was this:

1) Germany had of her own accord reduced duties on a great number of imports from the entire world. These reductions, effected after January 1, 1957, were taken into account in applying the provisions of the Treaty, and Germany had to make only a few new tariff reductions on imports from Community, as well as from non-Community, countries. These few were made and, as far as industrial products were concerned, in a generally non-discriminatory manner.

2) Tariffs of the Benelux countries were, in general, lower than the future common tariff of the Six. Benelux reduced its tariffs by 10% within the Community, but, of course, did not effect the same reduction on all third-country goods. Where the then applicable tariff was higher than the future external tariff of the Community, however, the same 10% reduction applicable to Community goods was put into effect.

3) Italy gave effect to the 10% reduction on goods from third countries, but made exceptions of a great number of products in regard to which it was difficult to predict whether the external tariff of the Community would be higher or lower than the applicable Italian tariff.

4) France's procedure was similar to Italy's. She had, in 1957, however, reduced or suspended duties on certain products (paper pulp, kraft paper, boxes) but these reductions and suspensions were later repealed. Under the terms of the Treaty, France was obligated on January 1, 1959, to fix tariffs within the Community 10% lower than those actually applied on January 1, 1957. As to non-Community goods she put into effect tariffs which were 10% lower than those provided for by law on December 31, 1958. This difference can be fairly important. For instance, on raw pulp the legal duty of 22% had been suspended on January 1, 1957, and one of 6% was

in fact applied. On January 1, 1959, the tariff to be applied to Community goods was therefore fixed at 5.4%, while the one applied to third-country goods was fixed at 19.8%.

The decision of the Six of December 3 meant, as to quotas, that these countries offered to other O.E.E.C. members bilateral negotiations concerning the application of the Treaty rules, *with the exception of the rule of 3% relating to small or nonexistent quotas*. This negotiation in fact fixed the over-all increase of quotas at 20%, whereas the implementation of the 20% rule resulted in an increase of much more than 20% of the quotas among the Six. No unanimous decision of the Council of the O.E.E.C. could be reached concerning this offer to negotiate, and each country was left free to initiate bilateral negotiations with one or another of the Six. Actually, such negotiations took place only between France, and most of the countries now constituting the E.F.T.A. Their result was a substantial increase in the quotas opened by France to these countries subject to the grant of reciprocal benefits by them—an increase which in the French-British case, far surpassed the 20% maximum.

3. THE REPORT OF THE EUROPEAN COMMISSION OF FEBRUARY 1959 ON FUTURE RELATIONS OF THE SIX WITH OTHER EUROPEAN COUNTRIES

Following the suspension of the negotiations concerning the free trade area, the Council gave the Commission the task of preparing a report concerning possible solutions of the problem of relations between the Community and the other European countries. The report of the Commission was submitted in February 1959, and even though it was not approved by the Council, it is highly interesting in that it indicates what preoccupies the Commission.

The report states in particular that the relations of the Community with the other European countries should be viewed within the framework of a general world-wide policy. From this point of view, protectionism would be an inconceivable Community policy. It is incumbent on the Community to pursue a liberal policy in regard to Europe and the rest of the world and to translate its intentions into actions. Noting that the United States, the United Kingdom, and the Community carry on almost one half of world trade, the Commission stated that these great industrialized economic entities have a particular responsibility in maintaining the economic equilibrium of the world. The major part of the world is, it continued,

composed of countries which are still in the throes of development, and it is doubtful whether they can, on their own, develop their national economies satisfactorily. Therefore, freer trade in the world will only be possible if it goes hand in hand with active and coordinated development programs. Experience demonstrates that free trade alone is not equal to the task of eliminating too-great disparities. On the contrary, if other steps are not taken, free trade may result in widening the gaps between rich and poor countries. The Commission therefore proposed a common policy to be followed by the United States, the United Kingdom, and the Community, with a view to lowering tariffs on a world-wide scale, to furnishing technical and financial assistance to developing countries, primarily by means of export credits, to stabilizing the prices of raw materials, and to assuring world-wide coordination of policies designed to meet problems created by business cycles.

Having placed the problem of the relations of the Community with the other countries of the O.E.E.C. in the more general framework of relations with the world as a whole, the Commission nevertheless reaffirmed the absolute political necessity of European solidarity. Although it rejected the concept of the free trade area as a means of associating the Community with other European countries, it nevertheless proposed some concrete tariff measures in order to establish a *modus vivendi* among O.E.E.C. countries.

Primarily because the propositions of the Commission were inadequate at the European level, the Council could not approve the Commission's report. In March 1959 it therefore appointed a special committee to formulate suggestions for reviving negotiations with other O.E.E.C. countries directed at the creation of a multi-lateral association between them and the Community. This special Committee has not as yet completed its work, and in the meantime, seven countries of the O.E.E.C. have decided to create among themselves a free trade area.⁶⁰

4. THE PROBLEM OF THE HARMONIZATION OF COMMERCIAL POLICIES IN REGARD TO CERTAIN COUNTRIES

Even though the Community has often reaffirmed its intention of pursuing liberal commercial policies in regard to non-Community countries, the lack of a common commercial policy during the transitional period will create certain problems. Because one of the Six

⁶⁰ See appendix at end of this chapter.

applies a more liberal tariff or quota to a given non-Community product than another, a risk of trade diversions within the Community, which will provoke lively reactions on the part of the producers, will result. The highly-developed countries which make up the Community are particularly afraid of the competition of three groups of countries:

1) those which have abnormally low salaries and wages (that is, the developing countries in Southeast Asia);

2) those where the state enjoys a commercial monopoly (the countries behind the Iron Curtain);

3) those which use artificial methods of a kind which falsify the price of exported products (for instance, countries with multiple exchange rates).

The risks of trade diversion during the transitional period are connected to the problem of *libre pratique* within the Community, and, in the cases of trade diversion, the countries may invoke the safeguard clauses of Article 115.⁶¹

Confronted with these problems, the institutions of the Community have assigned the Economic and Social Committee (a consultative organ which represents economic and professional interests) the task of dealing with them. In July of 1959, this Committee submitted to the Commission an opinion representing the viewpoint of economic and professional groups on these problems. This opinion indicates that, if the agreement of the Six on a common commercial policy (which, according to the Treaty, is the ultimate goal for the distant future) cannot be reached immediately, lack of coordinated action in regard to the three groups of countries mentioned above may well cause free trade in certain products⁶² within the Community to fail. The reason for this is the possibility of recourse to the measures contemplated by Article 115 of the Treaty. The coordination of commercial policies of the Member States, which the Treaty foresees for the transitional period, should, in general, be effected without delay, according to this opinion, and ought to be begun immediately in cases where the above-mentioned danger threatens.

In this connection, the Economic and Social Committee has formulated a certain number of proposals which, it seems, have not as yet been seriously examined by the Community institutions.

⁶¹ See text at note 32 *supra*.

⁶² The products in question are both industrial and agricultural, for example, natural or artificial textiles, optical goods, certain metal products, sewing machines, ceramics, rubber footwear and toys.

It is interesting to note that the spirit of these recommendations is to some extent protectionist in regard to the exports of the countries in question. Increased protection against exports of certain countries—and notably of those whose economies are in the throes of development—plainly seems to contradict the liberal declarations of principle of the Commission and to negate its professed desire to contribute to the development of these countries. No hasty conclusions should be drawn, however, since these are special cases which do, in fact, create problems of a certain gravity for the European industries affected.

5. THE DILLON PROPOSAL FOR REDUCTION OF THE TARIFFS OF THE PARTIES TO G.A.T.T.

At the session of G.A.T.T. held late in 1958, Mr. Dillon, as head of the United States delegation, submitted a proposal looking to a new multilateral tariff conference (analogous to those held at Annecy, Torquay, and Geneva during the last ten years) which would permit the President of the United States to utilize the powers, granted him by the Reciprocal Trade Agreement Extension Act of 1958, to reduce existing U.S. duties 20% on all products (with the exception of those duties which have reached the "peril point.") These powers expire on June 30, 1962.

In accordance with this proposition, G.A.T.T., during the winter of 1958-59, studied the possibility of organizing such a conference. The interest of this proposition obviously lay in bringing about a lowering of U.S. duties, as well as those of European countries, and particularly, those of the Common Market, thereby making new progress in the direction of liberalized world trade.

Realization of the Dillon proposal will create problems, however, from the point of view of the Community. The first of these is whether the Member States should negotiate on the basis of their present tariffs or on the basis of the future common external tariff. The answer is, as it were, imposed by the future common external tariff. In view of the fact that during the years to come the Treaty requires Member States to raise their duties on some of their products, and to lower them on others in order to establish their future common external tariff, it would be illusory to obtain concessions from them with regard to duties which they will, in any case, have to lower or with regard to others which they must in any case increase later.

A second question results from one of the rules of G.A.T.T. The

countries of the Community will have to increase certain duties to place them at the level of the common external tariff. A large number of these duties have been "bound" by each Member State vis-à-vis third countries. These commitments resulted from prior tariff negotiations—a given Member State agreeing, in exchange for counter-concessions by other G.A.T.T. countries, to reduce and "bind" certain of its duties, that is, not to increase them. It is clear that if one of the Member States is to increase a "bound" duty in order to carry out its obligations within the Community, then it must either give up such counter-concessions or offer other compensation. This compensation may, of course, result from the fact that another Member State must lower corresponding duties to place them at the level of the future common external tariff, and G.A.T.T. expressly provides that situations of this kind should be taken into account.

The effect of these provisions is that the ultimate establishment of the future common external tariff of the Community requires not only that the Member States shall fix this tariff in accordance with the complex rules already described, but that the "bound" tariff headings which the Member States intend to increase to the level of the future common external tariff should be re-negotiated with the countries of G.A.T.T. which are not members of the Community. This tariff will, in effect, be modified following these re-negotiations because the Member States of the Community will have to offer compensation to their G.A.T.T. partners.

Consequently, if negotiations are undertaken pursuant to the Dillon proposal on the basis of the future common external tariff, it will be necessary to carry out successively two separate negotiations—one to re-negotiate the "bound" tariff headings of the Community members, and the other, on the basis of the external tariff of the Community resulting from such re-negotiations, to lower the common external tariff in exchange for counter-concessions by the United States and other countries.

By a decision of May 5, 1959, the Council decided to accept the offer of Mr. Dillon so that new tariff decreases can be effected in the interest of developing world trade. The Council considered that this objective is perfectly in accord with the intentions of the Member States as expressed in the Treaty, according to which the Common Market should contribute, in conformity with the public interest, to the harmonious development of world commerce, and, especially, to the reduction of customs barriers.

At its 1959 spring session, G.A.T.T. was able, therefore, to decide to hold a new world tariff conference. This is to begin on September 1, 1960, at which time the "bound" duties which the Member States of the Community intend to raise will be re-negotiated. The conference should end by Christmas 1960. In January 1961, the negotiations of the Dillon proposal itself will begin. They are to be terminated in time to make it possible for the President of the United States to use his powers to lower U.S. tariffs.

This schedule plainly has meant that the Member States have had to accelerate their decisions regarding the projected common external tariff. This tariff had to be ascertained as soon as possible in order that the countries of G.A.T.T. could know which tariff headings were to be re-negotiated, and what concessions would be asked of the Member States, either by virtue of an "unbinding" of these headings or in order to obtain from the Six reductions of their future common external tariff (within the framework of the Dillon proposal) in exchange for appropriate counter-concessions.

IV. CONCLUSIONS

A. DIFFICULTY OF FORMING JUDGMENTS

An examination of those provisions of the Treaty which relate to the elimination of obstacles to trade among the Member States and to the establishment of a common external tariff and commercial policy indicates that, although the Six were successful in establishing fairly precise rules concerning their relations with each other, they were forced to leave vague the greater part of the rules affecting relations with third countries. This is understandable—among themselves the Six could undertake firm mutual obligations, because each was in a position to evaluate the benefits to be received in exchange for benefits granted, and to give effect to the benefits it promised. On the other hand, the establishing of a common external policy raises complex problems in view of the very different initial positions of the Member States, some traditionally liberal and others traditionally protectionist. Moreover, this is a field in which the countries in question have only partial control since they are bound by other international obligations and since foreign policy may only be defined in relation to constantly evolving situations at home and abroad.

It is practically impossible to take stock now of the effect of the internal rules of the Common Market. The goal is clearly enough

defined—the establishment of a single economic unit grouping highly industrialized countries whose population, economic power, and technical capacities will make it the third-ranking economic power in the world. But how will this be accomplished? Will the rules of the Treaty governing the abolition of tariffs and quotas be strictly applied? What scope will be given the safeguard clauses invoked? In particular, will the clause relating to difficulties pertaining to a particular sector be applied sparingly or will it be used to shield large areas of economic life from the full force of the Treaty? Doesn't the flexibility of the system for the abolition of tariffs involve the risk of postponing the solution of the thorniest problems until the end of the transitional period and, won't the consequence be virtually insoluble difficulties? It must be remembered that some Member States have long protected their industries extensively, and exposure now to competition with those of other Member States will create real problems.

It is also clearly difficult to estimate the effects of the rules governing the elimination of obstacles to trade among the Member States without taking other rules into account. For example, the rules concerning state competition and competition among enterprises must be considered. All state subsidies to industries are to be abolished, but how is this principle to function and what will be its consequences? Again, cartels and all forms of understanding between private enterprises are, as a matter of principle, prohibited. But, in spite of this prohibition, isn't there a risk that enterprises of the various countries may come to understandings dividing markets among themselves in order to avoid competition which is too lively for their tastes? What will be the impact of the ultimate answers to these questions on the structure of enterprise—will the smallest disappear, victims of powerful combinations, or will small enterprises be able to survive? What effects will this have on commerce? What kinds of professional groups will be established?

Another and a related question—what will be the balance of power between producers and consumers within the Common Market? For the time being, it seems that producers have more rapidly recognized the importance of what lies ahead and that they are organizing effectively at the Community level. No similar organization seems to exist among consumers. The unions are divided by politics, and not yet ready to take advantage of the new situation to increase international trade-union cooperation. However, things may change—though how and when no one can tell.

Even though the Treaty envisages some harmonization of the fiscal policies of the Member States, it imposes no firm obligations. It is therefore difficult to imagine what will happen in this area, since these policies will obviously exert great influence on any changes in the structure of enterprises, on their possibilities of investment, and on their respective competitive capabilities in the various countries of the Community.

Under these conditions, although in theory it is possible to assert that the creation of the European Economic Community will strengthen the economic power of its Member States by increasing the competitive capability of the whole and by raising the standard of living of Community inhabitants, it is difficult to determine to what extent and at what pace this will be accomplished, and also what sacrifices will be necessary and what economic upheavals will precede it. Will productivity rise faster or will wages—or will the two be subject to a “see-sawing” effect? And to what extent will balance-of-payments crises obstruct the course of events?

In this respect, it is obvious that the key to success in establishing the Community is the maintenance of a high level of economic activity. Only within the framework of a continuous increase of production, productivity, and total consumption will the countries of the Community be able to accept the necessary economic and social changes. If marginal enterprises have to shut down, it is essential that, through the continual progress of the economy as a whole, the workers thus freed may immediately find other employment. The Common Market could not survive a major unemployment crisis. The resulting political and social reactions would immediately force the governments to take protective measures, particularly with regard to imports, which would negate the very principles of the Community and would lead to its failure. But it is impossible for the Six to study economic trends in isolation—they must consider those in the rest of the world, and particularly those in the United States and the sterling zone. The internal success of the Community therefore depends directly upon policies adopted beyond its boundaries.

This raises the problem of the external policy of the Community itself. The provisions of the Treaty in this respect are vague. Moreover, the future common external tariff of the Community will give rise to negotiations the over-all results of which cannot be foreseen—all the more reason why it is impossible to predict what tariff will be applied to any particular product.

How will the external policy of the Community be determined?

In the first place, the degree of success of the Community's internal policy will be a factor. If, in the abolition of the obstacles to the free flow of goods among themselves, the Member States encounter great difficulty, a protectionist attitude towards the rest of the world will automatically result. If they succeed in eliminating commercial obstacles smoothly, however, there is every chance that their attitude towards the rest of the world will be more liberal. The Treaty itself provides that, in establishing its external commercial policy, the Community shall keep in mind the increase of competitive capacity which would normally be expected to result from the establishment of the Common Market.

The common external policy of the Community will also be influenced by its obligations towards its own overseas and associated territories. In so far as it wants to give the latter preferential treatment, it will have to maintain barriers against third countries.

The policy will also depend on the policies of other countries, both commercial and other. In this respect, initiatives such as the Dillon proposal and the creation of the free trade area of the Outer Seven will undoubtedly have an effect.

Finally, other international obligations of Community members will also play an important part. The provisions of the Treaty relating to the abolition of quotas among the Six, as well as the problem of a common quota policy, appear today in an entirely different light than they did at the time the Treaty was negotiated. There is no excessive optimism in the statement that, within a relatively short period, European countries in general, and those of the Community in particular, will most likely give up the system of quotas as a systematic means of protection against imports. This movement will be to the advantage of third countries, especially the United States. It will also result in a more liberal orientation of the Community than could have been expected only a short time ago. Another consequence, however, will be an increase in the importance of tariffs which will remain the only means of protection for Community products.

However, the freeing of imports and the durability of measures of liberalization are in direct correlation with stability in balances of payments and dependent upon financial, monetary, and economic policies adopted both by the Member States and by the larger non-member countries. In case of recession, general recourse by Community states to quotas will seem normal and is virtually certain. Here again, a coordination of economic policies of Europe and the

United States is imperative to avoid serious troubles and a retreat from the liberalization of world commerce.

The countries of the Community are all large importers of basic raw materials, and these imports should normally increase as the economic strength of the Community increases. The role of the Six in the commerce and economic development of the underdeveloped countries will therefore be an essential one. The Community is well aware of this role,⁶³ but to play it adequately, the Community must pursue liberal import policies vis-à-vis these countries—a necessity which creates conflicts.⁶⁴ For some Member States want to maintain or even increase their production of some raw materials, but many such enterprises could not survive third-country competition. The Community also wishes to maintain preferences in regard to the African territories with which it is associated. How these conflicts will be resolved no one can guess.

To sum up, and granting the uncertainties remaining in regard both to the internal development of the Community and to its relations with the rest of the world—and in spite of the setbacks which it may suffer in the course of its evolution—one cannot doubt that the formation of a new economic group as powerful as is the Community marks a major event in the history of the economic and commercial relations of the world.

Its formation will in all likelihood substantially strengthen the competitive capacity of the enterprises of the Community. In addition, the products of each Member State will benefit from tariff concessions of the others, for—in contrast to non-Community goods—they will ultimately be free from import duties. Consequently, the competition of Common Market producers will be more and more active both in Community markets and those of third countries. This competition, however, should provoke a lively competitive reaction in third countries, and it is to be hoped that in the end the main beneficiaries will be consumers in the Western world as a whole. The spectacular rise in the standard of living in Europe that occurred after the Marshall Plan was inaugurated ought logically to continue, and it will entail a substantial increase in the needs of European countries for basic raw materials as well as for machinery and consumer goods. All in all, although the nature of trade currents may change, it is unlikely that their volume will decrease.

These are the general conclusions usually drawn with respect to

⁶³ See the "Hallstein Report," discussed in Part III, Section E, Subsection 3.

⁶⁴ See the discussion concerning List G in Part III, Section A, Subsection 4.

the creation of the Community and, subject to the maintenance of boom conditions in the world, there is reason to believe that these conclusions will be verified by experience.

The existence of this new group will certainly involve some general problems for the United States concerning both the world's political and its economic balance. It is difficult to say how the overall balance of payments of the United States will be affected. Some American industries will encounter greater competition in Community markets as well as in third-country markets and even in those of the United States. The demand for the products of other industries will increase. On the other hand, if the countries of the Community participate increasingly in financing investment in underdeveloped countries, the United States' share of the burden will, perhaps, be relatively lightened.

The conduct of the United States will greatly influence the policies of the Community. A shift towards protectionism would produce a similar shift in the Community, and a resolutely liberal U.S. policy will encourage liberal tendencies in the Community. Moreover, coordination of policies to control economic cycles will be an essential element of the effort to free trade throughout the world. Increased American investment in the Community alone will not compensate for the potential harm to U.S. industries which the creation of the Community could cause. Above all the United States must seek bases for active cooperation with the European countries directed at the maintenance of world prosperity, assistance to underdeveloped countries, and total freedom of trade. In this audit of the uncertainties which weigh so heavily on the future of the Community these conclusions alone are certain.

B. LESSONS DRAWN FROM THE EXPERIENCE OF THE FIRST MONTHS OF THE COMMUNITY

Can one draw conclusions from the history of the first months of the Community? Probably not, but it is certainly useful to isolate outstanding factors, since they will dominate its evolution in the months or years to come.

The first tariff reductions and quota increases within the Community were, generally speaking, carried out according to the rules of the Treaty. They seem to have raised no difficult problems for the Member States, nor of themselves to have had serious consequences for other countries.

These reductions and increases were, of course, fairly modest

in terms of absolute values. A 10% reduction of tariffs reflects a minimum effort at best. The increase of quotas was more impressive—in fact, larger than the Treaty provided for, but it occurred in circumstances which necessarily made its effect negligible. On the other hand, these advantages have also been granted in a relatively non-discriminatory manner to third countries.

The conditions under which this was done in regard to tariffs have already been indicated. The efforts to be made by the Benelux countries, Germany, and Italy in regard to quotas were of only minor importance, but, particularly as a consequence of the convertibility of currencies (and in the case of Germany, under pressure of G.A.T.T.), these countries have in general liberalized quotas on third-country goods to the same extent as quotas on imports from O.E.E.C. members.

France, who in 1958 applied a strict system of quotas on all imports, achieved 94% liberalization within the O.E.E.C. within a few months, and 70% vis-à-vis the dollar area. As to products not yet liberated, she increased quotas within the Community in accordance with the Treaty. She also increased quotas on imports from various other European countries in keeping with bilateral agreements. Because of the devaluation of the French franc and the very strict policy of financial orthodoxy since pursued, as well as by reason of the renewal of confidence created by the government of General de Gaulle, the rapid and extensive removal of restrictions on imports was not followed by a disturbing increase of purchasing abroad.

In sum, then, the Treaty and the measures taken with regard to third countries had no noticeable effect on the volume of imports or on the direction or nature of the flow of trade either within or without the Community.

Indications of a tendency towards protectionism within the Community on the one hand, and a psychological climate favorable to some deflection of the normal flow of trade on the other have already been noted. Protectionism manifested itself in the difficulties which arose in the calculation of the increase of quotas among the Six in accordance with the rules of the Treaty, and especially in regard to the so-called 3% rule. In other areas (particularly agriculture) some states have manifested a tendency to replace tariff or quota protection by consumer taxes on imported products. This development has had the incidental effect of drawing attention to the need of a more immediate and thorough supervision by the Community of

the fiscal policies of its Members than was contemplated at the time the Treaty was negotiated.

Changes in the flow of trade have been accompanied by two groups of contradictory phenomena. On the one hand, cartel agreements have been concluded between or among competing enterprises within a particular country, as well as within the Community. Apparently these agreements are of a financial and technical nature and it is often suggested—although to prove it is impossible—that these firms are organizing to “rationalize” competition among them. Whether these arrangements conceal clauses enjoining excessive competition or providing for a division of markets is also impossible to state.

On the other hand, preparations for an increased exchange of products among the Six are going forward. Business firms of the Six are setting up commercial networks of agents, distributors, and concessionaires in the Community, which, if not yet active, are making preparations for future conquests of markets. The newspapers in each of the Community countries are filled with publicity concerning products manufactured elsewhere in the Community. All of this is new because exporting firms were never sure in the past whether they were going to get import permits from neighboring countries or not. Now they have an almost absolute guarantee that the import policy of the other countries of the Six will become more and more liberal as time goes on. Consequently, they are prospecting markets and organizing outlets to an extent which they would never have considered a short while ago. Finally, because of the preferential tariff system which will progressively take effect, Community agents, representatives, concessionaires, and old clients of non-Community exporters seem tempted to abandon established contacts in favor of new ones with Community exporters. This tendency is obviously not easy to check on, but it is recurrently alluded to.

When the Treaty went into effect, a psychological shock to the public opinion of the Member States doubtless occurred. Public interest is indicated by the abundance of literature on the Common Market and also in the *rapprochement* of the Six, not only in industrial and commercial areas but also in areas where it would have been difficult, a priori, to imagine that there would be a need for professional organization. It is certainly normal for producers of chemical products, of industrial equipment, and the like, or for

wholesale and retail merchants of the Six to form professional organizations to deal with their problems. It is somewhat astonishing, however, that doctors, pharmacists, and lawyers of the Six are also forming professional groups.

Facts of this kind are evidence of the existence and personality of the Community. There is, indeed, a decided tendency within the Community to assert the existence of this personality by protectionist measures. Without going so far as to defend autarky as an ideal, the partisans of the Community, during its first months, defended relatively high tariffs, as well as the maintenance of quotas on non-Community goods on the basis of a need to set the Community off from the rest of the world. The political objectives of the Community obviously serve to support such theories, which were expressed (especially in France) most forcefully at the time when negotiations were in progress to unite Community and European non-Community countries in a free trade area of the seventeen O.E.E.C. countries. One of the arguments against this area was that it would absorb the Community in larger entity and would ultimately obliterate its distinctive characteristics.

It is all the more interesting to note that, in reaction against this theory, the Member States have in fact extended to third countries a very substantial part of the benefits of the tariff reductions which they made available to each other on January 1, 1959, and that all the members, and notably France, have made a great effort to apply liberalized quotas on a far broader geographical basis than that of the Community. According to the statements of its leaders, the Community also intends to commit itself resolutely to a liberal commercial policy.

These declarations of the intentions of the Community are explained by several important factors:

1) The suspension of negotiations concerning the free trade area among the seventeen countries of the O.E.E.C. caused a crisis in Europe—the gravity of which is clear to all—and the Six wish to resolve it. A few of them, and particularly Germany and the Benelux countries, have very potent economic reasons for wanting to maintain and develop close cooperation with the other countries of the O.E.E.C. by lowering commercial barriers.

2) The convertibility of European currencies established in December 1958, as well as the considerable increase of dollar reserves in the countries of the Community, did away with the justification

for a quota system on imports, whatever their origin, and the Six are bound by their other international obligations to make further efforts to liberalize trade.

3) The increase of the competitive capacity of European business and its success in the export trade, especially in U.S. markets, have eased the fears of European producers concerning foreign competition, and have led them to look forward more optimistically to a world-wide liberation of trade.

4) The reversal of the balance of payments of the United States has weakened the conviction that Europe will eternally be a debtor of the dollar area, and has also reminded the countries of Europe of their obligations to the United States, which has contributed so much to their prosperity, notably by means of the Marshall Plan. This reversal should be considered in connection with the necessity, ever more evident, that Europe share with the United States the burden of aiding the under-developed countries by adopting, vis-à-vis these countries, liberal commercial policies.

A progressively developing tendency towards commercial liberalism is evident in Europe, then, and particularly among Community countries. At the same time specific demands for protection in various areas have been voiced. Nevertheless the tendency to liberalism persists, and may well be intensified by rivalry between the Community and the free trade area of the Seven. Developments in these two groups will be extremely interesting to watch—particularly the measures which they adopt in regard to tariffs on July 1, 1960. Finally, the tariff concessions which European countries are prepared to consider within the framework of negotiations on the Dillon proposal will be a very important element for the future of European neo-liberalism.

C. THE UNITED STATES AND THE COMMON MARKET

The effects of the Common Market on the United States have already been the subject of a great deal of discussion. Commercial consequences as well as the consequences for the U.S. balance of payments have been considered. The general opinion seems to be that the United States accepted the Common Market for political reasons, and that its effects will be harmful in the short run for American exports to Europe and elsewhere. In the long run, however, it will slowly become advantageous as consumption in Europe increases. To avoid the possible harmful effects of the Common Market and to profit from the expected burgeoning of economic

power and prosperity of the Six, many American firms are developing investments in the Common Market.

These views of the probable effect on the United States are perhaps realistic, but, for the reasons already indicated, a prediction that they will prove to be well-founded is difficult to make. It is even more difficult to indicate whether in any particular sector of the economy, or in regard to any type of product, American exporters and producers will show a profit or loss, whether long, short, or medium term. Such a prediction would necessitate a structural study of each sector as well as knowledge of the future fiscal, tariff, and investment policies of the Member States.

If it is assumed that conditions will remain static, one can in fact guess that some trade which presently flows in long-existing commercial channels will be deflected, since consumers of one Community country will find it advantageous to buy in other Community countries, given the fact that imports therefrom will eventually be duty free, whereas imports from third countries will be subject to the common external tariff. Moreover, one may suppose that the competitive capacity of Community enterprises will increase, that marginal enterprises will disappear, and that the concentration of enterprises and mass-production possibilities for a wide market will make Community firms increasingly dangerous competitors for American producers. Indeed, this is the declared aim of the Community. Finally, however, it might also be predicted that, as the European standard of living approaches that of the United States, an increased demand will cause a new surge forward of international commerce, from which American business may also benefit.

What is more important, however, is to know whether and how the United States can influence the commercial policy of the Community, working in cooperation with it and with the other European countries, in order to permit the Community to evolve without setbacks and to create a favorable climate in the Western world for the development and maintenance of prosperity within a liberal trade structure. Action of the United States will be decisive in two spheres: in selecting policies to control the ebb and flow of economic trends; and in freeing the movement of goods.

In this respect the Dillon Proposal for international tariff negotiations was a first step in the right direction. The maintenance of a liberal import policy by the United States is a vital political and psychological element in stimulating the development of liberal tendencies within the Community and in the other European countries.

However, it will be necessary to go further and adopt plans to increase financial and monetary cooperation among the countries of the free world, in order to avoid economic crises which would cause an immediate return to protectionism. The forms of such cooperation are subject to discussion, but the need of it is beyond dispute.

Increased competition between the enterprises of the Community and those of the United States will, then, clearly call for serious efforts by Americans if they intend to maintain and develop markets.

However, these are the "rules of the game" of private enterprise to which the United States is firmly committed. It depends very much on the United States whether the creation of the Community—which aroused serious misgivings among non-Community nations because they sensed, and with some reason, protectionist sentiment within it—will mark a trend towards the lasting creation of a liberal system of world trade and payments.

APPENDIX

THE EUROPEAN FREE TRADE ASSOCIATION (E.F.T.A.) *

(THE LITTLE AREA OF THE "SEVEN")

As suggested earlier in this chapter, the possible association of the six members of the Common Market and the eleven other members of the O.E.E.C. in a free trade area was under discussion within the O.E.E.C. as early as July of 1956. Negotiations towards that end were suspended in December 1958.

In the spring of 1959 seven of the eleven members of the O.E.E.C. who are not members of the European Economic Community (Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and Great Britain) began study of the possibility of forming a free trade area among themselves. During a meeting of Ministers convened in Stockholm on July 20 and 21, 1959, the seven governments decided that the objective of their free trade area negotiations should be a treaty which could be signed and ratified by their respective parliaments in time to permit the area to begin functioning on January 1, 1960. On November 20, 1959, the Convention establishing a European Free Trade Association was initialled by the Ministers in Stockholm and it came into force in spring 1960 upon completion of the ratification process.

* The text of the Convention establishing the European Free Trade Association appears at the end of Volume II of this book.

Now that this project has been realized, the countries of the O.E.E.C. are divided into three groups:

- 1) those of the Common Market: Belgium, the Netherlands, Luxembourg, Germany, France, Italy;
- 2) those of the "little free trade area" (the E.F.T.A.); and
- 3) the still-developing countries—Greece, Ireland, Iceland, and Turkey to which Spain was added at the end of July, 1959, when it became a member of the O.E.E.C.

In creating the Association, the Seven declared that their aim was to facilitate future negotiations with the European Economic Community as well as with other members of the O.E.E.C. (that is, with the still-developing countries) which have particular problems. The object of these negotiations would be the elimination of customs barriers among all members of the O.E.E.C., and the establishment of a multilateral association including all of them, which would make it possible for O.E.E.C. members to increase their economic co-operation and at the same time to further the expansion of world commerce.

The free trade area created corresponds to the general principles of the G.A.T.T. definition of such an area. It contemplates the elimination of the obstacles to trade among its members, who, nevertheless, retain their freedom in regard to questions of commercial and customs policies towards third countries. In order to obviate deflections of trade—which might result from disparities in the commercial and tariff policies of the various participants towards the rest of the world—a definition of origin has been introduced. By virtue of this definition only those products, on passing from one country of the Area into another, which are considered to have originated in the former country will benefit from customs reductions or immunity.

To facilitate the negotiations which may bring together the E.F.T.A. and the Common Market, the seven countries have agreed to rules eliminating obstacles to trade among themselves which are as nearly similar as possible to the corresponding rules of the Common Market. Given the fact that no attempt is made to create institutions of the kind involved in the European Economic Community, the Seven wanted the application of these rules to be as nearly automatic as possible. They therefore made no provision for successive stages in the transitional period during which customs tariffs are to be progressively abolished, thereby rendering unnecessary decisions of the Council of Ministers of the E.F.T.A. concerning the termination of each stage.

The following paragraphs will outline the rules of the E.F.T.A. concerning:

- 1) the abolition of tariffs,
- 2) the abolition of quantitative restrictions on imports,
- 3) the definition of origin, and
- 4) the safeguard clauses.

The rules relate only to industrial products. Special arrangements govern agricultural products and fisheries.

A. ABOLITION OF TARIFFS

A "basic duty" is fixed. It is the duty which was in force on January 1, 1960. In contrast, therefore, to what was done in the E.E.C., the date determining this duty was not made retroactive. Thus a delay was provided for between the elaboration of the E.F.T.A. Convention and January 1, 1960, in the course of which the members could, as far as their other international obligations permitted, raise their customs duties or re-instate those which had been temporarily suspended wholly or in part. The Seven considered the question, however, whether the basic duty is to be the legal duty or the duty actually applied (that is, one taking into account still existing temporary suspensions). They have adopted a solution which consists in principle in retaining the duty in fact applied, conceding, however, that for certain products individual countries might have legitimate motives for departing from the general rule. A procedure before the Council of the Association is to ensure collective examination of such derogations.

The Seven contemplate a progressive abolition of customs as among themselves, which will take place in the following manner:

- 1) a 20 percent reduction will be effected on July 1, 1960. In this connection it may be noted that the Six reduced tariffs among themselves by 10 percent on January 1, 1959, and that the second over-all reduction of 10 percent (with a minimum of 5 percent on any single customs duty) is to be effected on July 1, 1960. In lowering their tariffs by 20 percent on July 1, 1960, the Seven hope to catch up with the Six and to fix the tariff reductions which they will at the same time effect among themselves, at the same level as those of the Six (although the plan of the Seven does not manifest the same flexibility as that of the Six).¹

- 2) Later reductions will follow successively—10 percent reduc-

¹ For the decision by the E.E.C. Council of Ministers to accelerate tariff reduction see Chapter I *supra*.

tions on January 1, 1962, July 1, 1963, January 1, 1965, January 1, 1966, January 1, 1967, January 1, 1968, January 1, 1969, and January 1, 1970.

This schedule and method mean that the rate of tariff elimination is automatic, allowing no possibility of extension of the transitional period or any part thereof. It means, that the transitional period is much shorter for the Seven than for the Six. It means, finally, that the process is also both automatic and rigid: all customs duties must be reduced at the given dates by the same amount of 10 percent. The Seven have not provided a flexible system of the sort established by the Six. The advantage of the method of the Seven is that it is simpler, avoiding the complex calculations of total customs revenue, and from the outset both governments and businessmen know what to expect. It also avoids the risk of pressure being brought to bear on the governments by special interests. The disadvantage is that recourse to the safeguard clauses in case of particular difficulties of individual industries may be more frequent.

As does the E.E.C. Treaty, the E.F.T.A. Convention provides that each member declares its willingness to lower its customs duties as against the other members more rapidly than required by the rules, if its economic and financial situation and that of the sector concerned so permit. It also provides that the Council may at any time decide that any import duties shall be reduced more rapidly or eliminated earlier and that between July 1, 1960, and December 31, 1961, the Council will examine whether it is possible so to decide in respect of duties applied on some or all goods by some or all of the members.

The Seven have also provided for the progressive abolition of drawbacks, that is, of rebates of duties levied by one member country on goods imported from outside the Area which are subsequently re-exported to another member of the Area after transformation or manufacture. This abolition should be completed by the end of the transitional period.

B. ABOLITION OF QUANTITATIVE RESTRICTIONS

The Seven have, like the Six, provided for a standstill in regard to import quotas. The members may not take steps which would mark a retreat from the level of liberalization reached as of January 1, 1960. Secondly, they contemplate, as do the Six, the complete abolition of all quantitative restrictions on imports within the Area at the latest by the end of the transitional period. To this end they

have agreed to suppress gradually during this period all quotas as between themselves. They hope thereby to avoid neutralizing the advantages obtained by the successive reductions of tariffs on imports and to avoid having to deal with difficult problems at the end of the transitional period concerning quotas which might still be in effect.

To attain these objectives, the Convention contains the following rules:

1) Any quota opened by one of the Seven to another member of the Association must be increased by at least 20 percent per annum;

2) Quotas opened not only in favor of other members but also in favor of third countries must be increased each year by an amount equal to at least 20 percent of the trade actually carried on, within the framework of these quotas, with the other members of the Association;

3) If, for a particular category of goods, a member has provided no quota, or a quota so small that an annual increase of 20 percent would not suffice to achieve complete elimination of the quota by the end of the transitional period, then that member must establish adequate quotas by July 1, 1960. This rule corresponds to the so-called "3 percent rule" for small or non-existent quotas of the E.E.C. Treaty.

4) The increasing of quotas will begin on July 1, 1960, and it will be applied to the quotas in force on December 31, 1959.

In addition, the Seven foresaw two particular quota problems. They recognized that in exceptional cases serious difficulties resulting from the obligation to increase quotas are conceivable within the Area. They are concerned particularly with the case of developing industries, for which a substantial degree of continuing protection may be justified, and with cases where a country applies a very low tariff or none at all, depending solely on quotas as a means of protection. In these cases, the Seven foresaw special arrangements to be authorized by the Council which would permit the complete abolition of quotas by the end of the transitional period and which would not hinder the progressive lowering of tariffs from generating a reasonable rate of trade expansion and which would not create difficult problems towards the end of the transitional period.

The second problem is that of the application of other international obligations, in particular those of the G.A.T.T. and the International Monetary Fund (I.M.F.). The Seven have paid more attention to these obligations than have the Six. Of course, their

Convention was negotiated at a time when the problem of a world-wide elimination of quotas was being seriously discussed in quite concrete terms whereas when the E.E.C. Treaty was negotiated, the prospects for a world-wide liberalization of trade (made possible in December 1958 when the European currencies became convertible) were still remote.

The Seven declare that they have international obligations concerning the use of quantitative restrictions and that, in establishing the free trade area, they have no intention of modifying those obligations. In particular, they do not propose to use quantitative restrictions in any way to create a preferential regime among themselves. This apparently is the reason for the provision in the Convention according to which quotas opened both to countries of the Area and to third countries will be increased by 20 percent; in fact, although the 20 percent increase is calculated only by reference to that part of the quota used by the other countries of the Area, the quota as calculated will apparently be open to goods from third countries as well as from other members. Moreover, the Seven envisage that during the next ten years the majority of the members of the G.A.T.T. may proceed, in accordance with their international obligations, to abolish quantitative restrictions on a large part of their imports. Accordingly the Council will, by December 31, 1961, and periodically thereafter, examine whether the rules concerning the progressive elimination of quotas continue to be appropriate, and whether, taking account of events occurring after the effective date of the Convention, these rules will effectively lead to the abolition of all quantitative restrictions by the end of the transitional period. The problem of the relationship of the rules adopted by the Seven concerning the abolition of quotas with the rules of the G.A.T.T. is also raised by the safeguard clause concerning balance-of-payments difficulties.

C. DEFINITION OF ORIGIN

The most difficult technical problem in a free trade area is the definition of the origin of goods. The only goods which are free of customs duties on passing from one country in the area to another are goods which originate within the area. Goods coming from one member which did not originate within the area continue to be subject to customs duties on entering the territory of another member, just as if they came from a third country. It must therefore be possible to distinguish products which originate within the area from

those which do not, otherwise so-called deflections of trade would result. In distinguishing goods which originate within the area from those that do not, there are, in the first place, two simple cases:

1) goods coming from outside passing from one to another country in the area unchanged. There is no doubt here: these goods do not originate within the area;

2) goods completely manufactured within the area from raw materials produced within the area. There is equally no doubt here: they originate within the area.

The more difficult, and more frequent, case is where the goods are manufactured within the area from raw materials or parts which originate outside the area, or which contain certain elements which originate outside the area. In these cases the problem of the definition of origin is particularly acute. The principle adopted by the Seven is that a product of this sort is to be considered as originating within the Area when the value added within the Area to the raw materials or parts imported from outside is at least equal to a given percentage of the total value of the product concerned. This is the "added-value criterion."

The fixing of a minimum percentage of added value constitutes in a sense an acceptance of the idea that the effect on the value of the finished product of the differences between the duties levied on its constituent raw materials—because they entered the area through a member country with a high tariff rather than a low one or vice versa—gradually decreases as the amount of transformation within the area increases. If the minimum added value required to qualify a product as of area origin were too low, some diversion of commercial activity could result. In fact, it would be profitable to establish transformation industries in those countries which apply the lowest tariffs on raw materials and assembly parts. If this happened, such industries would be competing with their counterparts in countries which apply higher tariffs on raw materials and parts under artificially created economic conditions.

Because this is true, the minimum added value required to combat disparities between the tariffs of the members on raw materials and parts coming from outside should be calculated in each case on the basis of the amount of tariff disparity and the degree of work done within the area. The higher the tariff disparity, the greater amount of work would have to be done within the area in order that a finished product could be considered as originating within it. Con-

versely, the smaller the disparity, the smaller the amount of work which should be required.

With a view to simplification, the Seven adopted as a general rule the criterion whereby a product is considered as originating within the Area when 50 percent of its final value (on the basis of the f.o.b., or the free-at-frontier, price) results from transformation operations carried out within the Area.

The smaller the disparity between the national tariffs of the members on a particular raw material, the smaller should be the amount of work required to qualify the product as of area origin. If tariffs of the various countries on a given raw material are the same, a customs union rather than a free trade area exists and a very slight transformation, adding only a very low percentage to the product's value, would be enough to qualify the product as of area origin. The same result may be reached if it is agreed that, whether their true origin be internal or external, raw materials to which the members of the area apply an identical or a very similar external tariff are to be considered as originating within the area when they are incorporated in a product manufactured within the area. For this reason the Seven also established a list of basic materials which, whatever their true origin, would be considered as originating within the area for purposes of determining whether finished goods, of which such basic materials are constituent parts, qualify for customs exemptions in passing from one E.F.T.A. country to another. In addition, certain transformation processes effected within the Area are considered to add sufficiently to the value of the material imported so that the resulting product may automatically qualify as of Area origin. For example, the spinning and weaving of wool imported from outside the Area will confer Area origin, since spinning and weaving produce cloth with a value which is more than double the price of the imported wool which it comprises.

The Seven consider that these rules concerning added value should be as liberal as possible. With this in mind, they decided to review periodically these rules in a liberal spirit, and that in any case a member of the Area may on its own initiative apply more liberal rules than those agreed to in regard to imports from the other countries of the Area.

Clearly, the more liberal the rules, the greater the number of products which may circulate freely within the Area. For European countries which are comparatively poor in raw materials, the liberal-

ity of the rules and the establishment of as broad a list of basic materials as possible are particularly important.

Once rules of origin have been established, the problem of supervising their application arises. Such supervision requires a certain number of formalities—for example, showing customs officials documents of origin—but to avoid hindering commerce within the area these formalities must be kept at a minimum. The Seven have decided that it is up to the exporter to prove that the product originates within the Area and he may do so by means of any of the above criteria.

Despite all precautions, deflections of trade or commercial activity caused by disparities between the external tariffs of the countries of the Area are still possible. To control these the Seven have further provided:

1) A "code of good conduct," by the terms of which members promise to abstain from any step which might have as a principal effect a deflection of trade. For example, they may not deliberately undertake a systematic lowering of their tariffs as against the rest of the world in order to put their industries in a more favorable competitive position than those of the other members.

2) An appeal procedure whereby a country suffering from serious deflections of trade because of tariff disparities may submit its case to the E.F.T.A. Council. The latter may make recommendations to the other members with a view to remedying the causes of such deflections. In such cases, the rules of origin could be modified and made less liberal, but other remedies could be adapted.

D. SAFEGUARD CLAUSES

As did the Six, the Seven have created two categories of safeguard clauses, one relating to difficulties in balance of payments, and the other relating to difficulties arising in particular sectors of the economy.

I. DIFFICULTIES IN THE BALANCE OF PAYMENTS

Recourse to the E.E.C. safeguard clause is subject to a complex procedure designed to permit strict supervision of such action of a country in difficulty (in theory, except in urgent cases such recourse must first be authorized by Community institutions), to render such recourse as rare as possible and to stress the solidarity of the Six by making "mutual assistance" available. The corresponding clause

adopted by the Seven is infinitely more flexible. Indeed the Convention provides :

1. . . . any Member State may, *consistently with its other international obligations*, introduce quantitative restrictions on imports for the purpose of safeguarding its balance of payments. [Emphasis added.]

2. Any Member State taking measures in accordance with paragraph 1 of this Article shall notify them to the Council, if possible before they come into force. The Council shall examine the situation and keep it under review and may at any time by majority vote, make recommendations designed to moderate any damaging effect of these restrictions or to assist the Member State concerned to overcome its difficulties. If the balance of payments difficulties persist for more than 18 months and the measures applied seriously disturb the operation of the Association, the Council shall examine the situation and may, taking into account the interests of all Member States, by majority decision, devise special procedures to attenuate or compensate for the effect of such measures.

3. A Member State which has taken measures in accordance with paragraph 1 of this Article shall have regard to its obligation to resume the full application of Article 10 [*i.e.*, the Article requiring the elimination of quantitative import restrictions] and shall, as soon as its balance of payments situation improves, make proposals to the Council on the way in which this should be done. The Council, if it is not satisfied that these proposals are adequate, may, by majority vote, recommend to the Member State alternative arrangements to the same end.

Admittedly these provisions incorporate notions identical with those in the Rome Treaty; for example, aid of the members to a partner in difficulties. But they are presented in a less systematic and less obligatory form than in the E.E.C. Treaty. Moreover, and this is important, in the Association recourse to the safeguard clause is unilateral, the member in difficulties being obliged only to give prior warning to the others if possible. Finally, whereas in the Rome Treaty the Community institutions determine the measures that the country having difficulties may take to protect itself, methods of application, and the like, in the Association each country has complete freedom of choice, subject only to its other international obligations.

The reference to other international obligations is important. The other international organizations concerned are, of course, the I.M.F., the G.A.T.T. and the O.E.E.C. They maintain relatively

strict control over the measures taken by a country in balance-of-payments difficulties, such measures consisting of the imposition of quantitative restrictions which are to be administered in a non-discriminatory manner. Two of these organizations, the I.M.F. and the O.E.E.C., also practice what the Six in their Treaty call "mutual assistance"; the I.M.F. may grant credits and the O.E.E.C. can also appropriate credits (through the intermediary of the European Fund of the European Monetary Agreement), as well as recommend to its members measures for facilitating the import by them of the exports of the country having difficulties. In addition, both the I.M.F. and the O.E.E.C. may recommend to the country in difficulties internal financial measures (cutting back public expenditures, restriction of credit, modification of discount rates, and the like) which will enable it to regain equilibrium in its economy. They may condition the granting of credits on the institution of a plan to stabilize the country's economy. Finally, the O.E.E.C. may even go so far as to fix the time limits within which the country, which has had to re-establish quantitative restrictions on its imports because of its balance-of-payments difficulties, is again to liberate imports.

In view of this existing framework the Seven thought it useless to make special arrangements for the Association. In so deciding they had certain things in mind.

1) They wanted to manifest their desires to respect their other international obligations, and in no way to use quantitative restrictions to create a preferential regime amongst themselves.

2) The Seven wanted further to show their desire to continue to cooperate with the Six, within the framework of the other international organizations, and in particular of that of the O.E.E.C. In fact, it is this organization which has worked out the most detailed rules concerning safeguard clauses for balance-of-payments difficulties. Since 1948 these rules have functioned well, thanks to constantly strengthened examination and control procedures, to procedures permitting systematic review of the interrelationship of the economic and financial policies of its members which in turn permit preventive examination of possible balance-of-payments difficulties, and appropriate measures of cooperation to be recommended; and thanks finally to the existence, first of all, of the European Payments Union and later of the European Fund, which on several occasions permitted the appropriation of substantial credits to countries in difficulties. Since the Association of the Seven has as its aim the establishment of a broad association uniting, within the O.E.E.C.,

the Seven, the Six, and the underdeveloped countries of the O.E.E.C., the Seven thought it natural to base themselves, as concerns balance-of-payments difficulties, on the system of cooperation already tested in the O.E.E.C. ;

3) Finally the Seven wanted to avoid the need for new international arrangements, since, in their opinion, those of the O.E.E.C. will normally suffice to cover both their own needs and those of the larger association of the eighteen countries of the O.E.E.C. which they hope to see formed.

Although their answer to the problem of restrictions imposed to counter balance-of-payments difficulties relies essentially on the other international institutions, the Seven were nonetheless forced to consider the possibility that protective measures of one of them might be maintained, despite the rules of the other institutions, over a long period of time. Such measures, if long maintained, could seriously disturb the functioning of the Association, and the Seven therefore concluded that E.F.T.A. institutions should supervise their application. They concede that it may become necessary, in the light of experience, to work out special procedures to attenuate or counteract the effect of these protective measures, although it is clearly impossible to foresee at present what such procedures might be. Nonetheless the gradual development of the Association of the Seven will obviously bring about an ever closer solidarity and interdependence among the members and their economies.

2. DIFFICULTIES ARISING IN A PARTICULAR SECTOR

Although the clause concerning balance-of-payments difficulties in the E.F.T.A. is more flexible than the comparable clause in the E.E.C. Treaty, the E.F.T.A. Convention clause concerning difficulties of a particular economic sector is both more complete and more rigid than its E.E.C. counterpart. This is largely because the Six decided to leave to the institutions of the Community—and in particular to the Commission—a very large measure of discretion in this field; since the E.F.T.A. will be institutionally much less centralized and less supranational, the Seven, on the other hand, wanted to establish precise rules at the outset in order to avoid giving their institutions too much discretionary power. They found, however, that there are limitations on the precision with which such rules can be defined.

In the first place a definition of this kind of difficulty was necessary. The Six refer simply to "serious difficulties which are likely to

persist in any sector of economic activity or difficulties which may seriously impair the economic situation in any region." The Seven were more precise, the relevant clause providing:

- I. If, in the territory of a Member State,
 - (a) an appreciable rise in unemployment in a particular sector of industry or region is caused by a substantial decrease in internal demand for a domestic product, and
 - (b) this decrease in demand is due to an increase in imports from the territory of other Member States as a result of the progressive elimination of duties, charges and quantitative restrictions . . . ,

that Member State may, notwithstanding any other provisions of this Convention,

- (i) limit those imports by means of quantitative restrictions to a rate not less than the rate of such imports during any period of twelve months which ended within twelve months of the date on which the restrictions come into force; the restrictions shall not be continued for a period longer than eighteen months, unless the Council, by majority decision, authorises their continuance for such further period and on such conditions as the Council considers appropriate; and
 - (ii) take such measures, either instead of or in addition to restriction of imports in accordance with sub-paragraph (i) of this paragraph, as the Council may, by majority decision, authorise.
2. In applying measures in accordance with paragraph 1 of this Article, a Member State shall give like treatment to imports from the territory of all Member States.

If the country concerned is to take protective measures, the harm caused must take the form of substantial unemployment, and a spectacular fall in domestic demand, resulting from an increase in imports from the other member countries, must be the proven cause of such employment.

The Seven, it should be noted, defined the kind of protective measures that a member country may apply, and the duration of their application. The Six, on the other hand, gave the Commission full discretion.

It is interesting to observe here that recourse to the clause, in the Association of the Seven, is unilateral, whereas in the Community

it is subject to prior authorization by the institutions. Nevertheless, to limit possible abuses, the Seven were forced to limit the duration of protective measures. They also provided that, beyond the 18-month period, protective measures may be continued only with the approval of the Council. This point is important, for it implies the possibility of active intervention by the institutions of the Association. In effect, the other countries of the group, or a majority of them, must consent to continued protection by the country concerned of the sector or the region in difficulties. Thus even the Seven, who are hostile in principle to supranationality and excessive institutional intervention, were forced to envisage fairly strict institutional control in this area.

In the same vein, the Seven provided that:

3. A Member State applying restrictions . . . shall notify them to the Council, if possible before they come into force. The Council may at any time consider those restrictions and may, by majority vote, make recommendations designed to moderate any damaging effect of those restrictions or to assist the Member State concerned to overcome its difficulties.

4. If at any time after 1st July, 1960, a Member State considers that the application of sub-paragraph (a) of paragraph 2 of Article 3 [*i.e.*, the prescribed reduction in tariffs] and paragraph 3 of Article 6 [*i.e.*, the prescribed elimination of protective elements in internal charges and revenue duties] to any product would lead to the situation described in paragraph 1 of this Article, it may propose to the Council an alternative rate of reduction of the import duty or protective element concerned. If the Council finds that the proposal is justified, it may, by majority decision, authorise that Member State to apply an alternative rate of reduction, provided that the obligations relating to the final elimination of the import duty or protective element . . . are fulfilled.

At the same time that they make unilateral action by the country concerned possible, these measures indicate the Seven's intention that the institutions should, wherever possible, intervene before such action is taken, and the further intention that the countries of the Association should grant aid to one another to overcome difficulties. But the institutions of the Association will also be able to authorize measures other than quotas to protect a sector or a region in difficulties, or to permit it to adapt itself to external competition—for example, by subsidizing production.

In the Seven as in the Six, the safeguard clause concerning balance-of-payments difficulties is valid after the end of the transitional period as well as during that period. Moreover, and again like the Six, the Seven provided that the safeguard clause concerning particular difficulties would only be applicable during the transitional period. The Seven did, however, provide that before the end of this period the Council will consider whether similar arrangements may be thereafter necessary.

E. CONCLUSIONS

As things stand it is difficult to guess at the consequences of the creation of the E.F.T.A. The rules determining origin will not be finally defined for some time to come, and it is quite probable that they will be in a constant state of evolution during the transitional period and even, no doubt, thereafter. That definition is, of course, fundamental, for it will determine the real substance of the Area, that is to say, the volume of products, in relation to total trade between the member countries, which is to benefit from customs exemptions when passing from one country in the Area to another.

In the view of its promoters the E.F.T.A. is not, moreover, an end in itself. It is essentially a means of "thawing" the situation created by the suspension of negotiations for the establishment of a large area including the European Economic Community and the other countries of the O.E.E.C. No one can guess whether the desire of the Seven to resume talks with the Six will be realized or not. But the future of the E.F.T.A. obviously depends on whether or not the eighteen countries establish this larger association.

This being said, the most interesting question is obviously whether a free trade area is, as such, a viable concept. In the course of the negotiations in the O.E.E.C. for the establishment of a larger area, the viability of such an enterprise was fiercely attacked, particularly by France. Later, the then Finance Minister of France, M. Pinay, declared that in his opinion the free trade area was an artificial concept, illogical and completely incapable of working. It will be interesting to see whether the Seven can show that it is technically possible to make a free trade area work. Verification of origin, and the formalities this necessitates, will make commerce among the members of the Association even more difficult than at present, despite the removal of quotas and customs duties. Clearly the major preoccupation of the Seven must now be to reduce these formalities as much as possible.

The experience of the Seven in regard to deflections of activities will be equally interesting. In its present form the E.F.T.A. groups together the United Kingdom, a world commercial power which produces about everything that modern techniques make possible and which applies, in general, quite high tariffs, and six small countries, mostly with low tariffs, each of which has attained an extremely high degree of productivity. On the one hand, there is a risk that the United Kingdom will have a quasi-monopolistic position within the Area for certain products since she will enjoy customs immunity in the other six, whereas her great world competitors (the United States, Germany) will continue to pay customs duties however low. On the other hand, the United Kingdom will suffer both from her high customs duties towards the rest of the world and, in certain sectors, from the extremely active competition of her partners in the Area; and she will no longer be able to protect herself by customs duties on products in relation to which the competitive strength of her partners is greatest—for example, on aluminum, special steels, clocks and paper. Will deflections of activity within the area occur to the detriment of the United Kingdom? Or will the latter gradually achieve pre-eminence over her partners, thereby creating an ever more monopolistic situation? It is impossible to foresee what will happen without making detailed studies, sector by sector; and such studies will be made more difficult by the uncertainty, which will persist for a long time, concerning the development of the commercial policy of the countries of the Area towards the rest of the world.

Whereas it was possible to give extensive consideration to the external commercial policy of the European Economic Community, the problem of the external commercial policy of the E.F.T.A. must be passed over in silence, since, by definition, it has none, each country reserving the liberty to determine as it sees fit its commercial, tariff and quota policy, subject to its other international obligations.

The E.F.T.A. undoubtedly involves preferences among its members as to tariffs, but these are acceptable to the G.A.T.T. Third countries are nonetheless protected to a certain extent against the consequences of the creation of the Association:

1) by the fact that no member of the Association if it wants to achieve increased protection vis-à-vis the rest of the world, can do so except within the framework of its international obligations (G.A.T.T., O.E.E.C.);

2) by the declared intention of the Seven not to use quotas as a means of establishing a preferential regime among themselves. The

manner in which they have handled the problem of the safeguard clause in the case of balance-of-payments difficulties is interesting and reassuring;

3) by the underlying possibility of competition in the progressive lowering of customs tariffs that the Seven may well provoke among themselves to avoid deflections of trade or industrial activity. The fact that a country like the United Kingdom is going to find itself, without any tariff protection, in competition with the very specialized industries of low-tariff countries like Sweden, Norway or Switzerland, will naturally compel it to increase its competitive strength so that it may lower its own tariff vis-à-vis the rest of the world.

Above all, like the European Economic Community, the E.F.T.A. aims at stimulating competition among its members, eliminating marginal activities, increasing productivity and production, raising the standard of living of its population and increasing consumption. The more the competitive power of its members increases, the less they will have to use administrative measures to protect their industries. They will also no doubt be motivated to reduce tariffs slowly as the E.E.C. is to do. In this sense, without being accused of undue optimism, one might say that the movement set off in Europe within the framework of the E.E.C. and within that of the E.F.T.A. may stimulate a new movement along the road towards freedom of world trade. During the transitional periods, third countries may well believe that their interests are being harmed. It is almost certain, however, that, given a state of reasonable financial stability in which cooperation between the great powers is an essential factor, a new era of increased prosperity will open to the countries of the Western world. Their responsibilities towards the underdeveloped countries will increase correspondingly.

These general observations may now appear somewhat arbitrary. And it will only be possible to verify their validity by experience. In this respect, the measures which the Six, and the Seven adopt in regard to tariff matters and the manner in which these measures are applied towards third countries are and will be instructive, as will be the extent of cooperation in the G.A.T.T. negotiations concerning the Dillon proposal.

Chapter IV

Exchange Control Regulations in France *

Fernand Charles Jeantet †

Although it is more than twenty years since the beginning of World War II many countries of the world still exercise some control over the international payments of private citizens and over international private investments. This is true of nearly all the European countries west of East Germany, including Great Britain, France, and West Germany, of most of the Middle Eastern countries and of many countries in the Western Hemisphere. Even such traditionally liberal countries as Switzerland have, although less conspicuously, exercised control over their international payments to and from countries with exchange controls by means of bilateral payments agreements.

Exchange control regulations have become a part of a general regulatory system aimed at close supervision of national economies—which in practice means control of its industrial and commercial activity, a certain amount of control of its agricultural production, plus credit, price, and employment controls. A new field of law, known on the Continent as economic law, has come into existence. For a long time only practitioners paid any attention to this law, and even they were concerned only with those laws, statutes, and regula-

* When this book was originally conceived, a survey of exchange controls in the Six against the background of the E.E.C. Treaty seemed an obvious need. By the time plans became concrete the need had become questionable—exchange controls had been dramatically relaxed almost everywhere. Nonetheless no one felt that a subject which had been of overriding importance to American investors in Western Europe and which is the focus of important provisions of the Treaty could be ignored. The compromise finally adopted defines the scope of Professor Jeantet's chapter as a description of exchange controls in one of the Six providing an example of what the problem of exchange controls has been in a Community country, an indication of how that problem has been affected by the Treaty, and a suggestion of what it may be should future balance-of-payments difficulties occur under the Treaty. Some of the most recent developments which took place after the completion of this chapter are mentioned in the footnotes.—THE EDITORS.

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tions which directly affected their fields of activity. It was believed that these laws would all disappear soon after the end of the war. But that expectation was frustrated; a certain amount of control is still a necessity and probably will be for a long time, either because political evolution is increasingly favorable to governmental intervention in the economic life of nations, or because active hostilities have been succeeded by the "cold" war, or for both reasons. Steps have been taken, however, if not to abolish controls, at least to make them more flexible. The organization of the European Economic Community represents a very important step.

This chapter deals with only one part of the whole body of economic laws whose interdependence makes exchange control regulations, when viewed separately, seem both complex and abstract. It will be limited to a description of the exchange control laws and regulations in France, and will be divided into the following sections:

- I. A General Survey of Exchange Control Laws and Regulations;
- II. International Payments;
- III. International Trade;
- IV. French Investments Abroad;
- V. Foreign Investments in France;
- VI. Sanctions;
- VII. Probable Evolution Under the European Economic Community Treaty.

I. A GENERAL SURVEY OF EXCHANGE CONTROL LAWS AND REGULATIONS

War was responsible for the introduction in France of the first exchange control regulations. Such regulation had been in effect in Germany for many years prior thereto. The Law of July 11, 1938, concerning the general organization of the country during wartime provides in Article 46 that, in case of a state of war, decrees issued by the President of the Republic may regulate or suspend the import, export, transfer, use, or sale of certain resources, that is, all goods and services, including money.¹

¹ Journal Officiel de la République Française (hereinafter cited as J.O.) July 13, 1938. The Decree of July 3, 1915 prohibited the export of gold, the Law of Aug. 1, 1917 created controls on exchange operations and was completed by the Law of Jan. 7, 1918. All of these were abrogated, however, by the Law of Mar. 30, 1929. Art. 46 of the Law of July 11, 1938 has been completed by Art. 5 of the Order of Jan. 7, 1959, [Jan. 10, 1959] J.O.

Soon after the declaration of war, a decree dated September 9, 1939,² prohibited or regulated for the duration of the war the export of capital (currency or other assets), exchange transactions and transactions in gold. A decree dated the same day required French citizens to declare their assets abroad to the newly created Exchange Control Office. The first of these decrees³ was ratified by the National Assembly and has the same force as a statute. It has remained in force in spite of the end of the state of war (May 10, 1946),⁴ and other texts have been added to it—namely, seven orders⁵ and two statutes.⁶ Application of these basic texts is effected by thirty-one decrees of the Head of the Government, thirty-two ministerial decisions of the Finance Department, more than seven hundred regulations of the Exchange Control Office, nearly nine hundred instructions and five hundred notes of the same office. The rules which are presently in force represent about a thousand pages of printed matter.

In itself this calls for explanation and comment.

A. THE HIERARCHY OF TEXTS

It should be understood that such statutes, orders and the Decrees of September 9, 1939, are "laws" in the technical sense of the word. The main consequence of that fact is that they are not subject to judicial review, and they alone provide for penalties (although the definition of the offense is given by administrative rules).

Decrees, ministerial decisions and regulations are as binding as statutes, but only to the extent that regulations are in conformity with ministerial decisions, ministerial decisions with decrees and decrees with the statutes. They represent a hierarchy of rules and, unlike statutes, if they violate requirements of form, involve an abuse of power, or are contrary to law, a private claimant can

² [Sept. 10, 1939] J.O.

³ Modified by several decrees or laws: Decree of Apr. 24, 1940, [May 2, 1940] J.O., Law of Apr. 15, 1942, [Apr. 16, 1942] J.O., Law of Feb. 2, 1948 arts. 1, 3. [Feb. 3, 1948] J.O.

⁴ Law No. 46-2154 of Oct. 7, 1946, art. 178 [Oct. 8, 1946] J.O.; see Cour de Cassation, (Ch. cr.), July 9, 1953, [1953] Dalloz 2 Jurisprudence (hereinafter cited as D.) 553.

⁵ An "order" ["ordonnance"] is, under French constitutional law, a law made by an individual to whom legislative power has been delegated, normally by Parliament. Such delegations were made to General de Gaulle as head of the French Government. These were the Orders of Oct. 7, 1944, [Oct. 9, 1944] J.O.; Jan. 15, 1945, Jan. 16, 1945 and Jan. 17, 1945, [Jan. 19, 1945] J.O.; May 30, 1945, [May 31, 1945] J.O.; Nov. 2, 1945, [Nov. 4, 1945] J.O.; and June 24, 1958, [June 25, 1958] J.O.

⁶ Of Dec. 26, 1945, [Dec. 27, 1945] J.O. and of Feb. 2, 1948, [Feb. 3, 1948] J.O.

seek recourse in the competent court, the Conseil d'Etat.⁷ Illegality of a regulation could also be urged before the Criminal Court and Criminal Court of Appeals in case of criminal prosecution under such a regulation.

Instructions and notes are comments of the competent governmental department and are not binding, except on the department itself. Accordingly, no claim in court is normally possible. Because some of these instructions appear in fact to be as important as regulations themselves, there is a tendency, however, in the decisions of the Conseil d'Etat to admit appeals based on illegality or abuse of power against instructions.⁸

Individual decisions of the competent department may also be attacked on the ground they are illegal or constitute an abuse of power.⁹

B. THE GENERAL EFFECT OF THESE RULES

The existence of this hierarchy of rules is suggestive of the technique of regulation. The law provides very broad definitions and applicable penalties and gives the government broad powers to prohibit or regulate certain operations. The government provides more precise (but still broad) definitions. Generally it forbids almost any operation which comes within the scope of its powers but delegates to the Ministry of Finance, who subdelegates to the Exchange Control Office, power to grant general (by regulations) or special (by individual decisions) exceptions. The result is the converse of the normal rule—instead of “all which is not prohibited is permitted,” the rule is virtually “all which is not expressly permitted is forbidden.” Such a formulation is inelegant and burdensome for private persons but places the governmental agency on the safe side in cases of omission.

This formulation also affords the agency concerned another advantage: it allows adaptation to special circumstances and to frequent changes in the economic situation. It is, indeed, one of the prominent features of economic laws that they give broad powers to

⁷ See Conseil d'Etat (hereinafter cited as C.E.) Feb. 28, 1951, [1952] D. 454; C.E. Mar. 28, 1952, [1952] D. 455; C.E. Apr. 17, 1953, [1953] Gazette du Palais (hereinafter cited as G.P.) II. 9.

⁸ C.E. Mar. 28, 1952, [1952] Jurisclasseur Pratique (hereinafter cited as J.C.P.) II. 7132.

⁹ C.E. May 16, 1951, [1951] Recueil Lebon (hereinafter cited as Rec. Leb.) 268; C.E. Nov. 12, 1954, [1954] G.P. II. 414; C.E. Feb. 11, 1955, [1955] Rec. Leb. 82; C.E. Feb. 20, 1956, [1956] Rec. Leb. 513.

the competent agencies and that the agencies constantly modify the rules. Private citizens must, therefore, constantly re-check what is permitted and what forbidden, and uncertainty about the future necessarily results.

A distinction must be made, however, between basic principles and current rules—the former being fairly stable and the latter changing frequently. Because a study of exchange control regulations might otherwise promptly become obsolete, this chapter contains statements of basic principles as distinguished from current rules.¹⁰

The regulations now in force greatly increase the rights of private investors granted by the legislative and administrative texts establishing the basic principles. The policy of the Fifth Republic is to follow sounder finance practices, strengthen national exchange rates, and promote private trade and investment. Two important sets of regulations have been promulgated to these ends: the first included Regulation 669 on foreign investments in France, issued at the beginning of 1959, and the second, published in the *Journal Officiel* of July 26, 1959, included four regulations which greatly facilitate monetary payments to and from the franc area.

C. THE AUTHORIZATIONS DELIVERED BY THE EXCHANGE CONTROL OFFICE

One consequence of the above-described system is the need for practitioners to have an accurate knowledge of the essential exchange regulations in order that they may know what kind of authorizations are necessary and how they may be obtained. These are of three kinds. The principal kind of authorization covers transfers of funds to and from the franc area. Indeed, one could imagine exchange control regulations which would apply only to such transfers, since the main purpose of such regulations is to maintain a satisfactory balance between the general debit and credit account of France in relation to the rest of the world. The transactions primarily affected are the conversion of francs into other currencies and vice versa, and the actual transfer of funds back and forth

¹⁰ The more important principles are contained in the following texts: the Decree of Sept. 9, 1939, [Sept. 10, 1939] J.O.; the Order of Jan. 15, 1945, [Jan. 19, 1945] J.O. concerning foreign investments in France; the Order of May 30, 1945, [May 31, 1945] J.O. concerning penalties; the Law of Feb. 2, 1948, [Feb. 3, 1948] J.O.; the Order of June 6, 1958, [June 25, 1958] J.O. concerning French investments abroad; and, most important of all, Decree 47-1337 of July 15, 1947, [July 20, 1947] J.O., amended by decree 59-1440 of Dec. 21, 1959, which contains a statement of most of the basic rules along with the Ministerial Decision of the same date, [July 20, 1947] J.O.

between the franc area and other monetary areas of the world. Crediting and debiting foreign accounts is part of such transfer.

But it is difficult to exercise effective control over transfers, which for the most part represent payments, if obligations between one area and another may be freely assumed. This is why international trade itself is controlled—that is, why the second kind of authorization, licenses to import and export goods are required.

In the third place foreign investments in the franc area are also controlled, not to implement old-fashioned notions of protectionism, but because foreign investments mean debts for the future which might one day upset the national balance of payments.

During periods of emergency, special measures have been applied to French citizens residing in France. Thus foreign investments could be requisitioned in order to supply the state with the necessary foreign currency. No requisition orders are presently in force, but French citizens residing in France must still declare their assets abroad¹¹ and all residents must repatriate their income.

D. THE VARIOUS AGENCIES

Authorizations are issued by the Exchange Control Office, which is the principal competent agency, the Department of Finance, through its Section for Exterior Finance (*Direction des Finances Extérieures*) being another. The Exchange Control Office, which is a separate and autonomous agency of the state,¹² is supervised by the Department of Finance but has been given authority to issue the necessary regulations and make individual decisions. Decisions are very often made upon the advice of the competent ministries (mainly the Department of Commerce and Industry and the Department of the National Economy). Each of these departments has to appoint representatives to a special Investment Committee, which is consulted by the Minister of Finance when large investments are in question.

Aspects of the mission of the Exchange Control Office are delegated to several other administrative bodies. One of the most important is the customs administration which controls all physical transfers, be they imports or exports. Monetary transactions are

¹¹ Since this chapter was written, exceptions to this rule have been created.

¹² Created by a statute dated Oct. 18, 1940, [Nov. 1, 1940] J.O. Since this chapter was written, however, the Exchange Control Office has been eliminated as an autonomous agency and legal entity by Decree 59-1438 of Dec. 21, 1959. Prior functions of that Office are now exercised by the Bank of France, under the supervision of the Department of Finance, or directly by the Department itself. Whenever the Exchange Control Office is referred to, it must be deemed to mean, therefore, either the Bank of France or the Department of Finance.

effected by the Office itself and for it and for the Exchange Stabilization Fund by the Bank of France, which is wholly state controlled. Applications have to be filed with the Exchange Control Office by interested parties or by their duly appointed agents or attorneys. But only French or foreign banks which have been designated as "Authorized Intermediaries" (practically all the major ones) are permitted to carry out the actual transactions.¹³ These Authorized Intermediaries receive a special delegation of authority from the Exchange Control Office to receive deposits of foreign currencies and negotiable instruments, to buy them, to open and keep the accounts in francs of non-residents, to receive and make international payments for the accounts of clients, to buy foreign currencies on the currency market for clients' accounts, to handle export and import licenses, and to keep, for the Exchange Control Office, appropriate records of their transactions. They very often receive authorization from the Office to carry out transactions subject to their acceptance of a duty of supervision and responsibility therefor. As such, "Authorized Intermediaries" have mixed status, part private part public, and consequently they assume special responsibilities.¹⁴

Since exchange control regulations apply to the whole franc area and not to France only,¹⁵ a definition of the franc area and of certain basic notions is at this point necessary.

E. THE DEFINITION OF THE TERM "FRANC AREA"

Pursuant to the new Constitution of the Fifth Republic, the Executive Council of the French Community of States (*La Communauté*) was created on December 19, 1958.¹⁶ The Executive Council on June 12, 1959, issued the following Decision:

Exchange control regulations shall be common to all Member States of the Community. Treaties concerning payments shall include all such States.

The Decision provides further:

all public and private resources in foreign currencies shall be put at the disposal of the Community. They shall be assigned to each State by the department in charge of the

¹³ Decree 59-1440 of Dec. 21, 1959. This decree replaces title VIII of the Decree of July 15, 1947, [July 20, 1947] J.O.

¹⁴ See Cour d'Appel, Toulouse, July 1, 1957, [1957] J.C.P. II. 10206.

¹⁵ Because local offices have been created. The "Caisse Centrale de Coopération Économique," formerly known as the "Caisse Centrale de la France d'Outre-Mer," is their central office.

¹⁶ See Order 58-1254 of that date.

economy and finance of the Community, with a view to an appropriate satisfaction of the needs of each. Such department issues the appropriate regulations. Import and export programs shall be determined by each State which shall also issue the appropriate authorizations.

The Executive Council of the French Community decided on the same date that the franc was the common monetary unit of all members of the Community, it being understood that each may have a separate currency with a parity base in relation to the French franc. This parity may only be modified by a decision of the President of the Executive Council. Currencies of the members of the French Community are freely convertible among themselves, and funds are freely transferable.

The franc area thus includes the territory of the French Republic—that is Metropolitan France—the Overseas Departments such as Guiana and the Departments of Algeria, and all Member States of the French Community. But it also covers a larger area, which includes countries which either use the franc as a monetary unit or currencies of their own (Morocco, Tunisia,¹⁷ Guinea, Cambodia, Laos, and Viet Nam). The parity base is not the same for all “francs.” For example, the C.F.A. francs which are used by African Member States of the Community are worth two Metropolitan Francs.

A complete study of the problems raised by the definition of the franc area (contained in a regulation¹⁸) would go far beyond the scope of this work. All rules mentioned in this chapter normally apply to the whole franc area. There are occasionally minor differences, which however, it will not be possible to explain. As used in this chapter the term designating all the world outside the franc area is “abroad,” franc means the French franc, and France means the territory of the French Republic and Monaco.¹⁹

F. THE DEFINITION OF “RESIDENCE”

Exchange control regulations attach little importance to nationality, except in regard to compulsory declaration and requisition of assets abroad. Instead they are concerned with the usual place of

¹⁷ Countries like Tunisia and Morocco are developing exchange control regulations of their own, but they—and this is even true of Guinea—continue to be parts of the franc area. In sum the situation is in transition. See Regulation (hereinafter cited as Reg.) 497, [May 17, 1951] J.O.; Reg. 579, [Oct. 31, 1954] J.O.; Reg. 673, [May 21, 1959] J.O.; Reg. 678, [July 5, 1959] J.O.

¹⁸ Reg. 644, [Feb. 22, 1958] J.O.

¹⁹ Decree of July 15, 1947, art. 73, [July 20, 1947] J.O.

residence (*résidence habituelle*), since an individual's residence is considered a more realistic indication of the location of his main interests and of the likelihood that he will withdraw income or the proceeds of assets situated elsewhere. Normally, payments between residents do not involve an international transfer of funds, whereas a payment between a resident and a non-resident sooner or later will.

A resident is a person who habitually resides in the franc area; a non-resident is a person who habitually resides abroad. But there is no definition of residence in the exchange control laws and regulations. The Exchange Control Office stubbornly refuses to give such a definition. Where French nationals are concerned, the Office virtually never considers a change of residence subsequent to September 1, 1939 as *bona fide*.

French non-residents who establish a residence in France must declare their foreign assets within six months after doing so. Recently, in giving instructions concerning the purchase and sale of real estate in France by non-residents²⁰ the Exchange Control Office decided that a four-year effective residence or non-residence could be considered, but it took great pains to explain that this was not a general definition of residence. It has even gone so far as to create a special franc account, the "Interior Non-residents Account," which must be used by French citizens who have a temporary residence abroad²¹ and by foreigners who have a "temporary" residence in France. Since the words "resident" and "habitual residence" are used by the law itself, only courts can finally decide, in each case, who is or is not a resident under exchange control regulations. For all practical purposes, however, residence coincides with the location of one's main center of activity, provided that his physical presence there is in the aggregate of sufficient duration. Strangely there has been no litigation on the question, parties preferring, because of the uncertainty, to settle disputes.²² Establishments of foreign companies or corporations in France are also considered to be residents, whereas the foreign establishments of French companies or corporations are deemed to be non-residents. This treatment of establishments, like the notion of "residence"

²⁰ See Part V, Section B, *infra*.

²¹ Since this chapter was written, Reg. 700 of Jan. 23, 1960 has authorized French citizens who have resided four years abroad to open "foreign accounts" in France with the authorization of the Bank of France. Four years' residence abroad thus appears as the decisive criterion of non-residence—at least for the purpose of Reg. 700, [Jan. 23, 1960] J.O.

²² See Part VI, *infra*.

itself, is familiar to specialists in tax law, and they know its difficulties. It means in practice that for financial purposes, as for tax purposes, such an establishment must be considered autonomous, with separate assets and books, as if it were a separate legal entity—indeed, as if it were a subsidiary.²³

G. THE MEANING OF SOME FREQUENTLY USED EXPRESSIONS

1. French assets abroad (*avoir français à l'étranger*) mean all kinds of property, real or personal, all goods, all rights of a pecuniary nature which are located abroad and owned by a resident of French nationality or a French branch of a foreign corporation or company.

2. The corresponding expression is "foreign assets in France" (*avoir étranger en France*).

3. Currency assets (*avoir en devises*) mean foreign currencies and short-term negotiable instruments which represent foreign currencies.²⁴

II. INTERNATIONAL PAYMENTS

By "international payments" is meant monetary payments which involve a transfer of funds across the frontiers of the franc area, but they may also include payments by a private debtor who is deemed to be a "resident" of the franc area to a non-resident private creditor or vice versa.

Since international transactions nearly always involve international payments, knowledge of the proper channels and procedures for making such payments under exchange control regulations is vitally important. Only the most general rules will be considered in this section. More specific rules will be examined in the sections concerning international trade, French investments abroad and foreign investments in France. Special rules resulting from the

²³ For the use of the words "residents," "non-residents," "habitual residence," see Decree of Sept. 9, 1939, [Sept. 10, 1939] J.O. concerning assets abroad, art. 1; Order of Oct. 7, 1944, [Oct. 9, 1944] J.O., art. 3; Order of Jan. 15, 1945 (foreign investments), art. 2; and Order of Jan. 16, 1945 (assets abroad), arts. 7, 9, 10 (art. 10 concerning the transfer of residence), [Jan. 19, 1945] J.O.; Order of Nov. 2, 1945, [Nov. 3, 1945] J.O. art. 1; Decree of Feb. 13, 1946, [Feb. 14, 1946] J.O.; Decree of June 4, 1946, [June 5, 1946] J.O.; and Decree of July 26, 1946, [July 28, 1946] J.O. art. 1 (all three on requisitions); Decree 47-1337 of July 15, 1947 (codification) arts. 24, 28, 32, 48, 52, 59; Ministerial Order of July 15, 1947, art. 1, 3° and 4°, [July 20, 1947] J.O.

²⁴ Other or more complete definitions appear in the following sections of the text.

existence of bilateral monetary or payments treaties or international clearing agreements are not included.

The franc area could be thought of as a monetarily closed unit. Payments to and from it must be made through appropriate channels, closely supervised by the Exchange Control Office. It not only supervises payments but authorizes them (when they are made from the franc area to a creditor abroad). It also authorizes residents to buy the necessary foreign currencies.

A. BASIC RULES

The basic rules are set forth in the following hierarchy of texts:

The Decree of September 9, 1939,²⁵ prohibits or regulates the exportation of capital and all transactions involving the exchange of money and gold, but the definition of capital exportation is left to decrees.

Article 27 of the Decree of July 15, 1947, now in force²⁶ specifies that "All payments addressed abroad are subject to the authorization of the Exchange Control Office." Article 2 of the same Decree also prohibits all physical exportation or importation of money, gold, negotiable instruments, or titles of debt, except as authorized.

Thus, transfers of funds to and from the franc area are controlled in their entirety. To make such control still more effective, Article 15 requires all foreign currencies or "instruments which represent foreign currencies" to be deposited with an Authorized Intermediary. Article 30 provides, however, that whenever transfers of funds are allowed (which they automatically are in the case of payments to be received from abroad, while payments to be made abroad must be specifically authorized), such transfers must be made through an Authorized Intermediary.

The Ministerial Decision dated July 15, 1947, which specifies the scope of application of this Decree, provides for certain exemptions, for example, in regard to travellers and tourists. It also regulates such matters as the opening of accounts to non-residents, the functions of Authorized Intermediaries, and the like, which are discussed elsewhere in this chapter.

These basic rules expressly refer to transfers of funds (or of legal instruments which, for this purpose, are treated as funds) to and from (mainly from) the franc area. They also concern payments in foreign currencies within the franc area which are directly

²⁵ Modified by a Law of Apr. 15, 1942, [Apr. 16, 1942] J.O.

²⁶ Decree 47-1337, [July 20, 1947] J.O.

prohibited²⁷ or prohibited by virtue of other provisions, such as the obligation to deposit foreign currencies.

But no mention is made of payments in francs, within the franc area, between a resident and a non-resident. And indeed, such payment should not be considered as a contemporaneous exportation (or importation) of funds, although a payment in francs made to a non-resident may necessarily involve a future exportation of funds.

A regulation of July 11, 1954,²⁸ was the first to provide that payments in francs between residents and non-residents (tourists excepted) should be made through the Authorized Intermediaries, thus identifying such payment with the exportation or importation of funds.

The validity of this provision is questionable. Whether it is still in force is still more questionable in the light of a new regulation,²⁹ which applies to transfers of funds between the franc area and foreign countries. The new regulation does not say that any specific part of the earlier one is abrogated, but it provides that parts of the earlier one³⁰ (which concern payments "between residents and non-residents") shall be replaced by more favorable provisions in the new regulation.³¹ The earlier regulation remains in force, however. The substituted provisions do not refer to payments between residents and non-residents, but only to transfers of funds to and from the franc area. Accordingly it can be concluded that payments in francs within the franc area, between residents and non-residents, are free of regulation. But considering that penalties are very heavy in case of infringement of the exchange control regulations and since it is easy to obtain the (perhaps) necessary authorization, payments between residents and non-residents without authorization would be ill-advised.

Non-resident tourists are authorized to bring into France any amount of any kind of currency, including francs. They may not use foreign currencies directly for payment, but must first sell their currencies through an Authorized Intermediary, except when goods are delivered outside customs limits (*hors douane*). In such cases the rate of exchange is also more favorable because of tax differences. They may freely use the proceeds of such sale, or imported francs, for their own personal needs. They may sell foreign cur-

²⁷ Decree 47-1337, art. 59.

²⁸ Reg. 574, [July 11, 1954] J.O.

²⁹ Reg. 682, [July 26, 1959] J.O.

³⁰ Title I, chapter 1, paragraphs I and II of Reg. 574.

³¹ Title I, chapter 1 of Reg. 682.

rency of one kind against foreign currency of another kind, provided they operate through an Authorized Intermediary. They may physically re-export such currencies, but it is safer for them to obtain the necessary documents in order to be able to prove that they are exporting currencies actually brought in by them.

Recent regulations make it possible for residents to import freely any amount of any type of currency and to keep it. But since they can neither re-export foreign currencies nor use them for payments, the sole possible use is for sale through Authorized Intermediaries.³²

As far as transfers of funds are concerned, the rules in force may be summarized as follows: Except for tourists and the importation of currencies, all payments which involve a transfer of funds, or legal instruments which represent funds, must be authorized and made through designated channels, that is, through Authorized Intermediaries. Authorization is, however, not necessary for payments received from abroad. Any resident to whom a payment is made is obliged to repatriate it, through appropriate channels, within one month, and to sell the foreign currency to the Exchange Stabilization Fund.

There is one other important rule. Payments made to and from a foreign account in francs are considered as a transfer of funds from or to the franc area, but general authorizations are provided for, which greatly facilitate such payments.³³

The corollary to these rules is the prohibition of compensation between payments to be made to and from the franc area.³⁴ "Private" or unauthorized compensation is a major offense.

B. THE CURRENCY MARKET

Because residents do not have the necessary foreign currencies to pay their foreign debts, because they must sell their foreign currencies to the Exchange Stabilization Fund, and because non-residents who invest in France must normally sell foreign currencies and buy francs in order to invest in France, it has been necessary to create an official currency exchange which is supervised by the Bank of France. But an increase in demand and in offers resulting from the increase in the volume of private international trade has made

³² For details see Reg. 697, [Jan. 23, 1960] J.O.

³³ Foreign accounts and general authorizations are explained more fully in the following discussion.

³⁴ *E.g.*, a resident of France collects money due in France to an American and the American in turn collects money due the resident of France in the United States. The two collections compensate for each other in an amount equal to the lower of the two.

possible the creation of a "Free Currency Market" to which, however, only Authorized Intermediaries have access. Under the relevant regulation³⁵ the Free Currency Market is now the sole currency market in France.

This market is closely supervised for a number of reasons. The first is to maintain rates of exchange between the franc and other currencies at a level which is fairly close to official rates. Since the market is "free," its rates are determined by buy and sell offers, and, whenever necessary, offers to buy or sell are made by the Bank of France for the account of the Exchange Stabilization Fund itself.³⁶ This system presupposes that the Bank has the necessary monetary reserves in the currencies quoted on the market. If its reserves are exhausted, a devaluation may eventually become necessary.

Another purpose of the close supervision of the Free Currency Market is to keep a check on the legality of sales and purchases in order to make certain that the appropriate authorizations have been issued, and that funds are used in accordance with such authorizations. Unused foreign currencies must in due course be resold on the Market, and when they are, the profits, if any, must be refunded to the Exchange Stabilization Fund. No one is allowed to buy foreign currencies merely for speculative purposes. However, Authorized Intermediaries may set off their gains against their losses, and profits are only refunded when they are in excess of a certain percentage (2% at the present time).

Sales and purchases on the Free Currency Market may be made for cash or on account, according to the authorizations granted. The number of foreign currencies quoted on the Market is, however, restricted.

They are presently divided into two main categories: (1) Foreign currencies from the so-called "convertibility zone" and (2) those of countries with which France has reached a bilateral payments agreement. The first group includes U.S. and Canadian dollars, the pound sterling, the Swiss and Belgian francs, the Deutsche Mark, the Portuguese escudo, the Mexican peso, the Italian lira, the Austrian Schilling, the Dutch florin and the Swedish, Danish, and Norwegian crowns. Recent regulations (of July 26, 1959) have put all of these currencies in a single category, which means that authorizations to buy such currencies are equally available and that conversion from one to the other is easy.

The so-called "bilateral group" includes only Czechoslovakia and

³⁵ Reg. 657, [June 21, 1958] J.O., as modified by Reg. 665, [Dec. 28, 1958] J.O.

³⁶ For details see Reg. 697, [Jan. 23, 1960] J.O.

Yugoslavia. Payments between France on the one hand and Chile, Ecuador, or Uruguay on the other, are made in U.S. dollars.

C. FOREIGN ACCOUNTS IN FRANCS

Payments abroad do not always involve a purchase of foreign currencies on the market and their transfer to a creditor's account outside the franc area. They may also be made to a franc account of the creditor held in France by an Authorized Intermediary.

The basic rules governing this transaction are set forth in a Ministerial Decision³⁷ concerning the application of Decree 47-1337.³⁸ The present reach of the rules is defined by a recent regulation.³⁹

The matter has been considerably simplified by these rules. Four types of "foreign" accounts (accounts of a non-resident), still exist, but only one type is common, the "Foreign Account in Francs." The three others are: "the Foreign Account in Foreign Currency," which an Authorized Intermediary may hold for a non-resident, under special authorization of the Exchange Control Office; the "Temporary Account" held for non-residents to which payments in francs may always be made;⁴⁰ and the "Interior Non-Resident Account" (I.N.R.) created to meet the special situation of foreigners who have a temporary residence in France or French citizens who have a temporary residence abroad.

The normal foreign account in francs is now called either "foreign account in convertible francs" or "foreign account in bilateral francs" (hereinafter "convertible account" and "bilateral account").

A basic rule must be kept in mind concerning such accounts: a payment made from such an account to a resident or by a resident to such an account is an international payment as defined under exchange control regulations. Accordingly, the same kind of general or special authorizations must be obtained for such payments as for international payments.

Three situations must be considered in regard to each type of foreign account: the opening of the account, transactions resulting in a credit to the account, and transactions resulting in a debiting of the account.

³⁷ Arts. 19-30, Ministerial Decision (hereinafter cited as Min. Dec.) of July 15, 1947, concerning the application of Decree 47-1337.

³⁸ See note 10, *supra*.

³⁹ Reg. 683, [July 26, 1959] J.O.

⁴⁰ Such accounts are said to be blocked because they may only be used in cases of emergency when an international payment is not authorized. A special authorization of the Exchange Control Office is necessary to withdraw money from such accounts.

I. CONVERTIBLE ACCOUNTS

a. The opening of an account by an Authorized Intermediary for a non-resident who has his residence in the "convertible zone" is permitted.⁴¹ A special authorization must be obtained, however, if the account is opened by a non-resident French citizen or by residents of certain countries which have special payment agreements with France.

b. Such an account may be freely credited with the proceeds of sales of foreign currencies of the "convertible zone" on the Free Currency Market, or by debiting another convertible account.

c. Such an account may be freely debited: to pay for the purchase of currencies of the "convertible zone" where currencies obtained on the Free Currency Market are used, or to credit another convertible account, or to make a payment in the franc area.

Convertible accounts are, then, free from governmental intervention in the sense that deposits are readily convertible and withdrawn. These accounts serve as a kind of anteroom to the franc area and general authorizations⁴² indicate how far the door of this anteroom is open into it.

Another important feature of these accounts is that they have no nationality. Such an account may be opened in the name of anyone, provided he is a foreigner residing in the convertible zone, and provided he does not belong to a country which has special exchange regulations preventing him from doing so.

Overdrafts on such accounts must be specially authorized by the Exchange Control Office.⁴³ Such authorization is freely given whenever the overdraft is connected with exports. Conversion between currencies of the convertible zone is free, and it is also possible to buy Czech or Yugoslavian currencies with assets in these accounts.

2. BILATERAL ACCOUNTS

a. Accounts of this type may be opened freely in the name of non-residents residing in one of the countries of the so-called "Bilateral Group": Albania, the East Zone of Germany, Bulgaria, Chile, Ecuador, Finland, Hungary, Israel, Poland, Rumania, Czechoslovakia, U.S.S.R., Uruguay, and Yugoslavia. Special rules apply for Chile, Ecuador, and Uruguay, payments being made to and from these countries in U.S. dollars.

⁴¹ By the general authorization given in Reg. 683, [July 26, 1959] J.O.

⁴² Reg. 700, [Jan. 23, 1960] J.O. See the section concerning foreign investments in France, *infra*.

⁴³ Reg. 683, [July 26, 1959] J.O.

b. Bilateral accounts may be freely credited: with the proceeds of sale on the Free Currency Market of any currency of the convertible zone, or of the currency of the country where the owner of the account has his residence, or by debiting an account of the same nationality.

c. Bilateral accounts may be freely debited in order to buy on the Free Currency Market the currency of the country in which the owner of the account has his residence or to credit an account of the same nationality, or to make a payment in the franc area, provided the true debtor is a resident of the country in which the owner of the account has his residence and the true creditor is a resident in the franc area.

The difference between the two types of accounts, convertible on the one hand, and bilateral on the other hand, and the reasons therefor are obvious.⁴⁴

III. INTERNATIONAL TRADE

The above-described rules are applied to international payments involved in international trade, and the necessary authorization to make such payments is linked with the authorization to import or to export goods, both of which are generally prohibited.

A. ORIGINS OF THE PROHIBITION

A basic Decree of November 11, 1944, prohibits both the exportation and importation of goods.

This prohibition was made necessary by the state of war then prevailing. It has since been used to control the economy of France. During the post-war recovery period authorizations to import goods were reserved for basic raw materials, equipment and supplies such as coal, oil products, heavy equipment and certain food products. Imports were to be made in accordance with the Plan for Reconstruction, popularly known as the "Monnet Plan," and the hierarchy of needs established by that Plan. Even now there is a priority for imports which are in keeping with the present five-year plan.

There has been a tendency, moreover, to use that control as a means of protecting national industry, although there is also a counter movement towards free international trade. The Organization for European Economic Cooperation (O.E.E.C.) has worked un-

⁴⁴ It is also obvious that all countries of the world are not mentioned in the above rules (for example, Argentina, Brazil, Spain, and Egypt). Special rules apply to those countries as a result of special payments agreements with France.

ceasingly to get its members to accept a progressive liberalization of trade among themselves.⁴⁵ The Coal-Steel Treaty and the Treaty establishing the European Common Market have made, and will make, important contributions to the liberalization of trade⁴⁶ and international payments.

B. THE ROME TREATY AND THE TREND TOWARDS LIBERALIZATION

Under the Treaty trade among the Member States is to be completely freed during the transitional period. Each year, basic quotas must be increased, and restrictions on exports are prohibited.⁴⁷ Other obstacles to trade among Member States such as customs duties, currency restrictions and the like must also be removed and a uniform tariff is to be applied to trade with non-member states.

Article 67 of the Treaty provides that members of the Community must gradually remove restrictions concerning transfers of funds among residents of the Community, to the extent necessary for the proper functioning of the Common Market, and that, during the first four-year stage, current payments among Member States must be entirely freed. In case of disturbance of the financial market of one of the Member States or in case of financial difficulties, emergency measures may be authorized, however.⁴⁸

These rules have been given effect in all Community countries and liberalization in France in fact goes beyond the requirements of the Treaty and has accrued to the benefit of non-European as well as Community countries.⁴⁹ Indeed, liberalization has now reached the point where quotas constitute the exception rather than the rule.

Exports, upon which there are no restrictions, have increased steadily. Two devaluations have boosted them by reducing French prices in relation to world prices, and will probably permit increased imports without damage to France's balance of payments. These rules relate, nonetheless, to a transitional period, and they therefore provide for emergency measures and do not require that all currency controls be suppressed. They require only that all necessary authorizations shall be granted.

In sum liberalization of currency control has made the regulations more flexible and made available more liberal allowances of

⁴⁵ See Chapter III *supra*.

⁴⁶ *Ibid.*

⁴⁷ Chapter III, Part II, *supra*.

⁴⁸ Treaty art. 73. See Section VII, *infra*.

⁴⁹ See Chapter III *supra*.

foreign currencies to those applying for authorizations. But exchange control laws and regulations remain for a number of reasons.

International trade is considerably freer, but it is not yet wholly free. Supervision and control of international transactions helps to keep a check on them. It also provides a check rein, if necessary, on the economic development of the country, and helps to acquire the statistical data which forms the basis of the five-year economic plans.⁵⁰ Last, but not least, it gives the government a means of effective and immediate action in case of emergency. The system of exchange control laws and regulations in France makes it easy to make the necessary changes. Regulations can be promptly modified, and departmental instructions, pursuant to a change of administrative policy, may introduce virtual freedom by making the granting of authorizations almost automatic.

Such flexibility is considered necessary, but it also makes—and probably unavoidably—import and export transactions somewhat complex.

C. IMPORTATION

1. As a rule, an authorization ("license") must be obtained from the Exchange Control Office and detailed rules are set forth in the relevant regulation⁵¹ for doing so. Special forms must be filed. Then the competent department, usually the Department of Commerce and Industry, passes on the application. The granting or refusal of an import license is discretionary, but if discretion is abused, or if the principle of equality among applicants is violated, appeal to the administrative court, the Conseil d'Etat is possible.⁵²

The import license is a non-transferable administrative document. Its validity is limited to a maximum of six months, which means that the goods must have been shipped to France before the six months have elapsed. The license must be checked by customs authorities at the time the goods enter French territory.

When a license is granted, it automatically gives the beneficiary the right to buy, through an Authorized Intermediary, the amount of foreign currency corresponding to the price mentioned on the

⁵⁰ These plans are not state imposed, but are, rather, detailed forecasts which guide the action of the competent departments and nationalized enterprises.

⁵¹ Reg. 483, [Jan. 4, 1951] J.O., modified by Reg. 685, [July 26, 1959] J.O.

⁵² C.E. Mar. 28, 1952, [1952] J.C.P. II. 7132; C.E. May 16, 1951, [1951] Rec. Leb. 268 and C.E. Feb. 20, 1956, [1956] Rec. Leb. 513; C.E. Feb. 11, 1955, [1955] Rec. Leb. 82. When imports have been freed by a regulation, as is now usual, the granting of a license is no longer discretionary but automatic.

license. There are strict rules, however, to avoid an illegitimate use of the foreign currency thus acquired.

The purchase of foreign currency may be made for cash or on account. But it can only be made on account until a credit on documents has been obtained. If the license is not utilized in due time, the foreign currency must be resold and the profit, if any, resulting from differences in the rate of exchange, credited to the Exchange Stabilization Fund. When goods have been shipped directly to France (or, in certain cases, through Antwerp, Amsterdam, or Rotterdam), payment becomes effective by transfer of the funds to the account of the sender of the goods. This rule has no exceptions. Alternatively a transfer of francs to an account in France of the sender is possible. The amount of money so transferred must never exceed the C.I.F. price of the goods.

2. In certain cases, the maximum six-months' validity of import licenses is inadequate—for example, when the goods to be imported consist of heavy machinery the manufacture of which cannot be completed within six months' time. In such cases, moreover, the foreign manufacturer often requires a payment by installments, beginning before the goods are delivered or even shipped.

A special procedure has been adopted for such cases, that of "Prior Authorizations." They are granted only when the importer can support his application by producing a written agreement between himself and his seller. The authorization makes possible the purchase of foreign currency, on account, within six months prior to the time the installment to be paid is due. The grant and use of such authorizations are very closely supervised.

3. When imports of certain goods have been freed, the same procedure must still be followed, but another regulation⁵³ declares that the necessary licenses for such goods are to be automatically issued. Whether "Prior Authorizations" are also to be automatically issued is not quite clear, but experience indicates that they are easily and promptly obtainable.

Goods bought for cash with a value inferior to 350,000 francs⁵⁴ or those which are paid for on an E.F.A.C. account⁵⁵ are handled more rapidly. In such cases it is sufficient to produce the invoice at the Customs Office and at the offices of an Authorized Intermediary

⁵³ Reg. 680, [July 21, 1959] J.O. See also Reg. 698, [Jan. 23, 1960] J.O. in regard to procedures concerning "import certificates."

⁵⁴ This amount has been raised to 5,000 new francs (equivalent to 500,000 old francs) by Reg. 696, [Jan. 23, 1960] J.O. Unless otherwise stated, "francs" means "old francs." One "new franc" equals 100 "old francs."

⁵⁵ See text at note 64, *infra*.

in order to import and pay for such goods. A similar procedure is applicable in importing spare parts which have a value less than 50,000 francs.

4. Another special procedure applies to goods not subject to quotas. This is the case for goods which are temporarily imported into France and are to be re-exported with or without modification, for those which technically are not considered as imported goods (for example goods in transit), and for certain privileged goods (furniture in case of a change of domicile, goods with diplomatic status, small postage parcels, and the like). The same procedure also applies to goods which have been freed pursuant to rules of the Organization for European Economic Cooperation and to coal and steel products subject to the Coal-Steel Treaty. In such cases an import certificate is automatically granted by the Exchange Controls Office. A certificate is a much simpler document than a license. Like licenses, certificates authorize the entry of goods into France and the purchase of the necessary amount of foreign currencies. The rules applicable to such purchases are very similar to those already described above,⁵⁶ with minor modifications—for example, the certificate is valid for three months only.

5. One apparently simple case of importation is specially treated by the Exchange Control Office—importation without payment. A special authorization is required since imports of this kind are not considered normal. They may involve illegitimate payments, made out of assets which have not been declared, or unlawful private compensation. When imports are linked to exports, the transactions are submitted to special scrutiny, to make sure that both are legal. Sometimes the Exchange Control Office grants import licenses with the proviso that the raw materials or parts so imported shall be re-exported within a specified time in the form of manufactured products. When equipment or finished products are imported in connection with foreign investment in France, payment authorization becomes part of the authorization to invest.⁵⁷

6. The above procedures apply to goods which may be physically imported, but intangible goods may also be imported. The most important example is that of industrial property rights—patents, trademarks, technical data, and such services as are linked with the communication of know-how.⁵⁸ In such cases, only the payment of the price, royalties, or fees must be authorized. But the

⁵⁶ See section C, subsection 1, *supra*. See also Reg. 698 of Jan. 23, 1960.

⁵⁷ See Part V, *infra*.

⁵⁸ See Chapter V *infra*.

usual practice, greatly favored by the Exchange Control Office, is to submit a written contract for approval. The approval given to such a contract, which is very closely examined by the competent authorities, means that when application is made for authorization to make payment it will be granted upon a showing that the payment is in conformity with the approved contract. There is no known instance of the refusal of such an authorization. Considering the wording of such approvals, it is questionable, however, whether they commit the Exchange Control Office legally.

Special rules also apply to insurance premiums,⁵⁹ transportation costs, and the like. For example, residents are not allowed to export from France more than 25,000 francs at one time nor more than the equivalent of 50,000 francs^{59a} in foreign currency per year for purposes of travel.

D. EXPORTATION

The only reason why exports still require licenses or some kind of similar authorization is that the Exchange Control Office wants to make certain that the total counter value of exported goods is repatriated into France, and that the foreign currencies thus obtained are introduced into the exchange market and put at the disposal of the Exchange Stabilization Fund. Moreover, exports are normally made against payment in the currency of the buyer. When that currency is "convertible," whether it or another currency is in fact used is not very important. But in certain cases, and due to special international agreements, the buyer must pay in United States dollars, although he does not reside in the dollar zone. Special supervision is also exercised over exports made to countries of the bilateral group, and to countries whose currency is weak, in order, as far as possible, to balance exports to, against imports from, such countries.

For this reason, the exporter must as a rule commit himself to repatriate the price of the exported goods and such repatriation must be made through an Authorized Intermediary within a month from the date payment is received. The normal duration of the export license is three months, and payment must usually be obtained within six months after the delivery of the goods to the purchaser. Special authorizations may be obtained for consignments abroad,⁶⁰

⁵⁹ Instruction No. 823, [Nov. 2, 1959] J.O.; Reg. 692, [Dec. 19, 1959] J.O.

^{59a} This amount has now been raised to 1,500 new francs (150,000 old francs).

⁶⁰ Reg. 686, [July 26, 1959] J.O.

and special procedures have also been devised for exports which require a longer lapse of time before payment. As is true of imports, moreover, simplified procedures have been established for certain exports of small value.

The French Government makes every effort to promote exports. For example, applicable industrial and commercial credit restrictions are not applied to export activities.⁶¹ Moreover, credit insurance and export insurance can be obtained from special organizations controlled and financed by the government⁶² and depreciation rates are accelerated when applied to equipment for the manufacture of products for export. (One of the most important incentives for exporting is the fact that exported products are not subject to the turnover tax, the tax on added value, the rate of which is 20%.)⁶³

Exchange control regulations also grant a special right to exporters: they may retain, in a special account called an E.F.A.C. Account,⁶⁴ a percentage of the foreign currencies earned by their exports. The percentage is 12% in the case of exports to the United States. The foreign currencies obtained by an exporter can be used to pay, without going through a complex procedure, the commissions of agents abroad (which otherwise could only be paid on special authorization), business travel expenses, and advertising. They may be used, upon special but easily obtainable authorization, to purchase equipment for the enterprise of the exporter, and they can be converted into other currencies. But the currencies of E.F.A.C. Accounts cannot be transferred to a third party and such accounts are kept, under strict rules, by an Authorized Intermediary. Every three months the exporter must sell on the exchange market at least 10% of the unused balance of his E.F.A.C. Account.

The legal theory of E.F.A.C. Accounts, as well as that of accounts in which an importer or exporter holds foreign currencies for certain purposes, has yet to be articulated.⁶⁵ He certainly is the

⁶¹ The National Credit Council ("Conseil National du Cr dit") fixes credit terms—duration, interest and maximum amounts—which banks grant to private enterprises, and it has facilitated export credits, *e.g.* by the Decision of Feb. 5, 1959 fixing the Bank of France interest rate for export transactions at 3% instead of 4.25% and permitting longer term bills of exchange.

⁶² French Insurance Company for Foreign Commerce ("Compagnie Fran aise d'Assurance pour le Commerce Ext rieur" or "Coface") created by Decree of June 17, 1946. See also Law of July 21, 1950.

⁶³ Min. Dec. of Dept. of Finance of Oct. 25, 1957.

⁶⁴ Export and Accessory Expenses Account ("Exportation—Frais Accessoires Compte").

⁶⁵ See Cour de Pontoise, Oct. 22, 1957, [1957] G.P. II. 389.

owner of the assets, but an owner who must use them for designated purposes. His right of ownership does not have the same content as in private law. It is restricted by state controls, and is exercised as if it were a social function; fortunately the restrictions are only temporary in the sense that the proceeds, in francs, may be freely disposed of.

IV. FRENCH INVESTMENTS ABROAD

“French investments” are investments which are or have been made by physical persons of French nationality who habitually reside in the franc area, or by companies, and other such entities, on behalf of their establishments located in the franc area.

A. EVOLUTION SINCE WORLD WAR II

The general policy of the various laws and regulations applicable⁶⁶ is quite simple:

All assets abroad owned by French residents must be declared to the Exchange Control Office.⁶⁷

Certain assets which are physically in France such as foreign currencies, letters of exchange, promissory notes, bonds, and stock insured abroad are considered as “assets abroad.”

Whenever possible or, in other words, whenever the assets consist in negotiable instruments, such assets must be deposited with an Authorized Intermediary in France or in an establishment abroad of an Authorized Intermediary.

All income having its source abroad, including proceeds of exports, must be repatriated and the corresponding foreign currency sold to the Exchange Stabilization Fund. This rule applies to all residents, French or non-French.

Assets abroad may be subject to requisition against due payment.

Acquisition and transfer of assets abroad are subject to prior authorization. Transfer and all other transactions must be made through an Authorized Intermediary. However, current transactions for purposes of exploitation and maintenance are authorized.

When exchange control regulations were first introduced in France, their purpose was merely to prevent the flight of French

⁶⁶ A policy which has been summarized in Decree 47-1337 of July 15, 1947, [July 20, 1947] J.O.

⁶⁷ Decree 47-1337 of July 15, 1947. But important exceptions to this rule have been created by Reg. 702, [Jan. 23, 1960] J.O.

capital, but at the end of World War II a different problem arose. At that time—the French economy was ruined—stores and factories were either physically destroyed or obsolete; there was a considerable shortage of foreign currency; the level of exports was at the lowest point it had been for a long time whereas imports in substantial quantities were sorely needed. Accordingly, the government wanted to be able to use French assets abroad to aid recovery. Requisition was considered both necessary and legitimate, the more legitimate since those who had invested abroad had suffered less from the consequences of the war. As time went on, requisition no longer appeared necessary, but the French economy still fluctuates seriously as the number of devaluations indicates. It is therefore still imperative to prevent substantial flights of capital, and the continued existence of a permanent canvass of French investments and assets abroad is thought necessary to help to keep track of transfers abroad from France. It also aids supervision by the tax authorities, and, since French payments to other countries have only in the last few months been fully balanced by export trade receipts, such a canvass is still necessary to make effective the obligation to repatriate the income of French investments abroad. But exchange control authorities are quite aware of the necessity to develop French enterprises and investments abroad to further national prosperity and security. Thus general prohibitions have been maintained in principle, but exceptions have become more and more frequent.

B. THE PRESENT SITUATION

The result of the above-described evolution is that requisition of assets abroad has since 1950 been practically eliminated. It has never been applied to residents other than those of French nationality, and its practical scope has always been limited to cash (of the so-called "hard" currencies) or such assets as could be easily transformed into cash. Residents have never been obliged to sell real property nor to dismantle their enterprises abroad. Nonetheless, compensation for requisitions was at the official rate of exchange, at a time when that rate was much lower than the rate of exchange prevailing outside France and, for that reason, requisition was deeply resented.

The three effectuating⁶⁸ decrees were those relating to the requisition of foreign currencies in cash,⁶⁹ the requisition of assets in

⁶⁸ Under Law 45-0140 of Dec. 26, 1945, [Dec. 27, 1945] J.O.

⁶⁹ Decree 46-177 of Feb. 13, 1946, [Feb. 14, 1946] J.O.

gold kept abroad,⁷⁰ and the requisition of certain foreign stock and bonds.⁷¹ These have not been abolished, but their application depends on regulations of the Exchange Control Office.⁷² Ownership and transfer of gold inside France is unregulated; but gold cannot be freely acquired or transferred abroad; nor transferred abroad, or from abroad, from or to the franc area.

The obligation to repatriate income—which as a matter of practice is an obligation only of residents of French nationality, although theoretically all residents are subject to it—is less resented now than it was for the simple reason that the free rate of exchange has ceased to be higher than the official rate.

The obligation to declare assets abroad, which does not apply to non-French residents of France,⁷³ is still in effect. Such assets must be declared within six months of their acquisition (in some cases they can be acquired without authorization) or within six months of the establishment of residence in France, for French persons who resided outside the franc area prior thereto.

Despite very heavy penalties, which may include five years imprisonment, confiscation of assets and a fine many times their value, the enforcement of the obligation to declare assets abroad has been very difficult. Declaration has been looked upon as the first step to present or at least future requisition, and French owners of such assets have therefore been reluctant to declare them. Very often the result of such legislation has been to prevent them from being repatriated.

From time to time therefore Finance Ministers have taken a realistic view of the situation, and a law has been adopted granting amnesty to non-declared assets in order to encourage their repatriation. Such is the case of the “permanent” amnesty resulting from a 1948 law.⁷⁴ Under this law as modified assets which are illegally abroad—that is, those which were not declared in due time or which were acquired without due authorization—can be repatriated without other consequences than a 25% fine, which it is in most cases advantageous to pay because the fine also covers all taxes, including heavy inheritance taxes, which were due. A special procedure

⁷⁰ Decree 46-1293 of June 4, 1946, [June 5, 1946] J.O.

⁷¹ Decree 46-1698 of July 26, 1946, [July 28, 1946] J.O.

⁷² Reg. 440, [Jan. 25, 1950] J.O.; Reg. 451, [Mar. 21, 1950] J.O.; Reg. 471 and Reg. 472, [Sept. 21, 1950] J.O. have stopped requisitions except for gold.

⁷³ Order 45-86 of Jan. 16, 1945; Order 45-87 of Jan. 17, 1945, [Jan. 19, 1945] J.O. See also Reg. 702 of Jan. 23, 1960.

⁷⁴ Law 48-178 of Feb. 2, 1948, [Feb. 3, 1948] J.O., modified by Law of July 5, 1949, art. 25.

has been devised to permit anonymous repatriation. A new order⁷⁵ has extended in two ways the benefit of the amnesty: (1) it applies to assets which were not declared prior to June 24, 1958, and (2) the 25% fine is eliminated. Repatriation must, however, be made through appropriate channels to enjoy the benefits of the amnesty.

C. A NEW FLEXIBLE POLICY CONCERNING ASSETS ABROAD

Some flexibility has been introduced into the regulations applying to the management of assets abroad:

Foreign currencies can be freely introduced into France by residents (introduction by non-residents is *a fortiori* free) and they do not have to be deposited.⁷⁶

Foreign stocks and bonds quoted on the Paris Stock Exchange (they are more and more numerous) can be freely acquired, but the negotiable instruments themselves are not physically delivered to the buyer.

Authorizations for the purpose of subscribing for increases in capital stock are more and more freely granted, through general or special authorizations, to shareholders of foreign companies, although the shares must be deposited. Whenever such stock is quoted on a foreign stock exchange, it is easy to sell it, provided the sale is made under the supervision of an Authorized Intermediary and provided the proceeds are either invested in similarly quoted stock or repatriated.

Real property abroad may be freely sold to a non-resident or even to a non-French resident, provided there is a deed of sale, provided the sale is made for cash in convertible currency or in currency of the country where the property is located, and provided the proceeds are duly repatriated.⁷⁷ Income from real property may, without authorization, be used to meet expenses or taxes, insurance premiums and repair costs of real estate (but not improvement and management costs).

These rules make clear that exchange controls are at present slight. All purchases, sales, encumbrances, payments and gifts are normally subject to authorization. In case of death the appropriate

⁷⁵ Order No. 58-544 of June 24, 1958, [June 25, 1958] J.O. See also Reg. 506, [Sept. 2, 1951] J.O.

⁷⁶ Reg. 652, [Mar. 22, 1958] J.O.; Reg. 699, [Jan. 23, 1960] J.O. specifies the conditions under which it may be introduced and makes explicit that this freedom is not a right but at the sufferance of the government. When money introduced represents income, it must be sold on the Free Currency Market.

⁷⁷ Reg. 584, [Feb. 19, 1955] J.O. See also Reg. 701 of Jan. 23, 1960.

inheritance laws are applied and legacies are unregulated. The drafters of the exchange control laws and regulations have indicated embarrassment in connection with transfers by inheritance of assets abroad. Authorization is required of "any act the aim of which is to dispose of" or modify the substance of assets abroad or to reduce "the rights in such assets."⁷⁸ Application of the appropriate law of inheritance does not, accordingly, result in the application of exchange regulations. But the creation of a legacy is an "act," and although there is no known example of difficulty in such cases, there is no doubt that difficult problems could be raised by certain dispositions of the will of a resident—for example, certain types of trusts which would prevent normal repatriation of income by resident beneficiaries. The Ministerial Decision of July 15, 1947, authorizes "the taking over of assets abroad acquired by inheritance." This is a clear acknowledgement that, at least in so far as the acquisition of assets by inheritance is concerned, exchange control regulations do not affect substantive rights.

But a deed of partition of an estate among heirs must be submitted to the Exchange Control Office if resident heirs, under the applicable law, must agree to accept a reduction or merely a modification of their rights.

The above rules permit strict control of new investments abroad. As a matter of practice new investment consists in the opening of a branch, the creation of an independent or subsidiary company or the increase of funds invested in such branch or subsidiary. In such cases special authorization must be obtained, and to obtain it, sufficient evidence of the commercial interest of the new enterprise or of its enlargement must be supplied. Normally the Exchange Control Office gives the authorization on the condition that a report shall be made each year on the development of the project, including a balance sheet and an income statement, and that normal dividends shall be repatriated and distributed.

When all provisions of the Rome Treaty have been given full effect, it is to be expected that all restrictions to French investments in the states of the Community will disappear, but, prior thereto, only "progressive steps" towards liberalization are to be anticipated.⁷⁹

⁷⁸ Decree 47-1337, art. 58, [July 20, 1947] J.O.

⁷⁹ See Section II, *supra*.

V. FOREIGN INVESTMENTS IN FRANCE ⁸⁰

Under the French Civil Code, as applied by a long line of decisions, foreigners may freely acquire assets of any kind in France, as well as any private rights that are recognized by French law, and they may exercise any trade or profession, except where expressly prohibited by statute. Such prohibitions are rare in the commercial trades and exceptions to these are often permitted. Special rules do apply, however, to such occupations as banking, mining, the manufacture of pharmaceutical products, and the publishing of magazines or newspapers. No law requires that the president or the general manager or the majority of the directors of a company be French, except in a very few cases such as companies which operate public utilities or companies which enjoy long-term licenses for the importation of crude oil and oil products, and practically no law requires a majority or even a minority of shareholders of a company organized in France to be French. A foreigner who wants personally to exercise a trade in France, or who wants to become chief executive (president, or manager, or head of a branch) of a company which does business in France, must obtain a "commercial permit," from police authorities. He must also obtain a "labor permit" if he wants to work in France as an employee. But commercial and labor permits are normally granted and abusive refusals are scarce.

Under exchange control laws and regulations, however, non-residents, whether foreign or of French nationality, cannot always freely acquire assets in France. This section deals with the problem of acquiring assets in France, with investments, and also with the management rights of inventors under exchange control regulations.

A. BASIC RULES ⁸¹

An order ⁸² attempts to give a definition of the "foreign assets in France" to which it applies. According to it, those words mean all movable or immovable, all tangible or intangible assets which are "located in France, including negotiable instruments," and also "all rights which can be exercised in France," provided the owner

⁸⁰ "Foreign investments" here means investments in France by non-residents.

⁸¹ The basic rules are set forth in Order 45-85 of Jan. 15, 1945, [Jan. 19, 1945] J.O. concerning "foreign assets in France," Decree 47-1337 of July 15, 1947, arts. 48-51 and Min. Dec. of July 15, 1947, arts. 19-36. The main Regulation presently applicable to foreign investments in France is Reg. 669, [Jan. 21, 1959] J.O.

⁸² Order 45-85 of Jan. 15, 1945, [Jan. 19, 1945] J.O.

of such assets or rights is a non-resident.⁸³ Difficult questions may arise in connection with the location of intangible assets. They (for example, bearer shares of stock) are located in France when they are physically there, or when they (for example, the rights of a partner in a partnership) are rights to an asset located in France. The trend of exchange control regulations as far as stocks, bonds and debentures are concerned is to take into account those which are issued in France and payable in francs.

One order⁸⁴ went so far as to authorize the Minister of Finance not only to regulate the acquisition and transfer of such assets⁸⁵ but also to impose compulsory declaration of assets in France held by non-residents and even to regulate the acquisition and transfers of assets held by companies organized in France, whenever non-residents participated in the management of such companies.⁸⁶ But the decrees and ministerial orders which put these provisions into effect have been abolished.⁸⁷

In 1947⁸⁸ authorization of the acquisition or assignment of the following kinds of assets was made compulsory:

a) Real property: land, buildings and rights in land and buildings considered in France as "immovables." Leases were not included.

b) Assets of a going concern: this phrase normally includes commercial premises (fully owned or under commercial lease), commercial name, installation, tools or equipment, goods, trade-marks and the like, each single element being considered as a means of building the assets of a going concern.

c) Stocks, bonds or debentures, issued by a French company or issued by a company organized abroad when such shares or stock are physically located in France. Subscription is, naturally, considered as an acquisition. These regulations also require the opening of accounts for non-residents to be authorized.

When the requirements for opening a convertible or bilateral account⁸⁹ or for paying francs into such accounts are not met, a "temporary" account may be opened, but such an account is blocked, and special authorization is necessary to withdraw money from it. The sole use which may be made of such funds is the purchase of stock

⁸³ *Id.*, art. 2.

⁸⁴ Order 45-85 of Jan. 15, 1945.

⁸⁵ *Id.*, art. 3.

⁸⁶ *Id.*, art. 4.

⁸⁷ Decree of July 15, 1947, art. 70, 3°, [July 20, 1947] J.O.

⁸⁸ *Id.*, art. 51 and Min. Dec. of July 15, 1947.

⁸⁹ See Section II, *supra*.

on the Paris Stock Exchange, provided the stock purchased is itself placed in a temporary blocked account. Transfers from a blocked account to another blocked account of the same nationality is possible.

Since it has become possible⁹⁰ for non-residents in all cases to open convertible accounts to which the proceeds of the sale of convertible currency on the French currency market is credited, and since such accounts may be used to make any kind of payment in France,⁹¹ a non-resident may freely acquire in France all assets other than those mentioned in the above list, provided, of course, that the assets so acquired are not exported from France. Furthermore, non-residents may acquire assets in France by operation of law: for example, by virtue of laws of inheritance, or tort law. The freedom to acquire is linked with the freedom to assign the asset, thus assignment of the assets listed above must be authorized.

Normal exploitation and acquisition of the income of an asset are unregulated, but problems arise in regard to the utilization of such income in France and its withdrawal from France and in regard to utilization and withdrawal of the proceeds of the sale or assignment of legitimately acquired assets.

Withdrawal is subject to authorization. Credits to Foreign Accounts of Francs which have a source other than the sale of foreign currencies or another foreign account are not permitted.⁹² It is not certain that even if income or the payment for an asset sold is in francs that these may be used without authorization for other payments in France. If one considers that the provisions of Regulation 574⁹³ are still in force, such a payment must be made to an account of the non-resident, and an authorization is therefore required. The alternative would be to pay the funds into a temporary blocked account. But if those provisions have been abrogated, then a payment may be made in cash and such cash may be used freely (except for transactions of the kind listed above).

General authorizations have become more and more frequent, and even where authorization is still necessary—and this is true in regard to withdrawal from France of income or the proceeds of the liquidation of an investment—it is easily obtained. The basic rules remain, then, but recent regulations and instructions have increasingly reduced their effect.

⁹⁰ Reg. 683, [July 26, 1959] J.O.

⁹¹ Similar rules apply to "bilateral accounts."

⁹² Reg. 683, *supra* note 90.

⁹³ Title I, chapter 1, paragraphs I and II. See text at note 29, *supra*.

Among the liberalizing rules are those which encourage investment in France.⁹⁴ An examination of the status of the principal kinds of foreign investments in France under presently applicable rules is at this point necessary.

B. REAL PROPERTY

Real property in France may be acquired freely by a non-resident provided the acquisition is paid for in cash from a convertible account or from a bilateral account (in the latter case the account must be of the same nationality as that of the residence of the buyer) and provided the acquisition is made through a notary. Notaries in France have a special status which makes them officers of the state in certain respects. If the property is acquired from another non-resident, the necessary amount of foreign currency of the buyer must be transferred in France through appropriate channels to pay transfer taxes and other legitimate costs of the deed of sale.

Real property legitimately owned by a non-resident may be sold to a resident for francs, and such francs may be credited to a Foreign Account of the vendor (if the vendor resides in the convertible zone, a convertible account must be opened; if in the bilateral zone, a bilateral account of the same nationality as that of the residence of the vendor). The sale must be made through a notary. In short, "disinvestment" may be freely effectuated.⁹⁵

Leases are unregulated, whether the non-resident is the lessor or the tenant, but transfer of commercial leases may be considered a transfer of assets of a going concern.

C. STOCK, BONDS, AND DEBENTURES QUOTED ON THE PARIS STOCK EXCHANGE OR ON THE PARIS BROKERS' EXCHANGE⁹⁶

Provided it is paid for from a Foreign Account (even a blocked temporary account) and through an Authorized Intermediary, the stock, bonds, or debentures issued by a French company may be freely bought. The corresponding certificates are placed in a convertible account or a bilateral account, or a blocked account, ac-

⁹⁴ Reg. 669, [Jan. 21, 1959] J.O.

⁹⁵ *Id.*; Instruction to Notaries, Jan. 21, 1959.

⁹⁶ "Paris Brokers' Exchange" is a free rendering of "Marché des Courtiers en Valeurs." "Paris Stock Exchange" renders "Marché Officiel." Brokers on the "Marché Officiel" are called "Agents de Changes" and their status dates back to 1810 (but is now principally regulated by the Decree of Oct. 7, 1890). Both "Agents" and "Courtiers" are brokers but the "Agents" have special privileges and more restricted duties, although both are under supervision of the same committee, the "Comité des Bourses." The reasons for the difference in status of the two is mainly historical.

ording to the origin of the funds. All dividends are automatically paid into the same kind of foreign account as the one in which certificates are kept, as are proceeds of sales made through appropriate channels. An authorization is necessary when such assets are not sold through official channels. Subscription to the increase of capital of French companies is equally free when the shares are quoted on the Stock Exchange or the Brokers' Exchange and when subscription is made through appropriate channels. Non-residents are authorized to buy French stock on the Stock Exchange or Brokers' Exchange, not only for cash but also on margin.⁹⁷ If stock is bought on margin, the usual guaranty must be deposited and may be composed of funds originating from a Foreign Account or stock on the Exchange which is itself in a Foreign Account.⁹⁸ As the result of a general authorization,⁹⁹ various convertible currencies amounting in value to hundreds of millions of dollars were invested on the Paris Stock Exchange in a recent six months' period.

Non-residents are authorized to withdraw from France legitimately acquired stock, debentures, and bonds issued there in franc denominations. In case of withdrawal, dividends are freely transferred through an Authorized Intermediary. Physical transfer of certificates and coupons must always be made through banks and Authorized Intermediaries.¹⁰⁰ Owners must keep in mind that any assignment of the stock, bonds, and debentures which they have thus taken out of France must be authorized.

D. PRIVATE INVESTMENT IN COMPANIES ORGANIZED IN FRANCE

Stock of or interests in French companies may also be purchased directly and increases of their capital subscribed to. By "interests" is meant the rights of members of partnerships (*sociétés en nom collectif*, *sociétés en commandite*) or in limited liability companies (*sociétés à responsabilité limitée*). Such interests may not be issued in the form of certificates or negotiable instruments and, of course, cannot be quoted on exchanges. Shares of stock, on the other hand, are issued by stock companies (*sociétés anonymes*) in bearer or registered form, are negotiable instruments and may or may not be quoted on the exchanges.

While purchases on the Stock Exchange normally involve portfolio investments only, the purchase of interests in companies or

⁹⁷ "Marché à terme."

⁹⁸ Reg. 669, [Jan. 21, 1959]; Instructions 773 of Jan. 21, 1959 and 785 of Feb. 25, 1959.

⁹⁹ *Ibid.*

¹⁰⁰ Instructions 772 and 773 of Jan. 21, 1959.

non-quoted shares generally represent decisions to participate actively in business ventures. Such investments, which create new enterprises or enlarge existing ones, are very much encouraged by France, since they increase employment and contribute generally to the country's prosperity. They are especially encouraged outside the Parisian industrial zone, and when the enterprises to be created are to be located in areas where employment opportunities are scarce. Tax reductions, extensive credit, and even subsidies may often be obtained in such cases. Large foreign companies are thus motivated to make France their base of operations within the European Common Market.

These investments are subject to the authorization of the Exchange Control Office. This authorization is required by law for the purchase of or subscription to shares not quoted on the Stock Exchange or Brokers' Exchange. Control in this area is in fact exercised by the competent technical ministries, through an Investment Committee, however. Application for authorization involves a description of the venture, special emphasis being given to the amount of the contemplated investment, its technical contribution (for example, know-how, industrial experience) to France, the need for French-manufactured equipment and supplies, the location of the plant, the expected size of the labor force, the expected sales volumes and the contribution which the venture will make to the reduction of imports and the increase of exports. Such ventures often involve not only an application to buy or subscribe to shares, but also to import heavy or highly technical equipment. The applicant must also give information on the expected means of financing, and particularly on the amount of bank or other credit which may be needed, and whether the investment is to be made under a guaranty of the United States International Cooperation Administration. It must also be indicated whether the investment is purely foreign or involves French capital—which may help in achieving acceptance but is not a necessity. The application submitted does not, except in extreme cases, constitute a commitment, but the future attitude of French authorities towards the new enterprise will naturally be affected by the *bona fides* with which the project submitted to them is carried out.

When authorization is obtained, the interests or stock may be acquired, and the rules already described for their acquisition then apply. Newly-acquired stock may be transferred abroad, or deposited in a bank in France, or held by the company itself. Divi-

dends and other proceeds are transferable and convertible provided the owner of the stock is a resident in the convertible zone. If the stock is not deposited with an Authorized Intermediary, a certificate of residence must be produced for transfers, which must always be effected through an Authorized Intermediary. Transfer of stock dividends remains subject to authorization—which is easily obtainable if the relationship of stock to dividends is reasonable.

Assignment of such interests and stock is also subject to authorization of the Exchange Control Office, as is the withdrawal of the proceeds in case of “disinvestment.” The requirement of authorization is retained to make certain that transactions resulting in withdrawal are legitimate.¹⁰¹

E. OPENING OF A BRANCH IN FRANCE

The opening of a branch does not, of itself, require authorization since no new company is organized. In fact, however, authorization may be necessary—for example, because the assets of a going concern are acquired.

The transfer of profits is subject to authorization, but the initial authorization normally provides that further authorization shall be automatic. The sale of a branch is also subject to authorization since it involves the sale of the assets of a going concern.

F. LOANS

Loans in francs up to 100,000,000 francs need not be authorized if made from convertible accounts,¹⁰² if for a term of not more than five years and if the interest rate is not higher than the lower of: 5%, and 1½ times the rate of interest applied by the Banque de France for loans against securities.

Mortgages may be obtained through a notary. Interest and principal payments are transferable and convertible through the original convertible account out of which the loan was made. Assignments of loans are subject to authorization, and authorization is also necessary for loans which do not meet the above requirements.

G. EFFECT OF THE E.E.C. TREATY

The above rules apply to non-residents in general. When non-residents are residents of a Community country, the provisions of

¹⁰¹ But Reg. 419, which applied to dollar investments and has been superseded by Reg. 669 of Jan. 21, 1959, was more precise as to the purely technical character of the supervision to be exercised at the time of “disinvestment.”

¹⁰² See Part II, *supra*.

the Rome Treaty apply. Under Article 52 "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished in the course of the transition period." Article 58 provides that companies organized in accordance with the law of "a Member State and having their registered office, central management or main establishment within the Community" enjoy the benefit of, *inter alia*, Article 52. Progressive elimination of restrictions includes the elimination of all restrictions to the creation of agencies, branches, or subsidiaries.

Since these provisions require no immediate action on the part of the Member States, special rules have not yet been established for investments in France of nationals of the other five Member States. A problem might arise, however, if, contrary to the prohibition against new restrictions to establishment (Article 53) or to a program established by the Council (pursuant to Article 54) authorizations were refused, since, under the French Constitution, the Treaty, and, therefore action of the Council pursuant thereto, supersedes regulations and even laws.¹⁰³ In any case Regulation 669¹⁰⁴ may be considered a step in the direction of the progressive abolition of restrictions to establishment envisaged by the Treaty.

VI. SANCTIONS

Penalties for infringement of exchange control laws and regulations may be heavy, but the Ministry of Finance has the right to settle for a conventional fine, so that court decisions concerning penalties are not frequent. Infringement may also affect the validity of a contract or prevent or invalidate its performance. Here again court decisions are rare—obviously because parties do not like to become involved in court cases which may have penal consequences.

A. PENAL SANCTIONS

Two texts are here relevant. One,¹⁰⁵ of very general effect, concerns the prevention of infringements of exchange control regulations. The other one¹⁰⁶ applies only to infringements of regulations applicable to French assets abroad.

¹⁰³ French Constitution (hereinafter cited as Fr. Const.) 1958 art. 55. See text, *infra* at note 123.

¹⁰⁴ See note 81 *supra*.

¹⁰⁵ Order 45-1088 of May 30, 1945, [May 31, 1945] J.O.

¹⁰⁶ Decree of Sept. 9, 1939, [Sept. 10, 1939] J.O. art. 4, as modified by Law of Apr. 15, 1942.

Penalties consist in fines of a minimum of 150 francs and of a maximum of 300,000,000 francs and imprisonment of from one month to five years (or up to ten years for repeating offenders). The court must, moreover, confiscate the *corpus delicti* or, upon request of customs officials, it may impose fines of an amount equal to the value of the *corpus delicti*.

Fines are somewhat smaller in cases involving French assets abroad¹⁰⁷ and in such cases the criminal court is not bound to confiscate the *corpus delicti*. Attempted violations, when so characterized by a court, may be prosecuted and accomplices may also be charged.¹⁰⁸

The general principles of the French Penal Code apply to these sanctions, but derogations from the Code make them more stringent. A complete review of the derogations is beyond the scope of this work. Nonetheless it can be generally stated that the sanctions of economic laws and regulations are severe, and that the defendant has less protection against a rigorous application of the rules than he does in regard to other offenses. The reason is widely accepted. Violations of economic rules and regulations do not seem, *prima facie*, as unethical as other offenses, and it requires a very strong deterrent to frighten people into abstaining from actions which formerly were considered legitimate, and which are so directly to their advantage.

One of the most striking features of the penal provisions of this legislation is that proof of an intention to commit the forbidden action (*dolus penalis*) is not a necessary element of a conviction. Naturally an insane person or anyone deprived of will may not be considered responsible; but for all others these laws are applied in the same way as traffic regulations—violations are, so to speak, automatically punished. Needless to add, the old principle *nemo censetur ignorare legem* (no one is deemed to be ignorant of the law) is strictly applied.

The other prominent feature of these statutes is that their enforcement is intended to be a weapon in the hands of the competent government agencies. This explains most of their special provisions.

In the first place, infringement itself is not defined in a statute enacted by the French Assembly, but by an administrative body. It is provided that "Infringements of exchange control regulations are punished as provided in the present order."¹⁰⁹ Thus, the normal

¹⁰⁷ Cases in which the Decree of Sept. 9, 1939 is applicable.

¹⁰⁸ Order 45-1008 arts. 20, 21, [May 31, 1945] J.O.

¹⁰⁹ Order 45-1088 art. 2.

French principle *Nullum crimen, nulla poena sine lege* (no crime, no penalty, absent a law) is only in part respected. The "crime" is defined in a regulation, and in consequence of its official publication¹¹⁰ everyone is presumed to know all of the subtleties of complex and changing rules.

Secondly, broad powers are granted to certain administrative officials to discover and make an official record of infractions. These are not only the normally competent police officers, but also the customs officers and officials of the Ministry of Finance and Exchange Control Office. Such officials have power to investigate, obtain information from other governmental agencies (with respect to suspected offenses) and to go through postage parcels addressed abroad or sent from abroad.¹¹¹

Thirdly—and this is probably the best proof of the true aim of the statutes in question—prosecution depends on the decision of the Minister of Finance (or his representative) and the Ministry may choose to settle for a conventional fine, even after a judicial sentence has been handed down,¹¹² unless the accused has been sentenced to a term of imprisonment in which case the court's decision is final.

Settlements occur very often, not only because there are doubtful cases, but also because the government agency itself considers that its proper function is not to obtain heavy judicial penalties, but to recover assets which would otherwise be lost to the French economy. The policy of the exchange control administration is the same as that of a bureau of taxation. This is why, in case of death of a defendant, the possibility for prosecution does not disappear: confiscation of assets in the estate of the deceased person may be possible.¹¹³ Moreover, companies are jointly liable for fines to which their officers have been sentenced, when the infraction was committed in the interest of the company.¹¹⁴ It is only in the more extreme cases that judicial intervention is sought.

B. CIVIL LAW CONSEQUENCES

Contracts which violate certain prohibitions are void (under French law). In other cases, for example where payment in a foreign currency must be authorized, the law may make performance impossible, although the contract may not be void.

¹¹⁰ In the Journal Officiel.

¹¹¹ See Order 45-1088 arts. 3-7.

¹¹² *Id.*, arts. 8-10.

¹¹³ *Id.*, art. 11.

¹¹⁴ *Id.*, art. 12.

The first category includes provisions¹¹⁵ which subject all assignments of real property rights, all acquisitions of goodwill, stock, debentures and bonds issued in France or located in France, and all subscriptions to such stock, debentures, or bonds to prior authorization when a non-resident is a party to the operation. It also probably includes the provisions,¹¹⁶ under which all acquisitions and all acts, of which the purpose is the assignment or substantial modification of assets abroad, are subject to authorization when a French resident is a party to such act. Indeed, as a rule French courts will hold void transactions in violation of law, at least when a penal sanction is attached to the prohibition violated.¹¹⁷ In one case,¹¹⁸ for example, the court declared that a subscription to the shares of a company made by a resident acting as a straw-man for a non-resident was void because the necessary authorization had not been obtained. Under French law such a result is not subject to question, and, since the nullity is the result of a criminal offense, any interested party may bring an action to have the transaction voided.

Such consequences are harsh, and it has been argued that, since the nullity depends upon the lack of the necessary authorization of the Exchange Control Office, and since prosecution depends upon a decision of the Ministry of Finance, such a transaction should not be voided until that office has definitely refused its authorization. No court decision supports this theory, but it can, at least, be argued that if the Exchange Control Office grants its authorization a posteriori, but before a final court decision has been reached concerning the validity of a contract, the contract could not be declared void. Since the criminal offense has been purged, it can no longer be said that the contract involves a breach of law.

The nature of the nullity is important. It does not result from an incapacity to act, but from a violation of French public policy (i.e., *l'ordre public*). For that reason unauthorized transactions by French residents abroad should not be void, at least when, according to the relevant choice-of-law rules, such transactions are not subject to French law.¹¹⁹ Many regulations of the Exchange Control Office specify that transactions which are subject to the ex-

¹¹⁵ Decree 47-1337, art. 51, [July 20, 1947] J.O.

¹¹⁶ *Id.*, art. 58.

¹¹⁷ This rule has been applied in many instances of violation of the exchange control regulations. Cour de la Seine [Ch. Civ.] Mar. 14, 1949, [1949] J.C.P. II. 5038. Cour de Belfort [Ch. Civ.] Feb. 6, 1952, [1952] G.P. II, Table analytique 166.

¹¹⁸ Commercial Court of the Seine, Jan. 3, 1951, [1952] J.C.P. II. 6846.

¹¹⁹ Unless they are subject to Article VIII, section 2(b) of the Bretton Woods Agreement concerning the International Monetary Fund which provides for the unenforceability of exchange contracts prohibited by regulations of the signatory states.

change control regulations of another state must also conform with such regulations.

When exchange control regulations affect only the performance of certain obligations, the consequences may be very difficult to foresee. The most frequent and interesting case is the one concerning the prohibition of unauthorized payments. If, for example, a license contract, which provides for royalties to be paid by the French licensee to his foreign licensor, has not been submitted to the Exchange Control Office before it is executed, difficulties may be expected at the time an authorization for transfer of the first royalties is applied for. If the contract is under French law, and if it does not clearly provide that payment must be made in foreign currency, the French debtor will have performed its obligations under French law by a payment of the corresponding amount of royalties into a "temporary" account, which is blocked. On the other hand, if it is clear that payment must be made in foreign currency, non-performance may lead to a cancellation of the contract. Since, however, the contract will have been in force for a period of time, royalties will have accrued, or in certain circumstances damages will be payable. A French court would certainly grant such damages, but they could not be transferred without authorization.

Another dispute between the parties is possible. A non-resident may argue that it was the resident's duty to apply for the necessary authorization in due time. The resident may answer that the existence of exchange control regulations in France is well known, and it was up to the non-resident to stipulate such terms and conditions as he deemed necessary. There has been a great deal of theoretical discussion of this question, but each case requires its own solutions. Precedents are, for example, of little help in regard to the most frequent cause of litigation in this area—losses due to a sudden change in the rate of exchange between the currency of the debtor and that of the creditor. One case is, however, clear: if a loss is suffered because of the negligence of the debtor, he must make such loss good.¹²⁰

VII. PROBABLE EVOLUTION UNDER THE E.E.C. TREATY

New exchange control regulations in France which have created more freedom in international trade, payments, and investments

¹²⁰ Court of Appeal of Colmar May 28, 1952, *Revue Critique de Droit International Privé* 1952, p. 723.

since the end of the year 1958, were not introduced solely to comply with the Rome Treaty. Their scope is, in fact, broader than that of France's Treaty obligations—to which the regulations make no reference.

Consideration of the effect of the Treaty on those regulations is therefore indicated. Three points should be stressed: 1) The provisions of that Treaty are mandatory, and, at least to the extent that they are self-executing, must now be considered part of French exchange control laws; 2) The implementation of the Treaty is progressive; 3) The effect of the Treaty is to shift from national authorities to Community authorities the bulk of the power to regulate international trade, payments, and investments, both among Member States and, to a large extent, between the Community and third countries.

A. FRENCH LAW AND COMMUNITY LAW

It is important to realize that the hierarchy of French texts applicable to exchange control¹²¹ is now affected by the provisions of the Treaty which have become a part of internal French law. It is a clear principle of French constitutional law that when a Treaty has been duly ratified, its provisions prevail over any contrary provision of a prior or subsequent law. Accordingly the self-executing provisions of the Treaty are binding on French citizens and must be applied by courts whenever appropriate. That principle was expressly stated in the Constitution of 1946, Article 26: "Diplomatic treaties duly ratified and published have the same force as a law even though they be contradictory of internal French law, and no legislative act is necessary to their enforcement beyond that required for ratification."¹²²

The new 1958 Constitution is different but no less precise. Article 55 under the Title "Treaties and International Agreements" reads: "Treaties or agreements duly ratified and published have, as soon as they are published, an authority superior to laws, provided, for each treaty and agreement, that it shall be so applied by the other party thereto."¹²³

Accordingly, articles of the Treaty which concern foreign exchange control are part of French law and a person to whom the benefit of these provisions accrues may have recourse to the competent court to vindicate his rights.

¹²¹ See text at note 7.

¹²² Fr. Const. 1946.

¹²³ Fr. Const. 1958, art. 55.

B. A TRANSITIONAL PERIOD

During the transitional period powers of exchange regulation are to be progressively shifted from the Member States to Community institutions. Since the purpose of the Treaty is to establish an economic community, a single market common to the Six, it is to be expected that the power over economic decisions, which determine the need and form of exchange control regulations, would also be shifted to the Community. Indeed, the powers given to the Community institutions to make economic policy are great, while those which directly concern exchange control regulations, curiously enough, appear weaker. Exchange control measures are plainly subordinate, however, to questions of economic policy.

A thoroughgoing study of the Treaty would accordingly be necessary to indicate the probable effect of the Treaty on exchange control regulations. Some examples of the Treaty provisions concerning international trade, investments, and transfers of funds will, failing that, suggest the kinds of progressive changes which can be expected to influence exchange control regulations.

Increases of quotas and reductions of tariffs pursuant to the Treaty began on January 1, 1959, and bilateral quotas were merged by each Member State vis-à-vis the five other Member States, into global quotas which were increased by 20% (10% for each product). A similar increase must be effected at the beginning of each succeeding year.¹²⁴ All quotas must disappear by the end of the transitional period. State monopolies of a commercial character must be organized in such a way that they do not constitute an obstacle to progressive liberalization.¹²⁵ Services rendered across national boundaries are also to be freed of restrictions,¹²⁶ but since modification of national laws may be necessary in certain cases (for example, as to pharmacology) the Council will establish a program to facilitate the exchange of services from country to country.¹²⁷

Tariffs and charges of similar effect were first subjected to a general reduction of 10%. At the beginning of the two 18-month periods subsequent to January 1, 1959, and one year after the beginning of the last of these periods a new 10% general reduction must be made (of at least 5% as to each product, or 10% if the rate is higher than 30%). The reduction on each product should reach 25% at the end of the first stage and 50% at the end of the second

¹²⁴ Treaty arts. 31-33.

¹²⁵ Treaty art. 37.

¹²⁶ Treaty art. 59.

¹²⁷ Treaty arts. 60-63.

four-year stage (the timing of the reductions in the second stage again to be 18 months, 36 months, and 4 years after its beginning). In calculating those percentages duties which are not designed to protect national industry (i.e., duties of a fiscal nature) may not be taken into account.¹²⁸ Import duties are to be completely abolished by the end of the transitional period.

Investments are similarly to be freed of restrictions.¹²⁹ Existing restrictions may not, moreover, be made more restrictive after January 1, 1958. But the freedom of establishment, which is accorded powerful protection by the Treaty both in regard to physical persons and to companies, may raise technical problems. For this reason the Treaty provides, as it does as to services, that the Council shall, before the end of the first stage, lay down a program for the progressive implementation of the freedom of establishment. Since this program must be adopted by a unanimous decision of the Council, the Treaty also provides for a way to establish a program during the second period if unanimity has not been achieved prior thereto.¹³⁰

It is clear, then, that at least as of the second stage, transfers of funds among the Six will be facilitated.

Article 67 of the Treaty provides, moreover, that restrictions on monetary transfers within the Community by residents of a Community country must progressively disappear, but the implementation of this provision is to be very cautious. Article 67 itself specifies that restrictions must be abolished "to the extent necessary for the proper functioning of the Common Market." What is asked from Member States is not, at least during the transitional period, to abolish restrictive regulation but to apply it in such a way that it does not result in an obstacle to free trade and investment within the Common Market: exchange authorizations are to be granted "in the most liberal manner possible."¹³¹ In the same way Article 67 provides that total freedom shall be granted current payments no later than the end of the first stage—this rule to be implemented pursuant to Article 106 according to which each Member State pledges itself to authorize payments in the currency of the country in which the creditor has his residence. Article 71 provides, moreover, that "Member States shall endeavor to avoid introducing within the Community any new restrictions."

The caution here manifest is explained by the evident fear of

¹²⁸ Treaty art. 17.

¹²⁹ Treaty art. 52.

¹³⁰ Treaty art. 56.

¹³¹ Treaty art. 68.

further monetary troubles. The Treaty contains many safeguard clauses which may be invoked to deal with emergencies,¹³² and principally with balance-of-payments difficulties, which France insisted upon.¹³³

C. PROBABLE EFFECT OF A TRANSFER OF POWERS

It is accordingly probable that present national exchange control laws and regulations will not be immediately abolished, at least not by reason of the Treaty provisions. As has been indicated, the effect on French exchange control regulations has been to make them more flexible, but not to abolish basic laws. This could also be said of the exchange control regulations of the other Member States. Nevertheless, implementation of the Treaty will sooner or later result in virtually complete freedom of international payments and of the transfer of funds *within the Community* (absent emergencies, and the Community institutions are to decide, subject to decision by the Community Court, whether emergencies exist).¹³⁴

A further result will also be achieved. In order to create a common market it is not only necessary to abolish internal obstacles, it is also necessary to establish a common economic policy. Many steps must be taken to this end pursuant to the Treaty. One of the most striking is the progressive establishment of a common external tariff.¹³⁵ An economic community, however, far exceeds the bounds of a customs union. The Treaty therefore envisages decisions by the Council concerning economic trends (the *politique de conjoncture*)¹³⁶ and negotiations by the Community (through its Commission) not only of customs but of commercial treaties with third states.¹³⁷

A special body, the Economic and Social Committee,¹³⁸ has been established to assist the Council and the Commission in their economic functions, and special means to implement Community economic policy are provided for. Foremost among these aids are the European Investment Bank¹³⁹ and certain funds.¹⁴⁰ Little by little the Member States are either divested of their economic

¹³² Treaty arts. 26, 73, 93, 108, 109, 226.

¹³³ See Protocol Concerning France annexed to the Treaty.

¹³⁴ See, *e.g.*, Treaty arts. 73, 109 and 226.

¹³⁵ See Treaty arts. 18, 19 and 23.

¹³⁶ Treaty arts. 103(3).

¹³⁷ Treaty art. 113.

¹³⁸ Treaty art. 193.

¹³⁹ Treaty art. 129.

¹⁴⁰ Treaty arts. 199 and 132(3).

powers or must exercise them under the direction, or at least under the supervision, of the Commission or of the Council. The second yearly Report on the Activities of the Community by the Commission lays special emphasis on this aspect of its functions and stresses the important role of the Community in discussions with the O.E.E.C. and with G.A.T.T.

Under these conditions, it will be difficult for any of the Member States to maintain an independent set of exchange control rules and regulations, even in regard to relations with third countries. For example, the Treaty provides that after December 31, 1960, nationals of any one of the Six shall be accorded national treatment in any of the other five Member States in regard to financial participation in companies of the latter.¹⁴¹ The words used to designate "nationals" (in French, *ressortissants*) may apply as well to companies as to physical persons,¹⁴² and if that construction is accepted by the court, a company formed in France would be free to subscribe to the capital of a company formed in Italy, even though the "French" company's stock was wholly owned by U.S. investors. It would accordingly be meaningless for Italy to apply to investors from outside the Common Market prohibitions which would be stricter than those of France and correspondingly it would be meaningless for France to maintain stricter rules of investment than those of any of the other Six. The consequence of this logic has in fact already made itself felt even if the regulations do not yet reflect it. It is accordingly probable that, during the transitional period which ends in 1970 or at least no later than 1973, French exchange control laws and regulations will either be profoundly modified or abolished.

¹⁴¹ Treaty art. 221.

¹⁴² Some doubt might be expressed as to the accuracy of the opinion expressed in the text, given the usual translation of the word "ressortissants" as "nationals" and given the wording of Article 58 of the Treaty, to which Article 221 expressly refers. Article 58 states that "for the purpose of this chapter," which differs from that of Article 221, companies which are described in the first paragraph of Article 58 are assimilated to "natural persons being nationals of Member States" which seems *a contrario* to exclude such assimilation in other chapters. But (1) at least in French, "ressortissants" does not denote physical persons only; (2) the very wording of Article 58 indicates that when physical persons are meant it must be specified that the "ressortissants" concerned are physical persons; and (3) there would be no point in preventing a French company formed by U.S. citizens from subscribing to the capital of an Italian company, since practically the same results could, thanks to Article 58, be reached by forming in Italy a branch of the "French" company.

Chapter V

Industrial Property

Stephen P. Ladas *

I. PROTECTION OF INDUSTRIAL PROPERTY

A. INTRODUCTORY REMARKS

The establishment of the European Common Market has raised many questions in the United States with respect to its effects on patent, design, trademark, and other industrial property rights. This is particularly so because the six members of the Common Market Community are, with Great Britain, the foreign countries in which ownership and exploitation of industrial property rights by American firms and their foreign subsidiaries are most extensive.

Patents are sought in these countries not only with licensing or the establishment of manufacturing facilities in mind, but also because manufacturers in Western Europe enjoy strong competitive positions in world markets in part by means of foreign patents, and it is therefore vitally important for Americans to seek patent protection in this source of exports. Similarly, the acquisition of trademark rights through registration in the six countries prevents misappropriation and eliminates a source of dissemination of infringing marks to the rest of the world.

The acquisition and maintenance of industrial property rights in these six countries have assumed an even greater importance in the period following World War II because of the very significant shift in American business methods in this part of the world. Instead of exporting goods manufactured in the United States, American enterprises are in increasing numbers licensing manufacturing subsidiaries or independent manufacturers located in Europe. It is a

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matter of personal knowledge that licensing agreements in this period have increased by more than 1000% as compared with the pre-war period.

The acquisition and maintenance of industrial property rights in the Six present many difficulties. Some are caused by the fact that each of the Six is an industrial country competing with other industrial countries. All are technologically advanced; their populations are highly inventive; and each has large industrial concerns which file many patent applications and use or register a large number of trademarks.

Other difficulties stem from the fact that their laws and procedures are not uniform, so that the American inventor, designer or trademark owner encounters different problems in each of the Six. Further, their laws are based on economic and political philosophies or applied in keeping with judicial traditions and administrative procedures which differ from ours. For instance, a patent specification as filed in any of these countries may differ considerably from one which would be acceptable in an American patent application. The United States patent system permits independent product claims not limited to the process of manufacture. In most of the European countries such independent claims are not permitted. The American system imposes neither penalties for failure to work patents, nor annual taxes during the term of the patent in order to maintain it. The Common Market countries impose both. A symbol, device, or word which may be registered as a trademark in the U.S. Patent Office may not be admitted to registration or validly registered in some Common Market countries and the laws governing licensing and assignment of trademarks differ from American law.

What bearing will the creation of the Common Market have on these and other problems? Will the European Community adopt uniform patent, design, or trademark laws or will it seek only "harmonization" of the laws of its individual members? If "harmonization" is attempted, how will the attempt be made? Will the Common Market countries adopt special arrangements for the benefit of Community nationals, and will American nationals also enjoy the benefits of such arrangements?

The purpose of this chapter is to attempt to give some answers to these questions.

B. ROME TREATY PROVISIONS

The Treaty establishing the European Economic Community seeks to abolish economic boundaries between Member Countries. To this end, Article 3 foresees as one goal of the Community the "approximation of national legislation to the extent necessary for the functioning of the Common Market." The Treaty, in addition to providing for the removal of barriers to the free movement of goods, persons, services, and capital in the Common Market countries, contains a number of specific provisions envisaging coordination of national legislation to facilitate free movement. The Treaty does not provide specifically for harmonization or unification of industrial property law. Any development of this kind will only be effected by action of the institutions pursuant to the general provisions of Articles 100 and 235.

Article 100 provides that the Council of the Community, voting unanimously on a proposal of the Commission,

shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market.

In addition Article 235 provides:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.

Action by the Council in the field of industrial property may indeed be necessary if the disparities among the laws of the Six create substantial obstacles to the proper functioning of the Common Market, or if the harmful effect of such laws on the free movement of goods in the Common Market is to be reduced to a minimum. It would seem illogical to abolish national economic boundaries by means of the Treaty and yet permit the barriers created by private industrial property rights to continue to exist.

Pending such action by the Council, the only important limitation to which industrial property legislation is subjected by the Treaty (with the possible exception of that imposed by Articles 85 ff.

which are discussed later in this chapter) is that imposed by the last sentence of Article 36. The drafters intended that otherwise the regulation and protection of industrial property should be left to the Member States, as Article 36 makes clear.

Following provisions prohibiting quantitative restrictions on the importation or exportation of goods (Articles 30–34), Article 36 provides:

The provisions of Articles 30–34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archeological value *or the protection of industrial and commercial property*. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States. (*Italics added*).

Article 36, it will be noted, is stated in negative terms. It does not say that Member States retain under the Treaty full and virtually unrestricted power to maintain and create legislation concerning industrial property, but the effect is the same as if it so provided. This is clear since the bulk of the Treaty's provisions is directed at the removal of prohibitions and restrictions in respect of imports, exports, and transit and Article 36 places such prohibitions and restrictions, which are aimed at the protection of industrial or commercial property, beyond their reach. Ultimate definition of the limitation on this legislative freedom imposed by the last sentence of Article 36 is left to the Community Court by Article 177.

Article 36 is probably derived from, and corresponds to, Article XX of the General Agreement on Tariffs and Trade (G.A.T.T.). Article XX provides that the Agreement shall not be construed to prevent the adoption or application by the contracting countries of measures necessary for the protection of public morals, of health, and of life; or of laws or regulations relating to "the protection of patents, trademarks and copyrights"; or of measures "proper to prevent practices of a nature to induce to error."

Article 36 refers to "the protection of industrial and commercial property." "Industrial property" is an expression which has an accepted meaning. "Commercial property" is not. Although the meaning of "prohibitions or restrictions . . . justified on grounds of . . . the protection of . . . commercial property . . ." seems

broader, this clause is probably a restatement of what Article XX of G.A.T.T. expresses by the terms "measures proper to prevent practices of a nature to induce to error"; that is, it is probably directed at protection against unfair competition.

Reference also must be made to Article 234 of the Treaty, the first paragraph of which provides:

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

One of the Conventions to which this Article may be deemed to refer is certainly the International Convention for the Protection of Industrial Property, commonly known as the Paris Union Convention, originally adopted in 1883, and periodically revised in the ensuing years. The revision which last went into effect prior to the signing of the Rome Treaty was that of London in 1934. A more recent revision of the Paris Union Convention was made at Lisbon on October 31, 1958. Member States of the Common Market are required, by virtue of the second paragraph of Article 234, to take all necessary steps to remove any incompatibility between the Paris Union Convention and the Treaty.

In view of this provision and also of the provision of Article 100 which contemplates action by the Council to harmonize those laws, regulations and administrative rules of the Member States which directly affect the operation of the Common Market, and therefore to harmonize their industrial property laws, it is necessary to review the systems of industrial and commercial property in the Six resulting from municipal legislation and regulation and from international treaties. This review will not examine the systems of the Six in their entirety but only those aspects which may involve prohibitions or restrictions capable of frustrating the purposes of the Common Market.

C. PROTECTION OF INDUSTRIAL PROPERTY BASED ON NATIONAL LEGISLATION AND INTERNATIONAL TREATIES

National industrial property laws are territorial in character, that is, the territorial scope of the rights they grant and the obligations they create is limited to the areas in which those laws obtain.

The validity of a patent granted in Germany cannot extend beyond Germany's boundaries. A trademark right acquired in France is effective only in France.

The national law applicable in the territory of a state determines the subject matter of protection, the formalities and conditions of protection, the administrative procedure governing the acquisition of various rights, the scope of protection, the means of enforcement, and the duration of the right. All of these are determined by each state in the light of its political structure, its legislative, judicial and administrative traditions and policies, and its internal economy.

In the history of law industrial property legislation is comparatively recent. Generally such legislation was first introduced during the latter half of the last century¹ as new conditions of industrial and commercial life developed which demanded recognition of new claims and the satisfaction of new interests. Because these claims and interests were generally similar, it was possible for countries to model their industrial property laws on those of other countries whose general laws and legal phraseology were akin to their own. Certain type-groups of industrial property legislation are therefore found throughout the world, the countries of each group having enacted legislation based on common principles which produced similar administrative regulations.

But law consists not only of legislative texts or formal regulations. It includes administrative practice, techniques in handling legal materials, and political and social ideas and ideals which nourish and give life to legal materials and their administration. This makes industrial property laws, which are much alike in legislative texts—for example, those of France and Belgium—quite different in application.

By the beginning of the last quarter of the last century, it was already clear that the strict territorial theory of industrial property law and the disparities among legal regulations resulting from varying legislative and administrative practice were not in harmony with the nature of industrial property which should not be restricted irrelevantly by national boundaries; that the great multiplication and development of means of communication were creating a unified world; and that no country could expect to satisfy the claims and protect the interests of its own people in this sphere without securing for them protection on an international level.

This led to the adoption of the International Convention for the

¹ Switzerland passed its first patent law in 1888 and the Netherlands, not until 1910.

Protection of Industrial Property at Paris in 1883. The international regime of industrial property established by this Convention has been periodically revised in the three-quarters of a century that the Convention has been in existence, and it now constitutes an international charter which is of extraordinary importance in international trade and international investment.

This Convention has established two fundamental principles:

(1) the principle of national treatment according to which nationals of each contracting country enjoy in the other contracting countries the same protection and the same rights which those countries accord to their own nationals; and

(2) the principle that each country is required to extend specified special rights or advantages to the nationals of the other contracting countries, the object of which is to establish either certain uniform standards or certain kinds of protection, both of which are made necessary by the fact that the contracting countries have differing laws, and that adequate protection of industrial property must transcend the boundaries of individual countries.

The most important special rights and advantages for which the Paris Union Convention provides are:

(1) the right of priority under which a foreign applicant for a patent, design or trademark may first file in one contracting country and claim the priority date of this first filing in another contracting country upon the filing of a second application there, provided his subsequent application is filed within a certain term (twelve months for patents and six months for designs and trademarks, from the date of the first filing);

(2) the abolition of the forfeiture of a patent because of importation of articles made by the patentee in another country and restriction of the sanctions for non-working of his invention in the country in which he has obtained a patent;

(3) a period of grace for the payment of fees and annuities;

(4) the abolition of penalties for failure to work a design and for importation of articles bearing the design;

(5) the abolition of the requirement of prior home registration as a condition of registration of a trademark in Member Countries;

(6) the validation of trademarks registered abroad, subject to certain exceptions;

(7) the protection of the owner of a well-known trademark against misappropriation even though the owner has no registration in the foreign contracting country;

(8) the protection of trade names without the obligation of registration;

(9) protection against acts of unfair competition.²

This remarkable list of rights and advantages was designed to establish a far-reaching uniformity of legislative treatment of industrial property rights throughout the 47 countries which are parties to the Convention. The provisions of the Convention are given effect either on the theory that certain of them are self-executing or by legislation or administrative regulation. A number of signatory countries have been lax in bringing their laws into conformity with the Convention, but where implementing legislation was necessary, it has generally been enacted in each of the Six. Indeed, on the whole and in the long run, the growth of national law and practice which conforms to the Convention has been marked.

Each of the Six has long been a party to the Paris Union Convention of 1883, and each has ratified the revised London Text of 1934. All are therefore bound by it not only in their relations to each other but also to the other 41 countries of the Paris Union (including, therefore, the United States). The obligations created by the Convention are therefore of great significance in considering future industrial property developments in the Common Market.

Fulfillment of these obligations will not, however, resolve the problem for the Common Market of economic barriers created by industrial property rights. On the other hand a logical and complete

²The following additional special rights and advantages are provided for in the Convention:

- (a) the independence of patents obtained in the various countries, so that refusal, forfeiture or cancellation of the patent in one contracting country does not affect patents obtained in other contracting countries;
- (b) the elimination of refusals to a patent and of the invalidation of patents on the ground that the sale of the patented product is subject to restrictions or limitations resulting from the domestic law;
- (c) the exemption from patent-infringement rules of the use of a patented device on board vessels or aircraft temporarily entering the territory of a country;
- (d) the protection of process patents against the importation of products made in another country on the basis of such process patents;
- (e) the creation of an obligation of contracting countries to protect industrial designs;
- (f) the protection of armorial bearings, flags, state emblems, and official signs or hall marks against appropriation as trademarks;
- (g) the protection of service marks;
- (h) the permission to assign foreign trademarks with the local goodwill only;
- (i) the permission to license trademarks (although of very inadequate effect);
- (j) the protection of the trademark owner against misappropriation of his mark by a foreign representative or agent;
- (k) the protection of association or collective marks;
- (l) protection against false indications of origin.

answer to this problem would be the adoption of single patent and trademark laws, and a general unification of other industrial property laws throughout the Common Market. It is unlikely that the Six will go so far in the foreseeable future. Industrial property law is intimately connected with civil, procedural, commercial and criminal laws of the countries in question. It cannot be fully unified unless large segments of those laws are also effectively unified.

The question, then, is how far the Six may be willing to go in harmonizing their industrial property laws, and in considering this question two fundamental observations should be kept in mind. First, development in this field depends on choices among several vital alternatives of policy. Is the European Community to seek extensive or limited economic integration of the Member States, and in either case is it: to pursue a policy of free trade or one directed at a controlled economy; to impose specialization of industry or encourage competition; to seek an economy of large or of small units? These general problems of policy will determine to a large extent the answers to the questions posed.

Secondly, we must distinguish between unification or harmonization of the law of industrial property directed at simplifying the obtaining, maintenance and enforcement of industrial property rights—goals which are plainly desirable whether or not a Common Market exists—and that which is specifically necessary or desirable in order to increase freedom of movement of goods or to remove obstacles to such movement in the Common Market

II. PATENTS

A. PATENT LAWS IN THE COMMON MARKET COUNTRIES

A patent is a statutory monopoly granted to an inventor in exchange for the disclosure of his invention to the public in his application for a patent. Ownership of a patent for a particular product or process in one country of the Common Market enables the patentee to stop at the borders of that country the importation of the subject matter of the patent from any of the other five. Differences in the patent laws of the Six are important from the point of view of administrative procedure for the grant of patents, patentability of inventions, subject-matter restrictions, annuities, working requirements and duration of patents.

I. ADMINISTRATION PROCEDURE

The administrative procedures prescribed by the laws of the Six for grants of patents differ in important respects and the consequences of these differences are significant.

In two of the countries of the Common Market, Belgium and Luxembourg, there is no examination of an application, except with respect to formal matters. Administrative officials do not undertake to examine whether the invention is adequate or whether the claims³ are proper. The patent will be issued immediately, and determination of its validity is left to the courts. In France and Italy, examination is confined to subject matter,⁴ form, and unity of invention.⁵ In France, subject matter is considered only in the case of pharmaceuticals, and in Italy only in the case of pharmaceuticals and foods and beverages. Prior art⁶ is not cited in any of these four countries. In Germany and the Netherlands, on the other hand, examination is extremely strict as regards form, unity of invention, subject matter, and novelty; and domestic and foreign prior art may be cited. Oppositions may be filed after publication of acceptance

2. PATENTABLE INVENTIONS

Whether or not the patent office examines an application in detail prior to grant of the patent, the question of patentability of the invention may be litigated after the grant in each of the Six. A basic requirement in each country is novelty of the invention, but the definition of novelty varies.

The existence of an issued prior patent or any other printed publication anywhere covering the same subject matter is a bar to validity in all six countries, except that in Belgium an importation patent may be granted, although a corresponding foreign patent has been issued, provided there has been no public use in Belgium prior to

³ "Claims" in a patent application define the monopoly granted to the patentee. They tell the public the prohibited ground that the inventor claims for himself. If, for instance, the specification describes machinery in its entirety, and does not state which parts the inventor claims as new, the patent will be void if any particular part turns out to be old.

⁴ "Subject matter" in a patent application means the field to which the invention relates, for instance, a new process for the manufacture of food products or new food-stuffs or an invention in the chemical field or in the electronic field.

⁵ "Unity of invention" means that the application does not purport to claim separate and distinct inventions. If more than one invention is covered, a separate application must be filed for each.

⁶ "Prior art" means the prior knowledge in the particular industry or technology. Such knowledge may be embodied in scientific or technical publications, patent specifications, issued patents, etc

filing there. In France, Italy, and the Netherlands, moreover, prior publicity of the invention anywhere sufficient to enable it to be worked is a bar. This is absolute in the sense that any publication, whether printed or not, and any public use is fatal.⁷ In Belgium and Germany printed prior publication anywhere is a bar, while public use of the invention in other countries is not. In Germany, moreover, public use or any printed disclosure by the inventor during the six months preceding the filing date is not a bar and printed publications more than one hundred years old are not considered as affecting the novelty of the invention claimed.

The standard of invention which will justify the issue of a patent in the strict-examination countries, Germany and the Netherlands, is of the highest. The patent office examiners in these countries must be convinced not only of the novelty of the invention but also that a requisite level of inventiveness is disclosed⁸ and that the invention represents an advance in the art. The applicant is usually called upon to establish a "new technical effect" and must prove that the invention at the time of the application was not obvious to a person skilled in the particular art.

3. SUBJECT MATTER RESTRICTIONS

Restrictions relating to immoral inventions, financial schemes, and the like aside, significant differences in the laws of the Six relate, first of all, to the problem of process and product patents and, secondly, to exclusion of certain fields of invention from patent protection.

Belgium is the only one of the Six which grants patents for new processes as well as new products, in the pharmaceutical field. On the other hand in Italy no patents may be obtained either for products or for processes in the pharmaceutical field. In Luxembourg, the Netherlands, and Germany inventions relating to chemical or pharmaceutical products and foodstuffs can only be protected by

⁷ This is not true in the Netherlands. Its courts have held that a publication (or public use) is only fatal with respect to novelty if a Dutch expert could discover it, and the Patent Office takes the view that this may be prevented by factors of language or place of publication.

⁸ An invention necessarily involves an addition to the stock of knowledge, *i.e.*, the public must be told something which it did not know before. No invention is involved in merely doing what has not been done before if it could have been achieved by a skilled workman as a matter of shop routine. Mere application of ordinary knowledge or of obvious matter is not invention. There is no invention in the adaptation, without ingenuity, of a well-known idea in a well-known manner for a well-known purpose. There must be an exercise of inventive faculty and a display of thought, skill and design in working it out. But the quantum of such exercise or display required is not the same in all countries.

process claims. This was also true in France for pharmaceutical compositions and remedies, but a recent law passed on February 4, 1959, authorizes special patents for pharmaceutical products. In the Netherlands, products and compositions in bulk form, so-called *Stof*, can only be protected by process patents.

But while independent claims for products, as distinct from processes, are not allowed, claims covering the manufacture of given products are in effect permitted in Germany, the Netherlands, and Luxembourg, in the sense that these products are an inherent part of the process claims. If an infringer is sued on the ground that he is using or selling a product made by the patented process, the burden of proving that it was made by the protected process is usually on the patentees if the product is old, but this burden is shifted to the defendant if the product was new on the date of the process patent.⁹

4. ANNUITIES

All six countries impose annual taxes on the patentee during the life of the patent. In Belgium, France, Luxembourg, and Italy, these are payable annually from the filing date; in the Netherlands annually from the date of grant (which may be two or three years after filing); and in Germany, annually beginning with the third year after the filing date.

5. WORKING REQUIREMENTS

In each of the Six the patentee has an obligation to work his invention. The sanction for failure to do so is a restriction of his exclusive right. This obligation and the sanction therefor are basically affected by Article 5 of the Paris Union Convention. Article 5 provides that each country has the right to enact legislation providing for the grant of compulsory licenses to prevent abuses—notably failure to work—of the exclusive rights conferred by patents. Under the text as revised at Lisbon, an application for a compulsory license may not be made, on the ground of failure to work or insufficient working, until four years have expired since the date of filing of the patent application or three years since the date of the grant of the patent, whichever period last expires. An application for a compulsory license is in any case refused if the patentee justifies his inaction. Revocation of a patent is not permitted except in cases where

⁹ Such date being the date of the filing of the application or priority date of the process patent.

the granting of compulsory licenses is not sufficient to prevent abuses resulting from non-working. Even in such cases, however, a proceeding for revocation may not be instituted until two years have expired since the granting of the first compulsory license.

Although the domestic law has not been revised in Belgium and Luxembourg in accordance with Article 5, the courts have held that its provisions are self-executing and must therefore be given effect. In France since 1953 and in the Netherlands since 1957 the law has conformed to the London text of the Convention. The German law also reflects the provisions of the Convention. In Italy, however, the law governing working requirements is not conforming.

Italian law requires that a patent must be worked in Italy within three years from the date of grant. Failure to work within such term entails forfeiture of the patent. Patentees may void this result only by exhibiting the patented invention at one of the official Italian Fairs within the period fixed for working. The theory is that such an exhibition is in effect a working of the patent for the duration of the exhibition. Exhibition may be effective, however, only once.

6. DURATION OF PATENTS

In Belgium, France and Luxembourg patents are granted for a term of twenty years from the filing date. Importation patents are granted in Belgium for the remainder of the term of the corresponding foreign patent, if the term remaining does not exceed twenty years. In the Netherlands the term is eighteen years from the date of grant, and in Germany eighteen years from the day after the filing date. In Italy the term is fifteen years from the filing date. Patents of addition in all six countries are granted for the remainder of the term of the parent patent.

B. POSSIBILITIES OF UNIFICATION OR HARMONIZATION OF PATENT LAWS IN THE COMMON MARKET

Patents create lawful monopolies by granting the patentee the exclusive right to control the subject matter of the patent throughout the territory of the granting state. By the same token, patents restrain the liberty of others either to make and sell the same product, in the case of product patents, or to utilize the process, in the case of process patents. Article 36 of the Treaty reserves to each

of the Six the power to enforce all prohibitions and restrictions to the free movement of goods required by the protection of patent rights.

Is it possible, however, that no attempt will be made to unify or harmonize the six distinct patent systems of the Common Market? Such inaction seems unlikely, because the merging economic life of the Six must certainly create pressure to eliminate obstacles to the free flow of trade in the Community.

Indeed, efforts at harmonizing patent law had already been initiated before the conclusion of the Treaty, beginning in 1951 within the Council of Europe.¹⁰ A Committee of Experts on Patents was appointed by this Council to study unification, and on October 7, 1955 adopted the following resolutions:

The Committee believes that the unification on certain points of the substantive law concerning patents is one of the conditions for the creation of a European patent to be issued either by a European Patent Office or by national Patent Offices.

Unification, at least in the first stage, shall bear on:

- (a) the general conditions of patentability (industrial character, novelty, technical progress, inventive effort, effect of prior patents and patent applications);
- (b) the effect to be given to the specification and claims.¹¹

Before this resolution was adopted, various plans had been submitted by Longchambon (1949), Reimer (1953, 1954), de Haan (1954) and Was (1954).¹² These did not meet with approval. Then Dr. W. Lampert of Stuttgart suggested a project of unification.¹³ This project contemplates the conclusion of a treaty permitting an applicant to file a patent application in one of the contracting countries practicing prior examination, the filing to be effective in all contracting countries. The applicant would have the right to require that his application be communicated to the other contracting countries so that they might examine it in accordance with their laws. The countries whose patent offices do not practice examination with regard to novelty could only advise the applicant that they

¹⁰ 67 LA PROPRIÉTÉ INDUSTRIELLE 19, 68 (1951); 70 *id.* 59, 60 (1954).

¹¹ 71 *id.* 236 (1955).

¹² Longchambon, Rapporteur of the Committee for Economic Questions of the Consultative Assembly of the Council of Europe; Reimer, President of the German Patent Office; De Haan, President of the Dutch Patent Office; Was, Dutch Patent Attorney.

¹³ See *Report of Coordinating Committee on Industrial Property Rights*, [1957] ANNUAIRE DE L'ASSOCIATION INTERNATIONALE POUR LA PROTECTION DE LA PROPRIÉTÉ INDUSTRIELLE 37; 74 LA PROPRIÉTÉ INDUSTRIELLE 33-39 (1958).

would deal with the copy of the application as if it were a national application, and the applicant would be granted a national patent after fulfilling the usual requirements. Any country which practices examination would have the choice of adopting as its own the examination made in the first country or of submitting the application to an examination of its own as soon as it was advised that the first country was ready to publish the invention.

The Patent Commissioners of countries practicing examination have had a number of meetings. Among those present at the first of these, which was held at The Hague in April 1956, were the Commissioners of Germany and the Netherlands (as well as those of Britain, Austria, Norway, and Sweden). The following resolution was adopted:

This meeting, taking notice that nearly all the European Patent Offices which undertake a search for novelty have difficulty in disposing of the present very large number of applications for patents because of the general shortage of technically-trained staff, and the increasing volume of search material and complexity of inventions, observing that when applications in respect of the same invention are lodged in more than one of these Offices the search for novelty has to be made in each of them, thus leading to a considerable repetition of work, and being of the opinion that this repetition of work might be avoided to some extent if the result of a search in one Office could be available to other Offices in which an application in respect of the same invention has been made,

1. Recommends that these Offices should examine with interested parties in their countries whether powers,

- (a) to require an applicant for a patent to disclose the result of the search made in or on behalf of any other Office, and/or
- (b) to enable Offices themselves to exchange search results would be of advantage to the Offices and would be acceptable in their countries.

2. Requests the Government of the Netherlands to bring the resolution to the notice of the Secretary-General of the Council of Europe with the explanation that the measures proposed are of an exploratory nature.

At a second meeting in Munich in April 1957,¹⁴ the Commissioners accepted the Lampert project as the basis of a proposed first stage of unification. They appointed a sub-committee to prepare a

¹⁴ 73 LA PROPRIÉTÉ INDUSTRIELLE 123 (1957).

draft Convention for Applications for a European Patent. The sub-committee discussed the subject and submitted its conclusions to a third meeting of the Commissioners in Vienna in April 1958.

The sub-committee agreed that a convention should be concluded providing for the filing of a joint patent application by any person entitled to file a national patent application. The joint application should be filed in the country of which the applicant is a national or in which he resides. He should indicate, on filing, the countries to which his patent application is to extend, and the application should contain a specification and claims. The fees to be paid would be the sum total of the fees payable to each of the countries covered by the joint application, and examination would be made by the patent office of the country in which the application was filed or by the International Institute of Patents at The Hague, the results to be communicated to the patent offices of the countries concerned. No patent office would be bound to accept these results, each therefore remaining free to make its own examination. A subsequent meeting was held in October 1959 in Vienna. This meeting discussed a modification of the previous plan under which a joint application is presented to the Patent Office of one country with a list of the countries in which protection is desired. A copy of the specification and full filing fees for each such country are remitted. The Patent Office receiving the joint patent application distributes the documents to the other countries and keeps them advised of the prosecution of the original application. The other countries may start their examination at any time or may await the results of the search in the original country. The meeting in Vienna decided to entrust a sub-committee consisting of representatives of the Patent Offices of Germany, Great Britain, Austria, Netherlands, Sweden, and Switzerland with the preparation of a draft Convention.

In the meantime, an organization known as The Committee of the National Institute of Patent Agents (C.N.I.P.A.) has produced its own plan, known as the "C.N.I.P.A. Plan." Its general outline is that an applicant filing application in one country shall be entitled to file in other countries, within the Paris Convention priority of twelve months, an inexpensive preparatory application to be completed within a prescribed period which will be long enough to allow him to receive the result of the official novelty search upon his first application. It is proposed that this period be six months. The preparatory application will include a copy of the specification on file in the originating application in the same language. After the

preparatory application is completed, a certified copy of the novelty search in respect of the first should be filed. This search may be undertaken by the Institute of The Hague. The usual documents and the regular fees must also be filed with the complete application which will then be examined, in accordance with the law of the country. The advantages of this plan are: original payment of small fees and saving of expenses of translation of specification which are generally quite high; a term of 18 months for filing a complete specification in other countries.^{14a}

The directors of the patent offices of the countries which do not practice examination also had a meeting in Paris in June 1957.¹⁵ They favored a simpler procedure, which would leave untouched the existing laws in each country and would provide only for a common novelty examination. Applicants would be entitled to file an international application meeting certain requirements: unity of invention, specification and claims, and the like. The national offices would then refer the application to the International Institute of Patents of the Hague for novelty examination. The findings would be communicated to the applicant who would then indicate in what countries he wished to obtain patent protection. Each country would then be free to proceed with the application and grant or refuse the patent.

The directors of the patent offices of the Six have also decided to meet regularly to examine problems raised by the Common Market. Such meetings were held in Paris, Rome, Munich, The Hague, and Nice during the year 1958. At these meetings the directors discussed the conditions necessary for the harmonization of national laws, and particularly of the laws pertaining to working requirements within the Community; the possibility of common adoption of certain provisions of given national laws; and a common procedure which would permit inventors to obtain protection more simply.

Harmonization of patent law is, then, actively being sought. Under the aegis of the Council of Europe, two Conventions have already been concluded: a Convention for Uniform Formalities of Patent Applications signed December 11, 1953,¹⁶ and a Convention for the International Classification of Patents, signed December 19, 1954.¹⁷ The first has been ratified by four of the Common Market

^{14a} 1960 ANNUAIRE DE L'ASSOCIATION INTERNATIONALE POUR LA PROTECTION DE LA PROPRIÉTÉ INDUSTRIELLE (n.s. No. 9) 14-15.

¹⁵ *Id.* at 205-206.

¹⁶ 70 *id.* 21-28 (1954).

¹⁷ 71 *id.* 3-5 (1955).

countries: Germany, Italy, Luxembourg, and the Netherlands, and the second by five: Belgium, France, Italy, Germany, and the Netherlands.

A common search for novelty of claims for inventions is already operative in an informal way through the International Institute of Patents at The Hague, which was established by a Treaty of June 6, 1957. Belgium, France, Luxembourg, and the Netherlands are parties to this Treaty. The Institute is an international non-profit organization set up to carry out documentary research for the benefit of the governments of the member countries, of inventors, and of industry in general. The Institute functions independently of any government or state, and is staffed by qualified engineers and scientists of various nationalities who are engaged for specialized research in each of the different technical fields. Staff members are not permitted to perform any technical work other than that of the Institute.

The Institute has access to the documentation system used by the Netherlands Patent Office which covers patent specifications of Belgium, France, Germany, Great Britain, Luxembourg, Netherlands, Switzerland, and the United States. Requests for searches may be made by the appropriate national patent offices or private persons and organizations of the countries which are parties to the Hague Agreement and also by persons of any nationality of a country which is party to the Paris Union Convention.

Other attempts to simplify procedure, limited to the Common Market countries, are foreseeable. It is not unreasonable to expect that a plan may be worked out which will permit a Common Market inventor to make, at his option, a single filing in one country which will give him a filing date for all six countries, provided that the application satisfies requirements of form, content (proper description, claims, drawings, etc.) and certain other agreed requirements of the Six. It will probably be required, as in the Lampert plan, that copies of applications be transmitted by the patent office in which the application is first filed to the patent offices of the other Common Market countries.

It will probably be agreed that applications for novelty examination may be submitted to the International Institute of Patents at The Hague and that it shall communicate its findings to the patent office in which the first application was filed, and, in accordance with the applicant's request, to other of the Common Market countries. Under such a plan the applicant would have to do nothing further,

in connection with his application, in France, Belgium, Luxembourg, and Italy and his application would require only further examination in the Netherlands and Germany.

Such simplification of procedure is plainly desirable. The greater the difficulties in filing applications and obtaining patents in the Six—whether due to language differences, methods of drawing up applications, requirements concerning the enumeration of claims, or other causes—the greater the advantage which large and financially strong corporations have over smaller firms and individual inventors. If legal protection of inventions is justified, however, clearly it should be effected by the most efficient and equitable system possible, that is, one which enables everyone to obtain protection, and with a minimum of expense, trouble, and legal red tape.

With regard to procedure the greatest difficulty lies in obtaining from Germany and the Netherlands agreement to adopt the procedural system of the other four countries, or vice versa. It is difficult to believe that Germany and the Netherlands will agree to abandon their systems of examination. Nor would these two countries be willing to abolish their procedures for publication of inventions (the purpose of which is to make opposition by interested parties possible), even though the other four might be willing to subject applications to examination as to novelty, probably through the Institute of The Hague.

An agreement making it possible to obtain a single patent for the whole of the Common Market would increase freedom of movement of goods since it would eliminate the barriers created by the acquisition of patents in some only of the Six or by the acquisition of patents for the same invention in the various countries of the Common Market by different persons. But such an agreement presupposes agreement among the Six on a single procedure for the examination of inventions with respect to novelty and patentability, and uniform definitions of novelty, patentability and subject matter. An agreement on uniform definitions will be even more difficult to obtain than agreement on procedure.

If separate patents continue to be granted by each of the Six, harmonization of the law on these substantive points is highly desirable to avoid the possibility that a patent right and its inherent statutory monopoly may be available in one or some of the countries of the Common Market but unavailable in others. If harmonization is not achieved, products freely made in a Member Country in which no patent may issue will not be able freely to cross the

boundaries of Member Countries which have granted patents on the particular subject matter—a negation of the Common Market's aims. Moreover, conditions to which enterprises in the various countries of the Six will be subject will thereby be made less equal and intra-Common-Market division of labor discouraged. If small technical improvements may be patented in France but not in Germany, technical improvements in France may be unduly restricted. If pharmaceutical products may be patented in France but not in Italy, economic inequality between the two countries may result. Moreover, the movement from Italy into France of such products, freely made in Italy, can be blocked.

It would obviously be undesirable to lower standards by compromising the best laws with the worst. But any attempt to reach agreement as to what is the "best" law would encounter basic differences of opinion, strongly entrenched habits of mind and reluctance to change.

One revision of the laws of the Six which suggests itself, however, is the adoption of certain uniform requirements as to patentability coupled with a provision in each of the laws of the Six that anything which is not patentable in one of them, because it is not considered novel, should be so regarded in the others. Patent protection as a means of encouraging invention in the Common Market territory as a whole would seem to be economic justification of such a revision.

Uniformity of requirements of patentability may also be aided by resolving the problem of invention definition. In France, Belgium and Luxembourg the inventor describes the general operation or function of his invention and need not refer to all the features and advantages of the machine or device or product or to every new idea which is implied in every part of his invention or in the combination of different parts or details. No broad or detailed claims need be specified. A general résumé, however, must end the description. More specific delimitation of inventions is left to judicial determination which will decide in a case involving the validity or scope of a patent whether a special function, operation, feature or idea is covered by it, taking into consideration the whole of the description and drawings. This is also true to a certain extent in Italy.

In Germany and the Netherlands on the other hand, the inventor must make an enumeration of distinct claims, though these need not be too specific and detailed. The ambit of the claims depends on the nature of the result to be obtained by the device described in the

light of the common knowledge of the art at the date of the patent. A compromise between the two systems would not be impossible.

Harmonization of other aspects of patent law is less difficult. Certainly a uniform term for patents may be adopted, particularly if a common examination system is agreed upon so that the term may be computed in all countries from the date of the grant of the patent. Such uniformity is desirable because it will mean that statutory monopolies of patents on the same invention will come to an end at the same time in all six countries, and freedom of manufacture and of movement of goods throughout the Common Market will thereby be simultaneously ensured in all.

The necessity of paying annuities in each of the Member Countries for the maintenance of patents should be eliminated, moreover. Failure to pay the annuity in one Member Country may otherwise result in forfeiture of a patent there which continues in force in other Member Countries, again creating an obstacle to the free movement of goods. This problem could be effectively solved by providing for a single payment of annuities at a central office which would apportion it among the Six in accordance with an acceptable formula.

Finally, the problems created by working requirements for patents in the Six require a solution. Under the Paris Union Convention and the present law in the Member Countries, outside Italy, the ordinary sanction for non-working is the grant of a compulsory license. The pressure will, therefore, be great on Italy to change its law by introducing compulsory licensing as the first sanction for non-working.

Forfeiture of the patent will always threaten wherever it is possible that a Member Country may consider compulsory licensing insufficient to satisfy public interest in the subject matter of the patent. But forfeiture in one Member Country would leave an industry free to manufacture the subject matter of the patent in that country, although it would not be free to distribute such goods to other Member Countries where no forfeiture had occurred.

A patent owner is rarely, if ever, forced to exploit his own patent in every one of the countries where working requirements exist. He seeks out willing and qualified licensees with whom he can enter into negotiated license agreements. An intra-Common Market arrangement according to which working of the invention in one of the Six would be deemed to satisfy working requirements in all of the

others, would permit the owner of a patent to consider only economic factors in selecting the country or countries of the Community in which he or his licensees should work the patent. This would further one basic aim of the Common Market—the rationalization of production.

C. EFFECTS OF UNIFICATION OR HARMONIZATION ON AMERICAN INTERESTS

The right to file a single patent application in a central Common Market office or in the patent office of one of the Six (which would transmit copies of the application to patent offices in the other Member Countries) could be made available to the nationals of any country or only to nationals of Common Market countries. If the latter, justification would be sought in the Paris Union Convention. Article 15 of the Convention provides that the countries of the Paris Union reserve the right to make separately, between themselves, special arrangements for the protection of industrial property insofar as these arrangements do not contravene provisions of the Convention.

On the basis of Article 15 a number of countries of the Union have concluded the Madrid Arrangement for the International Registration of Trademarks. So long as the United States is not a party to this Arrangement, its nationals cannot register at the International Bureau.¹⁸ Similarly, an internal arrangement in the Common Market for a special patent filing system need not be open to Americans.

By the same token a system of common search for patent anticipations and single examination as to novelty could be closed to American nationals. Since the natural result of such a system would, however, be to eliminate searches and examinations in each country, such a system would doubtless be opened to American patent applicants, and it would be to their advantage. In order to ensure such advantage to its nationals the United States might, however, be required to adhere to the Arrangement of The Hague of 1947 which established the International Institute of Patents.

Adoption of a uniform duration for patents in the Six could not result in a disparity between the duration of patents owned by non-Community nationals and those owned by Community nationals because of the national-treatment clause of the Paris Union Convention. Therefore the advantages of uniformity in this area would

¹⁸ This is the International Bureau of Berne set up by the Paris Union Convention as a central organ of the Union.

necessarily accrue to American owners of Community patents. The same may not be true with regard to any special system of payment of annuities in the Common Market countries, since such a system need not effect a change of the laws of the Six with regard to patents not obtained under a single filing system. The total amount of annuities paid by an American patentee in the Six might therefore be higher since he would be forced to continue to pay them to each of the Common Market countries.

A serious question may arise with respect to working requirements. Germany and Switzerland have long had individual treaties with the United States providing that working of the invention in one country exempts the patent from the requirement of working it in the other. Other countries of the Paris Union cannot claim the benefits of these treaties in Germany and Switzerland because they are special arrangements under Article 15 of the Paris Union Convention. Similarly the Six may invoke Article 15 and provide that working of a patent in one of them will be deemed to satisfy working requirements in the other five. So long as each of the Six retains existing working requirements for its own nationals, the national-treatment clause of the Paris Union Convention would not entitle American nationals to claim the benefits of such an arrangement. This would put American patentees at a disadvantage in the Common Market since they would continue to be bound to work the patent in each of the Six and not only in one of them.

III. INDUSTRIAL DESIGNS AND MODELS

A. INDUSTRIAL DESIGN AND MODEL LAWS IN THE COMMON MARKET COUNTRIES

Whether in theory industrial designs should form a separate branch of industrial property or be classified as artistic property is a problem which has long been discussed¹⁹ and is at present the subject of serious consideration by an international coordinating committee organized by U.N.E.S.C.O. As a matter of fact, however, Article 1 of the Paris Union Convention includes industrial designs in its definition of industrial property, and most countries have special legislation for their protection which involves regulations of a hybrid nature related to both patent and copyright law. In any case, the protection of designs involves the creation of legal monopolies granting an exclusive right to make copies of the design.

¹⁹ See LADAS, *THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY* 367 (1930).

The possibility that such monopolies, because of differences among the laws of the Six, may impede the functioning of the Common Market requires consideration. Two of the Common Market countries, Luxembourg and the Netherlands, have no special legislation at all on designs,²⁰ and no protection of designs is given in their territory to either nationals or foreigners. At the last conference at Lisbon, the Paris Union Convention was revised for the first time to require all signatory countries to protect designs (new Article 5 quinquies), and it may reasonably be expected that upon ratification of the revised Convention, Luxembourg and the Netherlands will adopt legislation on designs. Indeed it has recently been announced that a Benelux industrial-designs law is under preparation.

The essential differences among the laws concerning industrial designs in the other four countries of the Common Market relate to administrative procedure, subject matter, scope of the right and duration of protection.

I. ADMINISTRATIVE PROCEDURE

In Belgium and France, industrial designs are treated as artistic works. A special law in each country²¹ provides for optional deposit of designs, but even without such deposit designs are protected by the copyright law. No examination whatsoever is made of the deposit application. Indeed, the deposit may be made under seal. Since the basis of protection is copyright, originality of creation rather than novelty is material. Therefore, prior publication or public use of the design by the author or owner of the design does not affect the validity of the deposit.

In Germany and Italy²² designs are, in the first place, protected under special legislation for the protection of designs and models. In Germany, in addition, copyright protection is possible if the design achieves a certain artistic standard. As a result, cumulative protection both by the design and the copyright law is in many cases possible.

In Italy, an artistic design or work of art applied in industry is subject to copyright protection only if the design is a work of art

²⁰ Designs can sometimes be protected under general torts provisions or, in special cases, by the copyright law.

²¹ France, Law of July 14, 1909, [1909] *Bulletin des Lois* pt. I, at 1231; Belgium, Royal Decree of January 29, 1935, [1935] *Moniteur Belge* No. 39.

²² Germany, Law of January 11, 1876, [1876] *Reichsgesetzblatt* 11; Italy, Royal Decree of August 25, 1940, 7 *Raccolta Ufficiale delle Leggi e dei Decreti del Regno d'Italia* 5948 (1940).

conceptually separable from the industrial product in which it is embodied as another entity. Cumulative protection in Italy by both the design law and the copyright law is not possible. In any case, protection of given subject matter as an industrial design requires compliance with the special legislation on designs which in turn requires registration. Novelty is essential.

In Germany applications for registration of designs must be filed before their public use in Germany or publication anywhere, and in Italy before public use or publication anywhere. While examination to determine novelty or registrability is not made, examination to determine compliance with formal requirements—in regard to the adequacy of representations, or to the proper titles of designs, for example—is made.

2. SUBJECT MATTER

In Belgium and France a design must, like any other creation entitled to copyright under the law concerning artistic property, be original. In Germany and Italy the courts have held that the design must satisfy the artistic taste and sense of the public.

The German, French, Belgian and Italian laws contain no other limitations of subject matter, and on the whole it may be said that, subject to the requirement of novelty in Germany and Italy, a particular design when registered will be protected in all four countries. In Belgium and France it will be protected even without registration.

3. SCOPE OF THE RIGHT

The scope of protection in Belgium and France is measured by the copyright law. Therefore, any "copying" which would be an infringement of a work of art is also an infringement of a design. Also, the right is measured not by the deposit but by the creation as embodied in the design itself. The exclusive right in the design is measured in Italy by the deposit, and the rights and protection of the owner are similar to those of a patentee. It follows that in Italy protection is limited to the application of the design to the particular product or article for which the design is registered.

4. DURATION OF PROTECTION

The fact that basic concepts of designs differ—some countries viewing them as essentially artistic property, others as a separate branch of industrial property—accounts for the difference in the terms of protection. In France a design may be deposited for a

term of five or twenty-five years at the applicant's option, renewal making possible a maximum total term of fifty years. In Belgium the term is the same as for artistic works in general, that is, the life of the creator plus fifty years after his death, except that designs created by corporations are limited to fifty years and that foreigners are limited to the term of protection enjoyed in their country of origin. In Germany, the applicant has the choice of a term of three, ten, or fifteen years; a term of less than fifteen years may be renewed for a maximum of fifteen years. In Italy, designs are registered for a term of two years, renewable for another two years, or initially for four years. Moreover, in Italy protection is conditioned upon a working of the design within one year from grant.

B. POSSIBILITIES OF UNIFICATION OR HARMONIZATION OF LAWS RELATING TO DESIGNS IN THE COMMON MARKET

As already stated, the whole subject of design protection is now under review by a coordinating committee organized by U.N.E.S.C.O. It is not unlikely that the Six will find it possible, under the impetus of this review and in response to the necessities of the Common Market, to harmonize their laws.

Four of these countries, Belgium, France, Germany, and the Netherlands, are already parties to the Arrangement for the International Deposit of Designs concluded at The Hague in 1925 by some of the member countries of the Paris Union.²³ Under this Arrangement nationals of the contracting countries may deposit directly at the International Bureau of Berne designs which they desire to have protected in all countries which are parties to the Arrangement. It is reasonable to expect that Luxembourg and Italy may now accede to this Arrangement. This will resolve for the Common Market countries the problem of a single filing office for designs. A revision of the Arrangement of The Hague is planned for November 1960 which, it is hoped, may attract a wider adherence to it from among countries party to the Paris Convention.

The adoption of a uniform law on designs by the Benelux countries may also advance significantly the harmonization of substantive and administrative law concerning designs in the Common Market as a whole, particularly if the Benelux law contains certain concessions by Belgium altering the too-liberal character of its present design law. Such concessions might enable Germany and France to harmonize their laws with the new Benelux law. The largest effort

²³ The United States is not a party to this arrangement.

to improve the protection of designs must be made by Italy, whose present law is very inadequate.

C. EFFECTS OF UNIFICATION OR HARMONIZATION OF LAWS ON AMERICAN INTERESTS IN INDUSTRIAL DESIGNS

Unification or harmonization of the law concerning industrial designs throughout the Common Market should, on the whole, be beneficial to American interests in designs. Under a unified Common Market law American nationals would have to obtain only one registration for all six countries, thereby substantially reducing costs. Harmonization of the law should at the least mean that designs would henceforward be protected in Luxembourg and the Netherlands, and that the term of protection in Italy would be longer than it is at present. It is not likely that the Common Market countries will conclude other arrangements among themselves which benefit only their own nationals.

IV. TRADEMARKS

A. TRADEMARK LAWS IN THE COMMON MARKET COUNTRIES

The protection of trademarks is an aspect of the protection against unfair competition, and the principles of fair dealing and avoidance of deception of the public are therefore fundamentals of it. Trademarks are symbols which distinguish the goods of one manufacturer or merchant from those of another. With use on goods of such symbols goodwill accrues to them which the law recognizes and protects as a property right. Free enterprise depends in large measure on the legal recognition of this right. Competition would be virtually impossible if competing goods were not distinguished from one another, since purchasers would thereby be deprived of a means of choosing among them. In protecting trademarks, the law protects owners against infringement, but it also shields purchasers from confusion and fraud.

All six countries of the Common Market recognize the fundamental principles of trademark protection, but their laws are by no means uniform and the territoriality principle may create conflicts even more serious than those created as to patents. Trademarks are more numerous than patents; while the latter have an average effective life of five to six years, trademarks are theoretically per-

petual. Insofar as trademarks create exclusive rights in certain symbols or words, and insofar as they require for their protection the exclusion of others even from the use of similar marks or from the use of the same symbols or words with regard to similar goods, they may operate as serious impediments to the free movement of goods in the Common Market. Impediments resulting from the recognition in one Member Country of trademark rights in symbols or words which other Member Countries consider unregistrable, and therefore available for use in trade, could be particularly serious. Avoidance of conflicts in this area is essential, and harmonization of the laws of the Six must therefore be sought.

Apart from the Paris Union Convention, little conscious effort has been made to harmonize trademark laws in the Six. Administrative habits and traditions of the various countries, rather than differing political or economic philosophies, have been allowed to reflect themselves in the regulation of trademarks. The laws and practice of the Six have drifted apart from one another and each country has become excessively jealous of its own way of resolving the conflicts of interest between trademark owners and the trade.

I. ADMINISTRATIVE PROCEDURE

Formalities of application for registration of trademarks are simple and any differences among them in the Six of no moment. The procedure for dealing with such applications is of two kinds. In Belgium, France and Luxembourg, the owner deposits what amounts to a claim to a trademark. The registering authority makes no examination to determine the registrability of the mark, either with regard to its character or in the light of prior registrations. In Italy only questions of form are considered. In Germany both a formal examination and an examination to determine registrability of the trademark in accordance with the law are undertaken. When these are completed, the applicant is advised of any prior registrations, but the application is not rejected if prior registrations have been found. The application is published, and interested persons may oppose it. In the Netherlands, the mark is examined as to registrability both in terms of its character and prior registrations, and the application may be rejected as a result of either examination. No publication to permit opposition is effected but once registered the mark is published and interested persons may demand cancellation by a complaint filed in the District Court of The Hague. Such complaints are heard in summary proceedings.

Germany requires proof of prior registration of the trademark in the home country of the applicant as a condition of registration of the same mark in Germany (except where exemption from this requirement has been officially promulgated on a reciprocal basis). Similarly, in Belgium and France courts have held that the validity of a registration by a foreigner is predicated upon the existence of a prior corresponding registration in his home country. Recently, however, the OMEGA decision of the Cour d'Appel of Paris, affirmed by the Cour de Cassation on February 3, 1959, interpreted the law of France differently.²⁴ In the other countries of the Common Market there is no requirement of prior home registration.

2. REGISTRABILITY

Views in the Six differ as to what constitutes a registrable trademark. While generally descriptive or generic words are not proper trademarks which may be validly registered, Germany and the Netherlands apply a much stricter test in this regard than do the other countries. In Belgium and France the mark is not validly registrable only if it is the usual and necessary description of a product (or if it is deceptive or misdescriptive). Letters per se or numerals per se are not registrable in Germany except when they have attained secondary meaning. Three dimensional marks are not registrable in Germany and the Netherlands, but they are in Italy. Whether registration in Italy may prevent others from putting goods on the market having the form shown in the representation is a subject of controversy. Combinations of colors without other distinctive elements are not registrable in Germany and the Netherlands. Names in Belgium and France are validly registrable only when represented in a special or distinctive manner.

Obviously, these differences mean that a certain mark may be a valid trademark and validly registrable in some countries of the Common Market while it cannot be the subject of an exclusive right of use in others.

3. EFFECTS OF REGISTRATION

In all the Common Market countries except Germany, property in a mark is acquired by use, and registration is only "declaratory" of title to the trademark. Therefore, registration may always be

²⁴ *Société Oméga v. Société Oméga Louis Brandt et Frères*, Cour de Cassation (Ch. civ., sect. comm.), February 3, 1959, [1959] Bulletin des arrêts de la Cour de Cassation 56, [1959] Semaine Juridique II. 11000, [1959] GRUR Ausl. 299.

contested by a prior user, and, if he proves his prior use, he may cause the registration to be cancelled. In Germany ownership is based on registration, and the first applicant is therefore entitled to registration and may maintain it as against a prior user, unless the mark of the prior user has become commonly and generally known in the trade as distinguishing the goods of the owner. In Italy, the rigor of the principle of prior use as the basis of ownership has been mitigated by the provision that a registration uncontested by a prior user for a period of five years from the date of registration becomes incontestable and conclusive. This is now also the system of most countries of the world including the United States.

The scope of the registrant's right is generally measured by the description of the goods for which it is registered, but two exceptions should be noted. In all six countries, the applicant may file for any description, but registration is not necessarily limited to the products for which the mark is in fact used or for which its use is proposed. (In Germany and the Netherlands, however, the goods listed in the application must fall within the applicant's business activity). In general, therefore, registration may result in too broad coverage.

In the second place, protection extends in principle to similar goods but similarity is more narrowly construed in France and Belgium than in the other four countries. With regard to marks of exceptional reputation the protection may extend to dissimilar goods in Germany, the Netherlands, and—in quite exceptional cases—in Italy. This protection is based, however, on the law of unfair competition rather than on trademark law.

4. USER REQUIREMENTS

A condition of the continued protection of his registered trademark in some of the Six is the owner's use of his mark. There are no user requirements in the trademark laws of France, Belgium, Luxembourg, and Germany, but non-use for three years may cause forfeiture of the registration in Italy and the Netherlands. In Belgium, however, prevailing judicial opinion is that the trademark right is lost by an unjustified non-use for a long period of time, and in Germany marks that are not being used (reserve and defensive marks) are protected by the courts only under special conditions.

5. TERM OF REGISTRATION

The term for which registration is granted to an applicant is ten years in Germany and Luxembourg, fifteen in France, twenty in the Netherlands and Italy and perpetual in Belgium. Renewal of registration is always possible for a similar term prior to expiration of the previous term.

6. ASSIGNMENTS AND LICENSES

Assignment of a trademark is permitted in France with or without the goodwill of the business. In Belgium, Italy, and Luxembourg the "establishment" attached to the mark must be transferred with it. Since 1957 in the Netherlands it has been sufficient that the part of the enterprise situated in the Netherlands be transferred with the trademark. In Germany, the entire business of the owner or a part of it must be transferred to the assignee.

Licensing of trademarks is freely permitted in France and the Netherlands. In Belgium, Luxembourg, and Italy a license is deemed an assignment of the right to use, and to be valid it must be accompanied by a communication to the licensee of specifications, formulae and the like, which will permit the manufacture of equivalent products. In Germany the position is probably the same, but there has been no judicial sanction of licensing as yet.

B. POSSIBILITIES OF UNIFICATION OR HARMONIZATION OF TRADEMARK LAWS IN THE COMMON MARKET

A certain degree of harmonization of the trademark laws of the Six has already been achieved by two national treaties: the Paris Union Convention, and the Madrid Arrangement for the International Registration of Trademarks (the "Madrid Arrangement"). Each of the Six is a party to both of these agreements.

By virtue of the latter particularly, nationals of, and persons domiciled or having a bona fide and effective industrial or commercial establishment in, any of the Six may obtain an international registration at the International Bureau of Berne for any trademark which is registered in their home countries. These persons, therefore, need no longer apply for a national registration of their marks in each of the Six. Filing through the Bureau of Berne, however, does not eliminate the substantive differences of the law of the Six. Countries practicing prior examination may refuse an international registration and in the others the validity of the inter-

national registration may always be contested by an interested person under the provisions of the local Trademark Law.

At the last revision of the Madrid Arrangement at Nice on June 15, 1957, a provision was inserted that any of the signatory countries may notify the Berne Bureau that an international registration may not extend to it unless the owner of the mark specifically requests such an extension in his application for international registration. The purpose of this amendment was to make possible territorial limitation of international trademarks which, prior to the amendment, had automatically extended to all twenty-one signatory countries. Even assuming that any of the Six will send such notification to the Berne Bureau, it is to be expected that applicants for international registrations will specify that they request protection in all six countries.

Mention also should be made here of the Arrangement for International Classification of Goods for Trademarks, also adopted at Nice on June 15, 1957. This Arrangement adopts the classification of goods used by the International Bureau of Berne for the international registration of trademarks and requires the signatory countries to adopt it in regard to national registration of trademarks. France and Italy have already done so, and since Luxembourg, Belgium, and the Netherlands have had no classification in the past, it should be easy for them to follow suit. Only Germany, therefore, must abandon its own classification in order to adopt the international classification.

By virtue of the Paris Union Convention the following aspects of trademark law do or will receive uniform solution in the Six:

(1) *Requirement of Prior Home Registration*: The present requirement in Germany, Belgium, and France for prior home registration will be eliminated as a result of the amendment of the new Article 6 of the Convention at Lisbon.

(2) *Effect of Prior Home Registration*: Article 6 of the Convention (new Article 6 quinquies in the Lisbon revision) establishes the rule that a mark registered in the country of origin of the applicant must be accepted for registration in other signatory countries subject to stated exceptions. These exceptions constitute in effect a negative definition of what is not properly registrable as a trademark. The provision has left unresolved many differences among national laws concerning registrability, but it has been helpful.

(3) *Prior Registration versus Prior User as Determinative of Ownership*: The rigor of the German law which bases ownership in

a trademark on prior registration rather than prior user is mitigated as a result of Article 6 bis of the Convention in the sense that the prior user of a well-known mark is permitted to contest an infringing registration. (The theory of the protection of "get-up"²⁵ of Article 25 of the German Trademark Law, which results in the protection of a reputation acquired in the trade with respect to a mark, has a similar mitigating effect.)

(4) *Assignment of Trademarks*: The provision of Article 6 quater concerning the assignment of trademarks is a uniform determination of the validity of an assignment of a trademark in a foreign country. Thus, a national of one of the six countries may validly assign his trademark in the other five countries, provided he transfers the local goodwill or establishment.

(5) *Grace Period for Fees Payments*: A period of grace of six months for payment of fees for the renewal of registration is provided for in Article 5 bis and must be given effect in the signatory countries.

But there is a substantial scope for further unification of trademark law in the Common Market. Differences still exist among the laws of the Six concerning: acquisition of ownership in a trademark by prior use or prior registration, registrability, user requirements, terms of registration, and licensing. These differences may impede the free movement of goods within the Common Market.

The logical solution of the problems created by these differences is the adoption of a uniform trademark law applicable in all six countries. The Benelux countries have been working toward the adoption of a Benelux Trademark Law for some years, and it has recently been announced that the text of such a law had been initialled by the three governments and was to be submitted to their parliaments. Should this project result in a uniform trademark law for all three countries, it might give impetus to a movement to adopt a uniform trademark law for the Six.

In the meantime, other possibilities are open. A common search bureau for trademarks, combining the search facilities of the Six, is wholly feasible. A committee established by the Berne Bureau has for some time now been discussing ways and means of creating such a search center.²⁶ The essential problems are those of money

²⁵ "Get-up" is understood under German law to be "a device considered in commercial circles as a sign of identification of the same or similar goods of another person," and this has been broadly interpreted to cover any distinctive sign including trademarks.

²⁶ 74 LA PROPRIÉTÉ INDUSTRIELLE 29-33 (1958). The Lisbon Conference of 1958 appears to have killed the proposal for a search center at the Berne Bureau.

and time required to establish such a center, and these may be minimized if the center's sphere of operation is limited to the Six.

The adoption of a uniform term of registration is also a possible improvement, given the fact that terms in the Six range from ten years to perpetuity and that for international registrations at the Berne Bureau the term is twenty years. Uniform provisions on assignment and licensing of trademarks are also possible and highly desirable. Agreement could be reached on a quantum of goodwill which must accompany transfer of a trademark and on basic requirements of a valid license—which should include an obligation to record the license for the information of the public.

The only subject on which general agreement will be truly difficult is registrability. Based on differing concepts of what best suits its own needs, each of the Six has struck a different balance between the interests and claims of individual traders and those of the trade generally. Must three-dimensional marks, that is, new forms of containers or products, be registrable? Must monopolization by the first user or applicant of numerals and letters, color combinations, slogans, surnames and geographical terms be permitted?

It is essential to arrive at a unified standard of registrability for the Common Market. Otherwise goods, bearing a word or symbol which is open to the trade to use or common to the trade in one of the Six, may be stopped at another's borders because that word or symbol is the subject in the latter country of a statutory monopoly resulting from its registration as a trademark. Such a uniform standard could be achieved by an arrangement among the Six providing that a mark refused registration in one of them, on the ground that it is not a proper trademark, shall not be admitted to registration or protection in the others. Another possibility would be to establish a Bureau analogous to the International Institute of Patents at The Hague which would give opinions on registrability controlling in all six countries.

A third possibility would be to adopt the revised provision in the new Article 6 quinquies, para. C (1) of the Paris Union Convention, as a basis for unification. This provision permits the owner of a trademark to prove that his trademark has acquired distinctiveness by long and exclusive use; and any trademark, be it a three-dimensional mark or a mark consisting of numerals, letters, slogans, surnames, or geographical terms, may be admitted to registration on that basis, although it may not have been originally registrable when first adopted and used.

Similarly the differences among the laws of the Six on user re-

quirements for trademarks may be reconciled by the adoption by each of a provision (which would have been voted into effect as part of the Paris Union Convention at the Lisbon Conference but for the objection of Japan) that the registration of a trademark may be expunged from the register on proof that the mark has not been used for a period of five years. The provision could add that use in one of the Six would satisfy user requirements in the others.

Uniformity of the law on all of the subjects hereinabove discussed may be brought about, short of the adoption by treaty of a single Common Market trademark law similar to the proposed Benelux law, in two ways: by amendment of the trademark legislation in each country through the adoption of uniform provisions pursuant to a directive of the Council or through the conclusion of a Common Market trademark arrangement which would provide for a single search and single registration at a common trademark bureau and would cover such points as registrability, basis of ownership, opposition, user requirements, assignments, licenses and term of registration, leaving to each country to determine by its own law other matters such as infringements, remedies, fees, renewals, and the like.

C. EFFECTS OF UNIFICATION OR HARMONIZATION OF THE LAWS OF THE SIX ON AMERICAN INTERESTS IN TRADEMARKS

The adoption of a single Trademark Law (like the proposed Benelux Trademark Law) for the whole of the Common Market would be in many respects beneficial to American interests. European Common Market trademarks would replace separate French, German, Dutch, Italian, Belgian and Luxembourgish trademarks. Reduced registration and renewal expenses and the simplification of procedure for the obtaining of registration and for the recording of assignments and changes of name would result. American nationals would be treated as Community nationals would be, and would, in addition, be entitled to the benefits of the Paris Union Convention.

If, instead of adopting a single law, the Six should merely amend their national laws in order to harmonize them on certain material points (registrability, duration, user and the like), American nationals would also be benefitted, since advantages accruing to Community nationals as a result of harmonization would also accrue to American nationals by virtue of the national-treatment clause of the Paris Union Convention.

Certain problems for American trademark owners would arise

only if the Six concluded a treaty arrangement containing provisions taking precedence over the national trademark laws of the Six. Any such provisions which were applicable only to nationals of any one of the Six seeking protection in the others would not change the protection afforded by each country to its own nationals. Therefore national-treatment protection of the Paris Union Convention could not be invoked. Moreover the compatibility of such provisions with the Convention might be defended by contending that they constitute a special arrangement sanctioned by Article 15. One result of such provisions would be discrimination against American owners of trademarks in the Community Countries.

Such an arrangement might provide that use of a trademark in one of the Six shall be deemed to satisfy the user requirements of the other five countries. This would discriminate against American trademark owners who would continue to be required to satisfy the user requirements provided for by the law of any of the Six on penalty of forfeiture.

It is impossible to believe, however, that provisions of an intra-Common Market arrangement can be adopted which will not be accompanied by a change of the national law of each of the countries. For instance, it is wholly unlikely that Germany will agree to an arrangement under which a trademark belonging to a French national may be freely assigned without goodwill and yet continue to consider invalid a similar assignment of a German national's trademark. Equally unlikely would be its agreement to an arrangement under which a French national might register in Germany a three-dimensional mark, even though German nationals continued to be unable to do so.

V. OTHER RIGHTS OF INDUSTRIAL PROPERTY

A. PROTECTION OF TRADE NAME

A trade name purports to distinguish the commercial activity of a person as distinct from a trademark which distinguishes the products of a manufacturer or trader from similar products of another. The concept of a trade name is broader under the law of some countries than under that of others, but the protection of trade names is generally ensured by the general law of unfair competition. The formalism and technicalities which have developed with reference to trademark protection are, therefore, not encountered.²⁷

²⁷ The Netherlands has a special Trade Names Act of 1921.

Registration of trade names in the commercial register²⁸ of the place where the business is located is required either for the recognition of the right in a trade name or simply as a means of informing the public. In Germany, Belgium, and France trade names are registered in the Commercial Register, in Italy with the Registry of Companies and in the Netherlands with the Registry of the Chamber of Commerce.

Conflicts in trade names, like conflicts in trademarks, may create obstacles to the free movement of goods in the Common Market. In this connection it should be noted that Article 8 of the Paris Union Convention provides:

the trade name shall be protected in all countries of the Union without obligation of deposit or registration, whether or not it forms part of a trademark.

Thus, a French or a German national may be required under his own national law to register his trade name in order to protect it, whereas he will be assured of its protection in other Union countries without registration. But does this also mean that a trade name adopted and used in France must be protected in the other Union countries without the fulfillment of any other condition or requirement as against the adoption and use of the same or a similar name by another? Is protection in the entire Common Market based on prior use anywhere in the Common Market or on first use also in the other countries in which protection is sought? Article 8 of the Paris Union Convention is not clear, and these questions are in dispute.

The extent of protection is left to the laws of each country. Thus they control the protection of trade names consisting of or containing surnames as against the adoption and use of similar trade names by persons lawfully entitled to the same surname, the scope of protection of trade names with respect to the businesses in which they are used, the protection of generic trade names and the like.

For the purposes of the Common Market the most important problem to be solved is that of protection of trade names throughout the Six upon their adoption and use in one of them. Failure to solve it may create conflicts of rights and obstacles to the free movement of goods. The problem is a difficult one, particularly when a trade name consists of or contains a surname which two firms, established in two different countries in the Common Market, have an

²⁸ The commercial register in civil law countries is maintained by the clerk of the commercial tribunal.

equal right to use. One possible solution would be to require registration of trade names in a central trade name bureau, or to centralize in such a bureau for search purposes all trade name registrations made in the individual countries. The other possibility would be to interpret Article 8 of the Paris Union Convention to mean that the person who first adopts and uses a trade name in one of the Six shall be protected against the use of the same or a confusingly similar name by another in the others. Article 8 was recently so interpreted by an Austrian Tribunal.²⁹ If deemed necessary, this interpretation could be adopted for the Common Market by an agreement among the Six. The scope of protection of trade names and remedies against infringement may be left to determination by the laws of each Member Country.

No unification or harmonization of the laws of the Six concerning trade names can involve discrimination against American trade names, again because of the national-treatment clause of the Paris Union Convention.

B. REPRESSION OF FALSE INDICATIONS OF ORIGIN

Goods originate not only from particular manufacturers or traders but also in particular places where these products are produced, manufactured, grown, or otherwise derived. This latter origin is indicated by appropriate expressions affixed to the goods. These are of two kinds: indications of geographical source which are direct or indirect indications of the places (country, region, locality) from which the products or merchandise come;³⁰ and appellations of origin which are geographical names of the places (country, region, locality) where the products are grown, manufactured, or otherwise obtained and which by virtue of their soil, climate, or techniques give such products their qualities.³¹

Indications of geographical origin which are false or misleading—for instance, the use on a perfume of the indication “Made in France” although the perfume was not, in fact, made in France, or “Swiss Watch” on a watch not made in Switzerland—deceive the purchasing public. If the products are of inferior quality or other-

²⁹ Judgment of September 16, 1958, [1958] Ö PatBl. 189. It is to be noted, however, that this is based also on Articles 10 and 22B of the Austrian Trademark Law. Furthermore, it involved a family name rather than a trading name.

³⁰ For instance, the indication “Made in U.S.A.” or the marking of an address of establishment or factory, such as “Detroit.”

³¹ For instance, “Moselle wine” or “Roquefort cheese.”

wise unsatisfactory, they may also damage the reputation of the particular country or locality whose name is thus falsely used. The law in all countries generally prohibits false or misleading indications of origin of this kind. In the Six, the general provisions of the unfair competition law and penal provisions on mismarking or fraud may be invoked to suppress such false or misleading marking.

Difficulties with respect to the second kind of indications of origin, appellations of origin, are of two kinds: those involving delimitation of the area of the locality or region within which producers may use the appellation in question; and those involving a determination of the cases in which a geographical term or name is a true appellation of origin, and not merely an arbitrary designation or a generic or descriptive term.

An appellation of origin is a badge of distinction when, either because of some natural advantage of its soil or climate, or because of traditional techniques and the skill of its producers, a locality or region has created a special reputation for its goods. Goodwill attaches to such appellations of origin in favor of the producers of that locality or region which the law seeks to protect. The right to the exclusive use of an appellation of origin by the producer of a given region or locality and the correlative right to prevent others from using it were not recognized earlier as industrial property rights. National legislation and regulations defining the rights by delimiting the region in question and by controlling the use of appellations of origin are developments of the twentieth century. By the time such definition had been effected, however, a number of such appellations had lost their distinctiveness and had become generic terms indicating merely that the goods in connection with which these appellations were used had certain characteristics or qualities. The difficulty today is to decide whether in a particular country the geographical designation in question is still an appellation of origin or has become a generic term. For example, Eau de Cologne and Suede Gloves are now generally admitted to be generic terms of special kinds of goods. But the generic character of other names, such as Champagne, Cognac, Camembert, Roquefort, Pilsner, and Porto is still subject to controversy.

Italy and Germany have some interest in the protection of appellations of origin but France has a far larger stake in such protection than any other country because of the exceptional reputation many French local or regional names enjoy, particularly those used in

connection with wine and cheese products. France has also gone much further than any other country in defining the right to the use of such names and in controlling their use.

Generally four countries of the Common Market protect appellations of origin in a uniformly effective manner either by legislation or by international treaties among themselves. These are France, Belgium, Luxembourg, and Italy. The Netherlands and Germany look to deception of the public rather than to property rights in appellations of origin as the basis for protection.

The Paris Union Convention does not go very far in the protection of appellations of origin. Article 10, as revised at Lisbon, prohibits "the direct or indirect use of a false indication of origin," but this leaves open the question whether the use of a particular appellation in a certain country must be deemed false. The claim that a particular term is used in trade as a generic term and is not an appellation of origin may, therefore, always be made.

With a view to obtaining more effective protection and enforcing stricter rules for the protection of appellations of origin, certain countries of the Paris Union have concluded among themselves the Madrid Arrangement for the Repression of False Indications of Origin. Generally, it permits the tribunals of each country to decide whether an appellation of origin by reason of its generic character cannot be protected, but it specifies that regional appellations of origin of wine products may not be so treated. They must always be protected, and no allegation that such an appellation has become generic will be considered. Germany, France, and Italy are party to this Arrangement. It is not unlikely that the Six will agree on uniform protection of appellations of origin. Free movement of goods in the Community would be seriously hampered by the failure to reach such an agreement.

A new Arrangement was also adopted at the Lisbon Conference by some countries for the international registration at the Berne Bureau of appellations of origin. Any appellation of origin recognized and protected in the country of origin may be so registered. The other countries may refuse protection by an appropriate motivated declaration addressed to the Berne Bureau within a year. If they make no objection, the appellation of origin thus registered at the Berne Bureau must be protected in the contracting countries, and they are not free to assert later that it is a generic term. At Lisbon, only France and Italy among the Common Market countries signed this Arrangement. It is not unlikely that the other four countries

may accede to it or that it may, in a modified form, be adopted as a particular agreement among the Six. This may prevent American producers from exporting to the Six certain products in connection with which appellations of origin are used generically (for instance, Champagne, Sauterne or Burgundy for wines). Theoretically such trade was possible in the past—but this is hardly a significant factor in American trade.

C. PROTECTION AGAINST UNFAIR COMPETITION

In contrast to patent, design and trademark law, where by legislation, regulation or administrative technique the Six have developed differences which create serious obstacles to uniformity, the fundamentals of the law of unfair competition—the requirements of good faith toward competitors and the public—are in many respects uniformly viewed by the Community countries. The reasons are historical. The French Revolution abolished guilds and merchant corporations, and the principle was recognized that every person should be free to engage in such business or to exercise such profession, art, or trade as he sees fit. Secondly, and as a corollary to the first principle, it was recognized that this freedom should be limited to those competitive efforts which are the results of one's own labor and merit and that the first principle should not be extended to sanction commercial benefits derived from usurpation of the fruits of a competitor's labor. Thirdly, the need was recognized to make civil remedies available where either intentional or negligent usurpation had occurred. Articles 1382 and 1383 of the Napoleonic Code were broadly enough stated to do so. Article 1382 reads:

Any person who causes injury to another by any acts whatsoever is obligated to compensate such other person for the injury sustained.

And Article 1383 provides:

A person is responsible for damages not only for those acts which he has actually committed but also for any damage caused by his negligence or imprudence.

These provisions are still in the French and Belgian Civil Codes. They are also copied in Articles 1401 and 1402 of the Dutch Civil Code and Article 2598 of the Italian Civil Code of 1942 (replacing Article 1151 of the old Italian Civil Code). The courts of these four countries, with admirable resourcefulness and flexibility, have created a vast law of unfair competition by a body of decisions

which goes beyond anything we have been able to accomplish through the supposedly adaptable instrument of our common law.³²

Germany has a special Act against Unfair Competition of June 7, 1909 (which served as a model for similar legislation in many other countries). Its first section contains the so-called general clause which, first of all, outlaws competitive conduct contrary to honest practices. In its subsequent sections the Act specifies and prohibits various acts of unfair competition, such as deceptive and unfair advertising, the interference with contracts of employees, the discrediting of a competitor, his business or goods, the misuse of business secrets and acts causing confusion. German courts, even before this Act, had protected against unfair competition on the basis of general provisions of law.³³

Indeed, the Six already had a well-established system of law against unfair competition by the end of the last century so that they could readily agree on the inclusion of provisions in this area of law in the Paris Union Convention. These are contained in Article 10 bis which, as last revised at Lisbon, reads as follows:

- (1) The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:
 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods or the industrial or commercial activities of a competitor;
 2. false allegations in the course of trade which are of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor;
 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods.

This provision of the Paris Union Convention is self-executing, and, in the area which it covers, it summarizes the law of unfair competition as enforced in the Common Market countries. But there are

³² Derenberg, *The Influence of the French Code Civil on the Modern Law of Unfair Competition*, 4 AM. J. COMP. L. 1 (1955).

³³ KOHLER, DER UNLAUTERE WETTBEWERB (1914).

aspects of unfair competition which are not covered by this provision, such as comparative advertising, enticement of employees, interference with contracts or advantageous relationships of competitors, use of marks of great reputation on dissimilar products, reference to a competitor's name or trademark in the sale of spare parts, use of the original trademark on repaired or reconstructed products, servile imitation of appearance of products, and the like. In these areas the domestic law of each country is controlling.

The Paris Union Convention obligates the contracting countries to assure "effective protection" against unfair competition. Does this imply the obligation to make injunctions or other summary proceedings available in addition to civil actions which may provide too slow a remedy? No such speedy remedy is available in France and Italy. The German Law of 1909 affords an extremely speedy remedy—the temporary injunction. In the Netherlands the general procedural law provides for provisional injunction by a summary proceeding before the District Court. In Belgium a special summary proceeding may be brought before the President of the Tribunal of Commerce under the Arrêté Royal of December 23, 1934.

The need to harmonize the laws of the Six concerning unfair competition is minor, since they are, except with respect to comparative advertising, slavish imitation of products, regulation of prices, gifts and discounts and the like, generally uniform. The Community should be little disturbed by differences of detail in the application of such laws. On the other hand, because of the broad similarity of the law, a uniform law against unfair competition should not be difficult to adopt, and it would be useful, since it could ensure uniform treatment particularly of more recent problems created by competitive activity such as the novel problem of know-how.

Americans would welcome any such efforts in the Common Market. The existence of a uniform code for fair competition, and the attendant certainty that a given act would be uniformly condemned in every part of the Common Market, would be highly desirable from the American businessman's viewpoint, however strict the requirements of good faith and fair competition.

D. PROTECTION OF KNOW-HOW

Although still at the law's periphery, know-how is a subject of increasing importance in international agreements and international investment. It is intimately related to patents, designs, and trademarks, is frequently included in licensing agreements and may, in-

deed, be the only subject matter of such agreements. The success of an industry in the competitive market depends on the development of know-how by costly research of its own or on the availability of know-how developed by others. New inventions permit an industry to make rapid advances but not until new technology and new organizational practices have been developed which make exploitation of the inventions technically and economically feasible.³⁴

The challenge of our times is the achievement of a greater economic development and higher standards of living. The sharing of technical knowledge and experience—of know-how—is of essential relevance to such achievement. Manufacturers in economically developed, and even more in economically underdeveloped countries, are anxious to share and to acquire from others technical information and experience, and thousands of agreements are today being concluded to accomplish this. The rules which determine the conditions under which know-how is to be communicated, the restrictions imposed on the recipient, and the enforcement of these rules are obviously of material importance, therefore, in meeting the challenge we face.

It is arguable that Article 36 of the Treaty includes protection of rights in know-how in the broad notion of "protection of commercial property." If this is so, the laws of each of the Six will determine the protection of these rights by virtue of the express provision of Article 36. In any case, no other provision of the Treaty contemplates action in regard to protection of rights in know-how by the authorities of the Community except, of course, Article 100 of the Treaty, the application of which could result in harmonization of laws relating to those rights.

I. DEFINITION OF KNOW-HOW

The English term appears to have acquired an international acceptance and is generally employed in contracts in languages other than English. It is generally understood to cover both tangibles—recipes, formulae, designs, drawings, patterns, technical records, specifications, lists of materials, and the like—and intangibles—information concerning processes, practical procedures, details of workshop practice, technological experience and training. No dis-

³⁴ For instance, a patent for an antibiotic may broadly define the organism, or describe its fermentation in a nutrient medium as demonstrated by laboratory experiment, but commercialization of the subject matter will entail very considerable additional expense since practical manufacturing techniques must be developed which will permit production at a reasonable cost.

inction is made in the legal treatment of these two elements of know-how in the countries with which we are concerned. In license agreements both elements, tangible and intangible, are covered and in the actual execution of these agreements, both may be furnished. Practically they differ in that the communication by the licensor to the licensee of tangibles is more readily proved, and in regard to problems of secrecy of the subject matter.

In European countries, know-how, which is the subject of license agreements, is distinguished from industrial and business secrets. The latter are protected without regard to the existence or absence of contractual obligations, and such protection is available only if a betrayal of secrets or breach of confidence in bad faith has occurred. The fact that industrial secrets may be the subject of license agreements can neither increase or decrease the protection afforded by these rules.

There is general agreement that the elements of know-how in a given instance must be of practical commercial or industrial value to merit protection. But must they also be secret in the sense that prior to disclosure to the licensee they were known only by the licensor; or is it sufficient that they were unknown to the licensee only, or that, even though known to some competitors, they were also kept secret by them and were not, therefore, known to competitors generally?

In Belgium and France, opinion is divided. In the Netherlands and Germany it may, perhaps, be sufficient that know-how is valuable to the licensee in that without the license he could only obtain the information and knowledge it comprises by expending time and money. In Italy exclusive knowledge of the licensor is not required, but there must be secrecy in the sense that the matter is not generally known to competitors or readily available to the licensee from normal sources.

2. NATURE OF THE RIGHT IN KNOW-HOW

Is the right in the know-how, as the subject matter of a grant, a property right or is it only a right based on a contractual relationship? If know-how is considered to be property, certain consequences follow: transfer of possession only might be contracted for, the grantor retaining title; in such a case a third party without notice might be prevented from using or disclosing the know-how, and it would not be part of the goodwill of the licensee transferable along with other elements of goodwill. Moreover, creditors could not attach it. If, on the other hand, title were transferred to the grantee,

creditors could attach the know-how. Here the distinction between tangible and intangible elements of know-how, as well as the contract terms, might be of importance.

In this field, as in others, the right is defined by the remedy available under law. In the Six the remedy available is one for a breach of contract. Breach of the obligation to respect secrecy may also be considered a tort, and the penal law affords a sanction as well.

Articles 17 and 19 of the German Law against Unfair Competition provide for both civil and criminal sanctions, and injunctions are also available under its general provisions. In Belgium and France, an action for damages is available under the broad provisions of Article 1382 of the Civil Code, which is the basis of the law against acts of unfair competition. Article 309 of the Belgian Penal Code and Article 418 of the French Penal Code provide for criminal punishment of anyone who fraudulently, or with intention to cause harm, communicates manufacturing secrets to third parties. In addition, Article 2 of the Arrêté Royal of December 23, 1934, of Belgium provides for a summary remedy akin to an injunction in certain cases of unfair competition, which include the unauthorized use of models, specimens, technical combinations, and formulae of a competitor, and generally, of all information or documents entrusted to another. In Italy, the general principles of unfair-competition law based on Article 2598 of the Civil Code protect know-how. A special provision in Article 2105 of the same Code affords protection against the divulging of information relating to the organization or methods of production of an enterprise. Anyone who, having had access by reason of his status or profession to information intended to remain secret, communicates such information to others or exploits the same for his own benefit is subject to criminal punishment under Article 623 of the Penal Code, and damages may also be obtained. In the Netherlands, a contract or a tort action may be brought and there are also penal provisions (Articles 272 and 273 of the Penal Code) against intentional divulging of secret information which should be kept confidential because of the actual or previous professional position of the person who divulges or because a commercial or industrial enterprise had ordered that such information be kept secret. The courts also may enjoin the unauthorized use of know-how.

In the absence of recognition of property in know-how, a third party is not liable to action and may keep and use the know-how received from the communicatee so long as he has paid value for it

and had no knowledge of the contractual restrictions between the licensor and licensee. In Germany tortious conduct by a third party—for instance, the employing of a former employee of the licensee who was able, by reason of inadequate control, to obtain information or documentary material relating to the know-how—exposes such third party to an injunction.

Availability of know-how to the public, after communication to the licensee, which is not attributable to the fault of the licensee, terminates the right to obtain an injunction against the licensee in order to prevent violation of the license agreement under both German and Belgian law, but damages may still be obtainable if the agreement is violated and if the contract makes no exception in regard to public availability. The obligation to pay royalties in such cases may, however, cease under German law according to a decision of the Bundesgericht (1951, 17 B.G.H. 2, p. 42), but not under Dutch or Belgian law, unless the contract provides otherwise. Even in Germany, however, there are exceptions in the case where the intention of the contract was to give the licensee a time advantage or where it provides for a continuous flow of know-how to him and the royalty is presumed to be unaffected by the publication of a portion of know-how from time to time.

The undertaking by the licensee not to use the know-how after termination of the license agreement is fully enforceable under the laws of Belgium and the Netherlands, but in Germany the right to use is so limited only during the period from termination of the agreement until know-how becomes generally accessible.

3. RESTRICTIVE CLAUSES

License agreements involving the communication of know-how may contain stipulations restricting the licensee for the term of the agreement or even after its termination. These include:

(1) clauses prohibiting the licensee from selling the products made with the aid of know-how outside a defined territory;

(2) clauses prohibiting the licensee from communicating the know-how to subsidiaries or branches abroad;

(3) clauses restricting the licensee to use of the know-how in the manufacture solely of products, the components, ingredients or raw materials for which are supplied by the licensor;

(4) clauses prohibiting the licensee from manufacturing competitive equipment or products for a period of years after termination of the agreement;

(5) clauses obligating the licensee to use exclusively the trademark or trademarks of the licensor;

(6) clauses requiring the licensee to use the know-how only for the manufacture of a certain type of products designated by the licensor.

The German Law against Restrictions on Competition of June 27, 1957, is the only national law in the Community which purports to deal with restrictions to competition relating to know-how. Article 21 makes applicable to know-how the provisions of Article 20 concerning agreements for patents. Article 21 provides that these provisions of Article 20 apply in the case of:

agreements concerning the cession or use of results of inventive character not protected by law, manufacturing processes, constructions, other results enriching technique as well as results not protected by law which enrich cultivation in the field of growing plants insofar as they represent commercial secrets.

Under the provisions of Article 20, agreements are without legal effect if they impose restrictions on commercial activity which exceed the scope of the patent monopoly. Under this law restrictions relating to the nature, the extent, the quantity, the area, or the period of the use of such commercial secrets are permissible.

Of the six restrictive clauses listed above which may appear in agreements concerning know-how, numbers (1), (2), (5), and (6) are permissible under German law. Clause (3) is of doubtful legality, and Clause (4) is definitely illegal. The same answers obtain under the French Law Decree of August 19, 1953. Under Dutch law, any of these clauses are unenforceable if held contrary to public interest by administrative decision. On the other hand, in Belgium and Italy, in the absence of any law against restraints of competition and in view of the broad recognition of the freedom of contract, all six clauses would be fully enforceable.³⁵

VI. GENERAL QUESTIONS

A. PROBLEMS OF TERRITORIAL ASSIGNMENTS AND LICENSES IN THE COMMON MARKET

The assignment by a patentee or a trademark owner who has obtained protection throughout the Common Market, of his patent or

³⁵ The International Chamber of Commerce through its International Commission on Industrial property is studying the whole subject of know-how with the view to adopting model provisions for insertion in agreements which would receive uniform enforcement in all countries.

trademark rights in one or some of the Six, or his licensing of the use of such rights on an exclusive or non-exclusive basis raises new problems. One of these—whether such agreements are affected by the rules against restraint of competition under Articles 85 to 90 of the Treaty—will be considered in the next section of this chapter.

A right of industrial property implies the power to exploit it commercially, and such exploitation includes the grant of assignments or licenses for a particular country, which are valid under its industrial property laws. Such grants may, however, create much the same barriers to the free movement of goods as may result where adverse rights have been initially obtained by different persons. The question, then, is whether barriers which may be created by such assignments and licenses are sanctioned by Article 36 of the Treaty.

Article 36 is directed at the powers of governments of the Member States, reserving to each freedom to legislate in order to protect *inter alia* industrial property within its territory. Article 36 therefore permits prohibitions and restrictions on importation, exportation, and transit justified by legislative protection of industrial property. In short, it does seem to sanction barriers created by the assignment or licensing of patents or trademarks.

Moreover, such assignments and licenses are, as a matter of policy, to be encouraged: they further economic progress and develop competitive conditions. The assignment by a German patentee of his Italian patent to an Italian enterprise permits the establishment of a new industry or the improvement of national production in Italy. Licensing by a Dutch trademark owner of his Belgian trademark to a Belgian firm coupled with communication of the relevant know-how permits the establishment of a new industry in Belgium.

The prohibition of such assignments and licenses would result in the retention in each country of the Common Market of all technical improvements achieved in it and therefore in a possible imbalance of economic development. Yet Article 29 of the Treaty specifically entrusts the Commission with the task of promoting:

. . . (b) the development of competitive conditions within the Community to the extent to which such development will result in the increase of the competitive capacity of the enterprises;

. . . (d) a rational development of production and an expansion of consumption within the Community.

The ultimate question is whether the geographical partitioning of industrial property rights which results from assignments and licenses can be permitted without creating obstacles to the free move-

ment of goods within the Community. It can be, perhaps, if only the right of the assignee or licensee to manufacture and sell is recognized, but not his right to prevent the free circulation of goods originating with the assignor or licensor. Denial of the latter right would permit purchasers of any goods lawfully placed in the market of one of the Six by the owner, assignee or licensee of a patent or trademark, to move them freely throughout the Community.

The Treaty may, indeed, be found to embody such a denial, for it may be argued that restriction of the free movement of goods which have been placed in the market of one of the Six would constitute "a disguised restriction of trade" in the sense of the last sentence of Article 36. In any case it seems certain that the Council and the Commission will have to grapple with this problem.³⁶

B. RULES AGAINST RESTRAINTS OF COMPETITION AND THEIR EFFECTS ON INDUSTRIAL PROPERTY RIGHTS

It is reported that a wave of consolidation, concentration, specialization and rationalization of industry in the Six is rising. A recent study lists sixty consolidations of industries in the Six and seventy-one agreements between or among financial, industrial, commercial, and professional enterprises across Community borders involving the building of new plants and the sharing of technical processes.³⁷ Some of these arrangements will raise questions when viewed in the light of the rules against restraints on competition of Articles 85-90 of the Treaty.³⁸

Article 85 provides in general terms that agreements of all kinds which have as their object or result the prevention, restriction or distortion of competition within the Common Market are incompatible with the Common Market and void. Article 86 prohibits the abuse of a dominant position in the Common Market by one or more enterprises. Article 87 provides for machinery to establish, within three years, the regulations and directives necessary to give effect to Articles 85 and 86. Article 88 makes provision for the

³⁶ The suggested solution of the problem of territorial assignment and licensing would reflect also the position taken in the United States by the Department of Justice in *U.S. v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), and embodied in H.R. 7234, 86th Cong., 1st Sess. (1959). The Supreme Court subsequently noted probable jurisdiction in the *Guerlain* case, 355 U.S. 937 (1958) and later vacated and remanded the case for consideration of a motion to dismiss by the United States, 358 U.S. 915 (1958).

³⁷ N.Y. Times, March 29, 1959, § 1, p. 19, col. 3 (late city ed.).

³⁸ A thorough analysis of these Articles is undertaken in another chapter. The possible significance of Articles 85 to 90 of the Treaty to industrial property agreements or to dominant positions centered in industrial property rights alone will be considered here.

period before the regulations contemplated in Article 87 are issued, requiring each Member State to pass upon agreements and the use of dominant positions in accordance with its own law and the provisions of Articles 85 and 86. Article 89 provides for the policing of Articles 85 and 86 by the Commission. Article 90 applies only to public enterprises, fiscal monopolies, and similar non-private corporate bodies.

Whether these provisions apply in the field of industrial property, for example to license agreements involving patents, designs or trademarks, or to action by one or more firms based on a dominant patent position, has been debated. One argument has been that in excluding prohibitions or restrictions in respect of importation, exportation or transit justified by the protection of industrial or commercial property from the Treaty's reach, Article 36 must also exclude those due to commercial use and exploitation of such property. Article 90 relating *inter alia* to enterprises to which Member States accord special or exclusive rights, has also been interpreted as applicable to industrial property, since the owner thereof must, by the nature of things, be deemed to receive from the Member States "special or exclusive rights."³⁹

These views must be discounted. The terms of Articles 85 and 86 are too general and broad to permit the assumption that they were not intended to apply to industrial property. Had there been such an intention, it would have been clearly indicated as, for instance, is done in the British Restrictive Trade Practices Act of 1956 (Section 8) and in the German Restrictive Trade Practices Act (*Gesetz gegen Wettbewerbsbeschränkungen*) of June 27, 1957 (Articles 16, 20 and 21). Article 36 of the Treaty leaves to the Member States the power to legislate to protect industrial property rights, but this is not in conflict with Articles 85 and 86 which will affect the action or agreements of those entitled to industrial property rights which tend to restrict competition unduly.

The real issue, therefore, is how far it is possible to reconcile two equally important objectives of the Common Market: the promotion of economic progress and development by recognizing and protecting lawful monopolies involved in industrial property; and the elimination of concentrations of economic power and of agreements unduly restricting competition by enforcing anti-monopoly and anti-trust rules.

³⁹ Gotzen, *La Propriété Industrielle et les Articles 36 et 90 du Traité instituant la Communauté Economique Européenne*, REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 261 (1958).

European jurists generally advocate special rules for restrictions related to industrial property rights, since such restrictions have always been accepted as a normal and necessary method of exploiting industrial property. The owner of such rights, who is fully entitled to prohibit others from using his property, should also be able to grant limited rights—for instance, exclusive rights limited to one country only, or rights conditioned upon his control of production by the licensee or upon sale by the licensee at fixed prices.⁴⁰

In the view of these jurists the regulations to be issued under Article 87 by the Council should specifically except such “normal” exploitation of industrial property rights, and a list of clauses of agreements which should be permissible has been suggested.⁴¹

⁴⁰Bodenhausen, *The Effect of the European Common Market and Free Trade Area on Industrial Property*, British Group of International Association for the Protection of Industrial Property, Feb. 25, 1958. Professor Bodenhausen states the position quite forcefully:

It is not only normal, but also in principle desirable, on account of the common interest underlying the recognition of industrial property, that the owner of such property, whose rights fully entitle him to prohibit others from using his property, should also be able to grant limited rights to certain selected parties, for instance in the form of exclusive licenses confined to one or more countries or by means of a series of non-exclusive licenses on mutually differing terms. In granting such licenses, production control, price fixing, and so on, are indispensable adjuncts. If such arrangements are no longer permitted, the owners of industrial property will either prefer to exercise their rights solely by prohibiting others from industrial property altogether, that is to say, they will apply for fewer patents or none at all and instead try to keep their inventions secret, or they will invest less in the exploitation and protection of trademarks. If this were to happen, industrial property, which has hitherto been recognized as being in the public interest, would to some extent cease to serve its purpose.

⁴¹The Commission d'Etudes de la Propriété Industrielle of the Belgian Group of the International Association of Industrial Property attached to a report dated September 6, 1958, the following appendix on what must be considered “normal exploitation of industrial property”:

1. In granting licenses the holder of industrial property rights is at liberty to decide on the licensee and on the scope of the license which he wishes to grant.

For example, he may

- (a) stipulate the geographical area;
- (b) stipulate the technical scope;
- (c) stipulate whether the license shall be exclusive or not;
- (d) grant merely a sales license or limit the manufacturing license solely to licensee's own use or to sales in a specified territory;
- (e) fix the term on the license;
- (f) decide on quantity and quality.

2. In granting licenses, the holder of industrial property rights is at liberty to stipulate conditions relating to the creation and keeping in force of those rights.

3. In granting licenses, the holder of industrial property rights is at liberty, in order to safeguard the commercial value of his rights, to stipulate the conditions under which the products or services covered by the license shall be traded or performed by the licensee.

For example, he may stipulate

- (a) price conditions, possibly at second or further hand (think of branded goods);

Reference in this connection is made to the Treaty establishing the European Coal and Steel Community which contains provisions, analogous to those of Articles 85 and 86 of the Rome Treaty, in Articles 60, 65, and 66. The High Authority of the Coal and Steel Community in its Fourth Report on its activities covering the period April 1955–April 1956 on page 151, stated:

The High Authority holds the view that agreements relating solely to the working of patents are not to be regarded as a restriction to the normal operation of competition within the meaning of the Treaty, and that accordingly, the granting of exclusively regional rights in the present case is not at variance with the provisions of the Treaty.

This statement of the High Authority of the Coal and Steel Community is rather limited in its scope and cannot be cited in support of the general proposition that any agreement or action which does involve undue restraint is permitted so long as it is related to an industrial property right.

- (b) that the goods or services shall be used only for specified purposes or in specified territories;
 - (c) that mention shall be made of the fact that the process, product or services are being traded or performed under the license.
4. In granting licenses, the holder of industrial property rights is at liberty to fix the system of remuneration, which may *e.g.* take one or more of the following forms:
- (a) a lump sum payment;
 - (b) payment of royalties;
 - (c) agreement on a minimum remuneration;
 - (d) a remuneration independent of the number or actual use of the industrial property rights to which the license relates;
 - (e) a ceiling amount for the payment of royalties;
 - (f) payment of fees necessary to keep the rights in force (think of the exclusive license);
 - (g) acquisition of ownership of, or license on, industrial property rights belonging to the licensee.
5. In granting licenses, the holder of industrial property rights is at liberty to impose conditions to safeguard the technical exercise of the industrial property rights. He may, for example, stipulate
- (a) quality control;
 - (b) the obligatory use of specified raw materials, semi-manufactured products, components or tools.
6. In granting licenses, the holder of industrial property rights is at liberty to attach the following conditions to the licenses:
- (a) the licensee may be prohibited from concluding similar license agreements with others;
 - (b) the licensee may be bound to supply to the patentee goods manufactured or services performed under the license, possibly limited to a specified quantity and/or at a specified price.
7. It is admissible in itself to pool industrial property rights for the purpose of exploiting them.

In all the cases mentioned above, the holder is at liberty, when granting licenses to different parties, to vary the extent of the conditions from one licensee to another.

Instead of this overly general proposition would it not be more reasonable to hold that insofar as agreements involving industrial property rights keep within the scope of the grant of the patent, design or trademark right, the making of such agreements constitutes the exercise of the lawful monopoly embodied in such grant, but insofar as they go outside the scope of the grant, they may be prohibited by Articles 85 and 86? Fixing the price at which the licensee shall sell is not within the scope of the grant nor is a clause obligating the licensee to buy raw materials, available in the market, from the patentee. On the contrary, the grant by the patentee or trademark owner of a license limited to a particular territory is within such scope.

Indeed, if industrial property rights are deemed to be agencies of economic progress and industrial and technical advance, then agreements granting rights thereunder would be agreements "which contribute to the improvement of the production or distribution of goods, or to the promotion of technical or economic progress" under paragraph 3 of Article 85 of the Treaty. As such they would not be prohibited, provided they:

- (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
- (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned (Article 85 para. 3).

To European lawyers the concept of "restrictions of competition" is a novel one. In the Six, and particularly in the field of industrial property, the familiar concepts are "abuse of right" or "offense against the public interest." For example, in contrast to American patent law, which in no case does so, European patent laws penalize non-working of patents by compulsory licensing and enable the application of restrictions to the patentee's rights for reasons of public interest (national security, promotion of public health and safety, and the like).

It is doubtful, however, whether Article 85 paragraph 3 will be interpreted, under the directives and regulations to be issued under Article 87, as incorporating only the ideas of "abuse" and "offense against the public interest."

A further question is raised by Article 88 which provides that, pending the promulgation of appropriate regulations or directives under Article 87, the Member States shall pass upon agreements

(involving *inter alia*, industrial property rights) according to their own laws and to the provisions of Article 85, especially paragraph 3. The domestic law of the Six plainly differs from the rules established by Articles 85 and 86. Belgium, Luxembourg, and Italy have no antitrust law of any kind^{41a} and certainly agreements of the "normal" type described above relating to industrial property rights would be entirely proper and valid. In the Netherlands, the law of June 28, 1956, requires agreements to be registered and the Minister of Economic Affairs has the right to annul, by means of an administrative decision, an agreement contrary to public interest. In Germany, the law of July 23, 1957 declares all agreements in restraint of competition, with certain exceptions, to be in principle null and void. Among these are vertical price agreements in respect of trademarked goods (in Article 16) and a number of restrictive clauses in contracts concerning the acquisition or use of patents (in Articles 20 and 21). In France, the Decree of August 9, 1953, prohibits the fixing of minimum prices, but exceptions are permitted in cases of exclusive rights based on a patent, license or design.

The Treaty goes well beyond the national law of the Member countries. Nonetheless it is difficult to conclude that at least "normal" agreements involving industrial property rights will be invalidated. This is true even if Articles 85 and 86 are held to be self-executing and even if they are held applicable to industrial property agreements.⁴²

The final definition of the scope of Articles 85 and 86 in regard to agreements relating to industrial property is of importance to Americans. The Common Market subsidiaries of U.S. corporations will, of course, be subject to Community law, even if they are beyond the reach of United States antitrust law. Moreover Community law will be relevant to the validity of agreements between American corporations and their subsidiaries or third parties in the Community.

If regulations or directives issued under Article 87 exempt agreements relating to industrial property rights or if such agreements

^{41a} By February 1960, antitrust bills have been introduced before the Parliaments of Italy and Belgium.

⁴² *Tuberries Louis Julien S.A. v. Van Katwijk's Papier-en carton verwerkende Industriën*, Rechtb. Zutphen, July 11, 1959, [1958] *Nederlandse Jurisprudentie* 984 (Neth.) held that Articles 85 and 86 were not applicable, and that the existing domestic law continued to apply.

On the other hand, the decision in Judgment of February 19, 1959, 2 *Beschlussabteilung des Bundeskartellamts*, [1959] *GRUR Ausl.* 252 held that the provisions of Article 85 *ff.* of the Treaty are applicable law in a case dealing with provisions in the license of a patent which limited competition.

are within paragraph 3 of Article 85, properly construed, American owners of industrial property rights may, on the one hand, be required by Common Market licensees to enter into the kind of agreements which in the light of American decisions may be frowned upon by our courts.

VII. GENERAL CONCLUSIONS

A. THE LIKELIHOOD THAT CHANGES IN INDUSTRIAL PROPERTY LAW WILL OCCUR

The adoption by the Six of a uniform patent, design or trademark law is unlikely in the near future. So, probably, is any major rewriting of their industrial property laws. These laws reflect a balance of the interests of those who own industrial property rights, the consuming public, and the state. Their amendment would shift this balance, and the reappraisal and attempted new reconciliation of interests which would necessarily precede it would be a difficult process even if the ends sought were purely domestic. Since goals in this context would be those of a community of six nations, the difficulties would obviously be far harder to overcome.

It seems equally unlikely—as the above discussion has indicated—that industrial property law in the Common Market will remain unchanged. The question is how far changes will go and how soon they will take place.

B. THE PROBABLE KINDS OF CHANGES

It may be reasonably expected that procedure will be simplified, both as a result of forces which were already at work in Europe and of others which the Common Market will inevitably set in motion. The Conventions for Uniform Formalities and Uniform Classification of Patents will almost certainly be ratified by the few countries of the Six that have not already done so, but further simplification is possible. An agreement may be reached making it possible to institute a common search for novelty through the Institute of The Hague, or even to file a single patent application, copies of which would thereafter be communicated to the individual patent offices of the Six.

These changes, however, are not of immediate significance to the principal goal of the Common Market—the creation of an area within which goods, persons, services, and capital can circulate with ever-increasing freedom. A second question is, therefore, whether

the law will be harmonized in order to avoid obstacles to the free movement of goods which industrial property rights, arising under six disparate legal systems, would otherwise tend to create.

The probability of harmonization will be determined by two factors. The first—which will exert pressure in favor of harmonization—is the fact that where industrial property rights are created by differing laws, obstacles to the free movement of goods do inevitably tend to result. The discussion in the previous pages of the problems resulting from differences in the laws of the Six makes this clear.

The second factor which will determine the probability of harmonization (essentially by determining what weight will be given to the first factor) is the direction in which the Common Market will evolve. The Treaty's effect should be ultimately to free trade, permitting it to flow increasingly in natural economic channels and to conform to the logic of mass production, specialization, and centralization. But political and economic policies of the Member States may retard this process, and nationalistic attitudes may prevent appropriate counteraction by Community authorities. If these pessimistic apprehensions do not materialize, integration should inevitably proceed. The Rome Treaty would then be only a beginning, and logic would compel extension of common action to new fields. Harmonization of industrial property laws in such an environment would necessarily follow.

C. LAWS WHICH ARE LIKELY TO BE HARMONIZED

Harmonization of the law is most likely where it is essential and therefore least likely to provoke vigorous opposition. Harmonization of the patent laws of the Six may probably be expected, therefore, which will:

- (1) result in a uniform duration of patents;
- (2) make possible a single payment of annuities to be apportioned among the Six;
- (3) create a system of working requirements under which working in one of the Six will satisfy requirements in each of the others; and
- (4) result in a common definition of novelty of inventions.

Harmonization even after the twelve to fifteen years transition period seems improbable in other areas of patent law. Some of the problems in other areas—opposition procedure, patentability, subject-matter—have been discussed. Others—inventions of employees, the treatment of inventions of additions or improvements by

others, the incontestability of patents after a certain period, compulsory licensing for reasons of public interest—were not touched on.

Harmonization of certain aspects of the laws of the Six governing designs may come about through the agreement now being discussed by the inter-Governmental Committee sponsored by U.N.E.S.C.O. Otherwise even an agreement on uniformity of duration appears difficult in view of the wide divergence between the fifty-year term in France and the four-year term in Italy. The only safe prediction is that Luxembourg and the Netherlands will pass legislation to protect designs.

Harmonization of the trademark laws of the Six may be very extensive. I am advised that plans are already being discussed in Germany for the institution of a "European Community Trade-mark." The adoption and registration of such a mark at a central office would be given effect throughout the Common Market area. The already existing system of international registration at the Berne Bureau should give added impetus to such a plan.

The new Convention of Nice of 1957 providing for a uniform classification of goods will most probably be ratified by all six countries. The creation of a common search center for trademarks of the Common Market countries to enable easy searches for anticipations should not, moreover, be difficult. Harmonization could also result in a uniform duration of trademark registrations, a provision that use of a registered trademark in one of the Six will prevent forfeiture of the registrations of the mark in the other five. Finally, uniform provisions may be adopted defining the quantum of transfer of goodwill which will validate an assignment of a trademark and the requirements of a valid license. The latter may include recording in a central European office in order to ensure notice to the public.

Leaving aside problems of trade names, appellations of origin, unfair competition, and know-how, harmonization of laws controlling territorial assignments and licenses and agreements involving industrial property, which may involve unlawful restrictions of competition, is also indicated. Free circulation of goods throughout the Common Market, once they have been lawfully placed on the market by the owner of the industrial property right, calls for uniform regulation. With regard to the application of Articles 85, 86 and 88 to agreements involving grants of industrial property rights, it is assumed that the Council will issue directives under Article 87.

D. HOW HARMONIZATION MAY BE EFFECTED

Harmonization of the laws may be brought about in two ways. The domestic law of the Six may be changed pursuant to directives of the Council. If this should be the avenue chosen, nationals of countries outside the Common Market, and therefore American nationals, will be entitled to the benefits of these changes by virtue of the national-treatment clause of the Paris Union Convention. On the whole, these changes will be advantageous to American owners of European industrial property rights since simplification and uniformity of procedural and substantive law will result. Because of the compromises which the changes will necessarily entail, some Americans may find new laws in individual countries less advantageous than are the present ones, however.

A second means of bringing about harmonization of the procedural and substantive laws of the Six would be intra-Common Market arrangements extending defined reciprocal benefits to the nationals of the other countries of the Six. If this means is chosen, the primary question will be whether such arrangements will be closed or open to countries which are not members of the Common Market Community. If closed, only American nationals and branches or subsidiaries of American corporations established in the six countries will be entitled to the benefit of such arrangements; if open, and if the United States becomes a party to them, Americans and American corporations established in the United States and elsewhere may avail themselves of the provisions of such arrangements.

It is not likely that there will be an attempt to conclude closed arrangements. Should closed arrangements be concluded, it is nevertheless probable that they will be followed by the enactment of laws in each Member Country making their provisions applicable to its nationals and consequently to persons enjoying national treatment under the Paris Union Convention. This conclusion is based on a number of considerations.

First, it is plainly to the interest of each of the Six to extend to its own nationals in its own territory any benefits or advantages extended to other Community nationals. If Italy is to agree that the obligation to work a patent owned by a German national will be complied with if the patent is worked in Germany, Italian patentees will also want to be able to meet Italian working requirements by working their patents in Germany. If Italian patentees alone are

to continue to be required to work their inventions in Italy, they may be forced to transfer their inventions to associates in the other countries of the Common Market, or run the risk of forfeiture. Transfer or forfeiture in Italy for non-working would represent economic loss to Italy, destroying an Italian asset in the European Economic Community.

When each country is a separate economic unit sheltered by economic barriers, it may, moreover, make sense to require local manufacture of patented inventions. Having created a unified economic area within which products, services and capital may move freely, the Six can no longer justify working requirements, however.

Secondly, a special arrangement among the Six extending reciprocal benefits to their nationals but leaving unchanged the domestic law in each country would, in effect, create discrimination against nationals of the other 41 Paris Union countries. It may be argued that such a special arrangement is authorized by Article 15 of the Paris Union Convention, which reads:

It is understood that the countries of the Union reserve the right to make separately between themselves special arrangements for the protection of industrial property, insofar as these arrangements do not contravene the provisions of the present Convention.

Examples of "restricted Unions" created under Article 15 are those of the Madrid Arrangement for the International Registration of Trademarks, the Madrid Arrangement for the Repression of False Indications of Origin, the Arrangement of The Hague for the International Deposit of Designs, and the Lisbon Arrangement for the International Registration of Appellations of Origin.⁴³ These Arrangements give the nationals of the parties thereto special advantages not available under the Paris Union Convention, but they remain open to accession by any Paris Union member.

A special arrangement of the Six providing that working of a patent by a Community national in one of them would satisfy working requirements in the others, would obviously discriminate against patentees of the other 41 countries of the Paris Union. If the Six concluded such a closed Treaty, however, its conformity with the spirit of the Paris Union Convention would be questionable. Article 15 does not require that special arrangements be open to accession by all countries of the Union, but the general qualification that such arrangements should not "contravene the stipulations of the Con-

⁴³ The United States is not a party to any of these Arrangements.

vention" must be understood to imply that arrangements may not defeat the fundamental purpose of the Convention—the most complete and effective protection of industrial property possible—nor may they substitute reciprocity for national treatment as the basic principle of the Union.

Thirdly, even if such a closed treaty were permissible under Article 15 of the Paris Union Convention, it would be self-defeating. For one of its main objects would be the removal of barriers to the free flow of Community trade and yet it would of itself encourage the creation of substantial trade barriers in the Community. For if a non-Community national could not avoid compulsory licensing or forfeiture of his patent by working it in only one country of the Six, he would be motivated to create barriers either by entering into exclusive license agreements with particular manufacturers in each of the six countries or by forfeiting his patent in some of the countries and retaining it in others, thereby preventing the free circulation of the relevant goods in the latter.

Finally, an attempt by the Six to create special rules for industrial property rights not applicable to non-Community nationals might provoke similar moves by others, for example, the Outer Seven. This would not only counter-balance the Community's action but might also be fatal to the Paris Union Convention.

The only logical solution is therefore uniformity of the law on the points which may create obstacles to the free movement of goods in the Common Market so that the same benefits will be available to all owners of Community industrial property rights regardless of their nationality or domicile.

For these reasons, American owners of industrial property rights should welcome progress towards harmonization of industrial property laws in the Common Market.

Chapter VI

Labor Law and Social Security

Otto Kahn-Freund *

INTRODUCTION

It is the object of this chapter to consider the effect of the establishment and functioning of the European Economic Community on the legal principles and institutions governing labor-management relations in the members of the Community. The Treaty of Rome contains a number of provisions on social policy, of which some are potentially very important, indeed perhaps indispensable to the functioning of the Community. At the time of writing (1959) the Community is, however, still at the beginning of its formative stage, and the social policies embodied in the Treaty are largely promises rather than achievements. Moreover, some of the provisions of the Treaty are simply general statements of policy or of legislative programs—blanks to be filled in in accordance with economic and political developments which cannot now be predicted. No prophecies of any kind will be attempted here; the following pages will within certain limits give an account of what has happened and of what is happening. They will leave it to the reader, if he is so inclined, to form his own judgement as to what is more or less likely to happen in the future.

Nor will any attempt be made to analyze the details of labor law in the Six; there, as everywhere, labor law is extremely complex. Such details as are discussed will only serve to illustrate the broad principles and to explain the fundamental institutions of labor-management relations which are thought to be of interest to those to whom this book is addressed. A very brief account of the salient features of social security law will also be included. Social security

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law is not only complex, however, it is extraordinarily kaleidoscopic, so that everything said today may very well have lost its validity tomorrow.

Accordingly this chapter falls under three headings, the last of which is an appendix. The first part is an attempt to analyze the Treaty itself and its impact on labor law and social security. The second is, as it were, a sketch map of the intricate landscape of the labor laws in the Six, including in particular the mutual relations of constitutions, treaties, legislation, and collective bargaining, the structure of unions, employers' associations, and their mutual relations, the role of the law in the enforcement of collective agreements, the legal representation of employees at plant level, the settlement of collective and individual disputes, and the special problems relating to the termination of contracts of employment. The third part will deal with some features of social security law.

None of these matters will be sufficiently analyzed to make possible the solution of practical issues. The object is to help the reader to ask the right questions rather than to give those answers which only the expert on the spot can provide.

I. THE IMPACT OF THE TREATY ON LABOR LAW AND SOCIAL SECURITY

A. GENERAL

The report made to the foreign ministries of the Six on April 21, 1956, by the Heads of the Delegations forming the Intergovernmental Committee set up by the Messina Conference (commonly referred to as the "Spaak Report") must serve in this field as the point of departure for an analysis of the Treaty itself.¹ The Report emphasizes that the removal of internal tariffs and import quotas is in itself not sufficient for the creation of a common market. Other measures are required, and among these special importance attaches to provisions designed to promote mobility of labor and to those facilitating re-adaptation so as to protect workers from the "burdens and risks" attending progressive change. One of the aims of the Community must be the free circulation not only of goods and services, but also of the "factors of production themselves, that

¹ *Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères* (April 21, 1956) [hereinafter cited as Spaak Report]. The Inter-Governmental Committee had been established by the Messina Conference in June, 1955, under the Chairmanship of M. Paul-Henri Spaak, then Belgian Foreign Minister.

is of capital and of men." "Thus we must give hope to an unemployed labor force, which instead of being a burden for some countries, will be transformed into an asset for Europe." This, however, cannot be achieved overnight. "Transformations as fundamental as these cannot be accomplished without long delay. Within reasonable limits, one year more or less makes no essential difference. The chances that the Common Market will be firmly established are all the better if the period provided for its establishment permits a gradual coalescence of monetary policies and of social policies."²

"A gradual coalescence of social policies" ("*une convergence progressive . . . dans les politiques sociales*") appears in the Spaak Report not perhaps as an indispensable condition for the functioning of a common market, but as one of the elements which may greatly assist in giving it firm foundations. At the end of the transitional period labor should be free to circulate in the Community and common social legislation for which the Treaty provides should have been enacted.³

It is useful at the outset to bear in mind that, within the framework of the Spaak Report as well as within that of the Treaty itself, the gradual assimilation of social and labor legislation and administration is intended to serve two related but distinct purposes: the removal of obstacles to migration of labor, and the removal of what are called "distortions" of competition. More will have to be said about the first point, especially with regard to social security law. The Spaak Report approaches the second problem with great caution. It deals with the "correction of distortions," pointing to the possibility that legislative and administrative measures, other than those of an openly discriminatory kind and those openly supporting certain industries or enterprises, may in fact falsify "the conditions of competition between national economies as a whole or certain of their branches."⁴ Yet, the Report is at great pains to point out that differential burdens—for example, through public expenditure or through social security programs—do not in themselves falsify the conditions of competition, since they may be compensated for by rates of exchange. The Report also indicates that it is quite wrong to think that competition can develop only on the basis of equalizing the conditions which determine prices. "On the contrary: it is on the basis of certain differentials that equilibrium can be established and exchange be developed. It is thus for

² *Id.* at 17-19.

³ *Id.* at 20.

⁴ *Id.* pt. I, tit. 2, ch. 2 at 60.

example with differences in wage levels if they correspond to differences in productivity." And the Report points to the common interest in establishing labor-intensive industries in regions where labor is abundant. The Report is strongly influenced by the expectation that, as the demand for labor rises where labor is cheapest, wage rates will tend to rise, and that, on the other hand, the free circulation of labor will gradually facilitate an equalization of conditions of employment.⁵

These passages of the Spaak Report are of fundamental importance for an understanding of the Treaty and of the policies to which its provisions seek to give effect. "Equalization, so far from being a condition precedent of the operation of the common market, is, on the contrary, its result. Hence it is useless to try somehow to modify by decree the fundamental conditions of an economy which arise from its natural resources, its level of productivity, the significance of public burdens. Part of what is commonly called harmonization can therefore only be the result of the functioning of the common market itself, of the economic forces which it releases, and of the contacts between those interested to which it leads."⁶

This is clearly not intended to be a plea for *laissez-faire*. "Deliberate and concerted action" is necessary for the functioning of the Common Market. But it must be "limited." It must consist in "correcting or eliminating the effect of specific distortions which further or hinder certain branches of (economic) activity."⁷

At first sight the problem here looks like that of the chicken and the egg—that is, is harmonization of labor conditions a prerequisite or a consequence of the Common Market? The answer given by the Report is clear—generally speaking new economic conditions should be allowed to have their impact on labor conditions, and "harmonization" should be resorted to only where there are "specific distortions."

These policies are reflected in the Treaty, but not as clearly as might have been the case. This may be due to the fact that the relevant provisions were drafted only at the end of the crucial conversation between the French and West German Prime Ministers.⁸ It seems to have been argued, especially by the French Government,

⁵ *Id.* at 60-61.

⁶ *Id.* at 61.

⁷ *Ibid.*

⁸ See Katzenstein, *Der Arbeitnehmer in der europäischen Wirtschaftsgemeinschaft*, 31 *BETRIEBS-BERATER* 1081 (1957).

that an elimination of gross distortions was not enough, but that it would be necessary to assimilate the entire labor and social legislation of the Member States completely so as to achieve parity of wages and social costs. The relevant provisions show the traces of a compromise between these two policies, but the general policy of harmonization as visualized by the Treaty would not appear to run counter to the principles of the Spaak Report, and only one of the special clauses imposes upon the members a compulsory obligation to take any concrete steps towards its realization.⁹ At the same time the Treaty places more emphasis than the Report on a deliberate policy of social improvement.

This is the meaning of the key Article 117 which has obviously confronted the Commission with difficulties of interpretation. Article 117 provides:

Member States hereby agree upon the necessity to promote improvement of the living and working conditions of labor so as to permit the equalization of such conditions in an upward direction.

They consider such a development will result not only from the functioning of the Common Market which will favor the harmonization of social systems, but also from the procedures provided for under this Treaty and from the approximation of legislative and administrative provisions.

At first sight this Article seems to disinter "the chicken-versus-the-egg" issue which had been so effectively buried by the Spaak Report. The first paragraph looks like a prescription and the second is more nearly a prediction; the first purports to inaugurate a policy, the second expresses a prophecy. In the first paragraph the "equalization" of the living and working conditions "in an upward direction" is envisaged as one of the objectives of the Community, no doubt as being desirable in itself, and at the same time as a part of the foundation of the Common Market. This means that by appropriate measures the conditions are gradually to be improved until they are at the level of that Member State which has the highest standard. But the second paragraph seems to express the view, adumbrated to some extent, as we have seen, by the Spaak Report, that, if coupled with "the procedures provided for under this Treaty and . . . the approximation of legislative and administrative provisions," the automatism of the Common Market itself

⁹ Treaty Establishing the European Economic Community, March 25, 1957, art. 119 [hereinafter cited as Treaty], 298 U.N.T.S. 14 (1958).

will produce the harmonization which in the first paragraph is seen as the end product of deliberate policies directed towards it.

That this is very far from being a legal "point," a lawyer's quibble, is shown by the attitude of the Commission, which has been at great pains to clarify the interpretation of Article 117.¹⁰ The second paragraph might have been thought to be compatible with a policy by which conditions of employment are not forced up but forced down. Competition may produce a uniform level of prices and wages below that prevailing in any given Member State. One country may be forced to dilute its social security system so as to remain competitive with others. This interpretation has been emphatically rejected by the Commission. It

. . . considers that Article 117 provides for the equalization in an upward direction of the living and working conditions of labor, and a functioning of the Common Market which will favor the harmonization of social systems cannot imply a levelling on a theoretical average standard of living, as this would, for example, force those countries with the most advanced economic and social development to hold up their social evolution till less fortunate countries have managed to catch up. Against this equalization should be placed the desire to encourage and help all peoples in the Community to improve their existing social situation, as the equalization provided for by the Treaty must be sought by means of more rapid progress in those areas where progress seems to be most needed.¹¹

This official view of the Commission was further expounded by Signor Petrilli, a member of the Commission and President of its Social Affairs Group. He added the significant observation that

. . . the concept "equalization in an upward direction" constitutes neither a reason to hold up development in the countries at present most favored nor a Utopian yearning after mechanical equalization of living and working conditions. For the Commission, this concept means an approach directed to offering individuals, social groups, geographical areas and economic sectors equal opportunities to play their part in social progress.¹²

This latter point is of importance. The "living and working conditions" referred to in the first paragraph of Article 117 are clearly

¹⁰ See [Sept. 18, 1958–Mar. 20, 1959] E.E.C. COMMISSION, SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY, ch. 6 [hereinafter cited as SECOND GEN'L REP.].

¹¹ *Id.* para. 169 at 107–08.

¹² See Petrilli, *The Social Policy of the Commission*, in Bulletin of the European Economic Commission, May 1959, at 5 [hereinafter cited as Bulletin].

understood, and to be understood, as an aggregate, and it will thus be legitimate, for example, when comparing wage levels, to take into account the effect of social security schemes or of public services (health, housing and the like) provided out of governmental funds. This has two significant consequences: In the first place, the Treaty does not inaugurate a policy of "mechanical" assimilation of legislation. It does not visualize uniformity of labor and social legislation, not even, necessarily, uniformity of social security burdens as a condition for the functioning of the Common Market. It does not, after all, give effect to a general program corresponding to that aspect of French policy in this matter which, in a more special context, has found expression in the "Protocol relating to Certain Provisions of Concern to France."¹³ In the second place, the interpretation put on Article 117 by the Commission, by the President of its Social Affairs Group, and also by the European Parliamentary Assembly,¹⁴ effects, so to speak, a second burial of the problem of automatism and planned action which, needless to say, is not really a mere logical conundrum but a profound problem of economic and social policy. It reads Article 117 as an expression of the views expounded in the Spaak Report in the sense that the automatism of the Common Market is permitted to have free play as long as it produces an equalization of working conditions in an upward direction, but that corrective and planned action will have to be taken if it impedes social progress or—this is implied rather than expressed—leads to a deterioration in the conditions of the more advanced members. In so far, then, as Article 117 thus interpreted permits and indeed demands conscious action not only to promote migration and to remove distortions of competition, but also to promote social progress, it constitutes a program which goes beyond that envisaged in the Spaak Report.

But even with this third objective of equalization added to the first two, it is not a program for wholesale legislative and administrative uniformity. Such uniformity is neither one of the objectives

¹³ Treaty, *Protocol Relating to Certain Provisions of Concern to France*, March 25, 1957, pt. II, 298 U.N.T.S. 14, 133 (1958).

¹⁴ See its *Résolution sur les questions sociales traitées dans le premier rapport général sur l'activité de la Communauté Économique Européenne*, pt. I, paras. 2-4, [1959] *JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES* [hereinafter cited as *J'L OFF.*] 167. Numbers 4 and 5 of the Resolution reflect the dilemma discussed in the text. In the same Resolution (numbers 7-10), the Assembly also expressed the view that the Commission should urgently pursue a policy of developing the underdeveloped regions of Europe, and, in this connection, promote development programs transcending national frontiers, and cooperate in these matters with the Council of Europe and with O.E.E.C.

of the Community nor considered a necessary step to achieve the purposes of the Community formulated in Article 2 of the Treaty. "The approximation of their respective municipal law" appears in Article 3(h) as one of the activities of the Community, but only "to the extent necessary for the functioning of the Common Market." Any other attitude towards the unification of law would, it is suggested, be wholly unrealistic generally, and especially in connection with labor and social legislation. The important differences between the various systems of labor legislation and social security in the six countries are no doubt partly the result of disparities in economic development such as the authors of the Spaak Report and of the Treaty hoped gradually to overcome. To a very large extent, however, they are caused by differences in tradition, in political outlook, in social *mores*—differences which are deeply rooted in the political and social history of Europe and quite incapable of being eliminated by a stroke of the pen of a legislator or treaty maker. The analogy with the evolution of the United States may be very misleading. There is all the difference in the world between developing the economy of a largely unpopulated continent for which a "common market" as well as a bond of political unity was provided in advance by a common constitution, and seeking to convert into an economic unit a continent enjoying the benefit, and suffering from the burden, of rich and manifold and very deep-seated traditions of thought and action. This may be a truism, but it happens to be a thought of special significance when contemplating the effect of the Treaty on social legislation. If, in two neighboring countries which are as closely connected economically as France and Western Germany, the structure and significance of collective bargaining and its relation to legislation, are very different (as in fact they are), the causes cannot, or cannot only, be found in economic disparities. They must be looked for in the political history and public opinion of these countries, and there is nothing to show that even a functioning common market would, within an appreciable future, produce uniformity where for centuries there has been diversity.

Although any thought of unification of labor and social legislation en bloc may, then, be dismissed at the outset, the "procedures provided for under this Treaty" and "the approximation of legislative and administrative provisions" are nevertheless expected—as Article 117 indicates—to make a contribution to the equalization of living and working conditions in an upward direction. The "procedures" here referred to are very obviously the steps which, in ac-

cordance with Article 8, will be taken during the transitional period, that is, before the Common Market can be said to "function"; and the gradual reduction of customs duties and elimination of quantitative restrictions within the Community, the gradual establishment of a common external customs tariff, the raising of agricultural productivity, the gradual freeing of the movement of workers, services and capital are thought in themselves to be able to help towards the desired improvement.

A closer look at the Treaty itself and at the Spaak Report is useful, however, in order to determine what role has been assigned to the "approximation of legislative and administrative provisions," in the life of the Community and in the constitutional structure created by the Treaty.

B. THE APPROXIMATION OF LEGISLATIVE AND ADMINISTRATIVE PROVISIONS

In the Spaak Report¹⁵ the "Assimilation of Legislation" is linked in one chapter with the "Correction of Distortions," though in a separate section. It is pointed out that distortions of competition can arise, for example, where in one country social security services are financed out of general taxation and in another out of contributions with the result that labor-intensive industries in the former country enjoy an advantage compared with those in the latter. Different methods of financing social security and different conditions of employment—for example, the relation between male and female wages, hours of work, overtime pay, and holidays with pay—are especially mentioned as possible causes of distortion. But the assimilation of legislation is not envisaged as the only primary remedy. Even where, as may be the case, several distortions do not so to speak cancel one another out, the Commission is, in the first place, not to go further than to propose that the governments concerned either recommend to the organizations adjustments in collective bargaining or submit legislative changes to their parliaments. In the event of the rejection of its proposals the Commission is to have the power of agreeing to countervailing "escape clauses" permitting subsidies or delaying tariff reductions in proportion to the retained "distortions." Unification of legislation appears as an ultimate device where such measures do not promise success.

In certain cases the best way of making the distortion disappear will turn out to be to assimilate in the various coun-

¹⁵ Spaak Report, pt. I, tit. 2, ch. 2, §§ 1 and 2.

tries the legal provisions the disparity of which gives rise to the distortion itself.

But even in such cases one ought to proceed with caution:

One must not however lose sight of the effect on costs which such modifications of legislation may have; it will also be necessary to endeavor to give priority to different modifications which between them can in this respect produce an effect of mutual compensation.¹⁶

Although the assimilation of legislation thus appears in the Spaak Report primarily as an instrument to be applied in the last resort for the elimination of distortions which cannot otherwise be removed, it is recognized that it may serve more far-reaching purposes, for example, the removal of customs barriers (through unification of revenue legislation), or the removal of obstacles to the free circulation of goods and persons through the unification of social security systems. It will be noted that the Spaak Report does not envisage simply the preservation of social security rights for migrant workers (such as has already been largely achieved in the course of recent events)¹⁷ but the unification of social security systems as a whole. These more far-reaching measures will, however, have to be adopted unanimously.

No one can read the section of the Spaak Report which deals with assimilation of legislation without becoming aware that the two branches of the law which must have been foremost in the minds of its authors were revenue law and labor and social security legislation. As regards labor law in particular, the Report leaves no doubt at all that the Common Market is expected to bring about a high degree of uniformity. The relevant passages are important enough to be given here *in extenso*:¹⁸

As regards the conditions of labor, one cannot easily visualize the continued existence inside a common market of systems which are noticeably different from each other. The spontaneous tendency towards the harmonization of the social systems and wage levels and also the pressure exercised by the trade unions in order to obtain a co-ordination of the conditions of labor will be supported by the gradual creation of the Common Market. The unification which should proceed naturally, *and without in any country encroaching upon the conditions of life and labor*, will

¹⁶ *Id.* at 64.

¹⁷ Règlement N° 3 concernant la sécurité sociale des travailleurs migrants [1958] J'L OFF. 561 [hereinafter cited as Reg. N° 3].

¹⁸ Spaak Report 65.

moreover contribute to facilitating to a considerable extent the gradual creation of freedom of movement of labor.

Again we see, here more particularly with regard to legislation, the thought which runs like a leitmotiv through the Spaak Report, that assimilation must be the fruit primarily of economic development, subject, however, to the principle, more fully articulated in the subsequent pronouncements of the Commission, that the development thus engendered will always be upwards and not in the direction of deteriorating conditions. And again, as previously in a more general context, there is a warning against precipitate action.

On the other hand, one should not underrate the difficulty of solving these problems exclusively by governmental action and in accordance with a time-table rigidly fixed in advance. Thus, a shortening of the legal or normal work week constitutes in fact an increase of wages. Wage increases, however, are not compatible with stable prices unless they either accompany an increase of productivity or can be carried into effect through an increase of the wage earners' share in the national income. The procedure which will have to be set in motion will have to give all the incentives which are necessary so as to make use of the given conditions in order to bring about an assimilation of the conditions of labor: it will in particular be a case of giving to such upward movements of wages as are compatible with stability a character which ensures the desired assimilation.

These procedures will have to make it possible to take account of the diversities of economic conditions, working class traditions, and the elements which go into the making of a policy of raising the standard of living of labor in their entirety. It will therefore be necessary to entrust the Commission with the task of making proposals which will take into account the forms and the times of change which are most propitious.

Here, as is true of the correction of distortions, these proposals will, during the first stage, require the unanimous consent of the Council representatives of the Member States; subsequently they can be adopted by a qualified majority vote. If there is in fact a distortion and if there is no agreement on the counter-measures proposed by the Commission, the state concerned should, in the opinion of the authors of the Spaak Report, be given by the Commission the benefit of an escape clause.

The Treaty itself has, with some modifications, given effect to the policy formulated in the Spaak Report. The programmatic pronouncement in Article 3(h) is implemented in Part III, Title I, Chapter 3 of the Treaty which bears the heading "Approximation of Laws." This Chapter makes clear that the legal power of the Community to enforce an approximation of legislation is very limited indeed. It has no power to legislate in a "supranational" manner with direct effect upon the laws of the Member States. The Council is by Article 100 instructed to "issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market." "Directives," in contradistinction to "regulations," are, of course, not directly applicable as part of the law of a Member State, but merely bind "any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means."¹⁹ Moreover, one exception apart, the Council can issue such directives only "by means of a unanimous vote"²⁰ so that each of the six members has an absolute veto. This is, of course, in line with the recommendations of the Spaak Report. The Council must act "on a proposal of the Commission," that is, a directive can only issue if a majority of the Commission²¹ and all members of the Council are in agreement, and, where a directive involves legislative amendment in any Member State, the Assembly and the Economic and Social Committee must be consulted. The Spaak Report recommended that, after the first stage, proposals for unification of legislation should be passed by the Council with a qualified majority, and this has—with some qualifications—been adopted, thereby creating the one exception to the principle of unanimity. Where the Commission has found that a disparity between the legislative and administrative provisions of the Member States distorts the conditions of competition and thereby causes a state of affairs which must be eliminated, and where consultation between the Commission and the interested Member States has not resulted in an agreement which eliminates the distortion (a situation which may, perhaps, be regarded as not altogether unlikely in connection with social legislation), the Council will be able, after the first stage ends, to issue directives, acting by means of a qualified vote on a proposal

¹⁹ Treaty art. 189.

²⁰ *Id.* art. 100.

²¹ *Id.* art. 163.

of the Commission.²² Since the vote has to be by qualified majority, the issue of the directive could, of course, be vetoed by any two of the three Members which have four votes on the Council (France, Germany, Italy) or by any one of them with the concurrence of either Belgium or the Netherlands.²³ A compromise between conflicting interests in the form of an amendment of the directive proposed by the Commission requires either the concurrence of the Commission itself or a unanimous vote of the Council.²⁴

It is certainly not the policy of the Treaty to make supranational legislation easy, and, as we have seen, this cautious approach to the problem corresponds not only to the attitude reflected in the Spaak Report but also to the needs of the situation. It would be unrealistic to place much reliance on the legislative powers of the Community as an instrument to assimilate social and labor legislation in the six countries.

This, however, is in no way to imply that certain branches of the law cannot, or should not, be gradually assimilated to one another. In fact, in a Resolution passed on January 15, 1959,²⁵ the Assembly expressed the view that importance should be attached to the harmonization of conditions of employment in the Community, and that to this end the Commission should not only furnish the representatives of the interests involved with the necessary documentary material, but should also take active steps to promote assimilation of the legal rules which apply in the various countries and should make contact with the relevant organizations with a view to achieving it. The Directorate-General of Social Affairs, which is the relevant administrative service of the Commission,²⁶ is actively engaged in a number of investigations, for example, of the existing legal situation with respect to the entry and the employment of foreign workers and their families,²⁷ of collective agreements,²⁸ of the way in which the principle of equal remuneration for men and women is applied in the six countries,²⁹ and of other matters. A certain measure of conformity among employment conditions in the Six may be

²² *Id.* art. 101, para. 2.

²³ *Id.* art. 148.

²⁴ *Id.* art. 149.

²⁵ Résolution sur les questions sociales traitées dans le premier rapport général sur l'activité de la Communauté Économique Européenne, *op. cit. supra* note 14, pt. V, paras. 13-16, at 168-69.

²⁶ SECOND GEN'L REP. Annexes A, B, C.

²⁷ *Id.* para. 174.

²⁸ [January 1, 1958-Sept. 17, 1958] E.E.C. COMMISSION, FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY para. 108 [hereinafter cited as FIRST GEN'L REP.].

²⁹ SECOND GEN'L REP. para. 79.

the fruit of these endeavors. Whatever is achieved will more nearly resemble the efforts of the United States Commission on Uniform State Laws than those of the United States Congress. In other words, it will result from cooperation under the auspices of the Community rather than from any direct intervention by the Community. Article 117 may be, in sum, the expression of an aspiration rather than of a program of action. To say this is not necessarily to imply a defeatist attitude concerning the possibility of gradually assimilating the legislation of the Six, but may only be to suggest that voluntary cooperation is the most promising method of doing so. This means that the policy of Article 118 may be more significant than the (at first sight) more ambitious pronouncements of Article 117.

C. COOPERATION IN GENERAL

Article 118 provides that "without prejudice to the other provisions of this Treaty and in conformity with its general objectives, it shall be the aim of the Commission to promote close cooperation between Member States in the social field."

The Treaty does not attempt an exhaustive enumeration of methods envisaged to achieve this aim. Mutual advice may, of course, be sought and given directly between Member States, but the Treaty reflects the view that the Commission and its administrative services are the "chosen instruments" of assistance to Member States and are to act as intermediaries, presumably adopting methods already well tested by the International Labor Office at Geneva and by the High Authority of the European Coal and Steel Community.

The Commission has already established contacts with both of these organizations. On July 7, 1958, the European Economic Community entered into a very important Agreement with the International Labor Organization,³⁰ in which the two bodies agreed to consult regularly with one another on questions of mutual interest, to keep each informed about the other's programs, and to seek coordination of work. The I.L.O. also agreed to give the Commission technical assistance. Since this Agreement was concluded, the Commission has established relations with the I.L.O. especially in connection with problems of safety, industrial hygiene, health protection, and vocational training, and the Commission has sent

³⁰ Accord Concernant la Liaison Entre l'Organisation Internationale du Travail et la Communauté Économique Européenne [1959] J'L OFF. 521; FIRST GEN'L REP. para. 105.

observers to I.L.O. meetings at which problems of this kind were discussed.³¹

In regard to social as well as other problems close liaison has been established between the Commission and the High Authority of the European Coal and Steel Community³² especially with respect to the health and safety problems referred to.³³ The history of what has so far been the most significant achievement of the Community in the field of social policy—the Regulations Concerning the Social Security of Migrant Workers³⁴—indicates that the work done over the past few years by the Coal-Steel Community and especially by the High Authority is a very important basis for the work of the Commission. The comprehensive research done by and on behalf of the High Authority, particularly in the fields of labor law³⁵ and of social security,³⁶ cannot fail to be of great benefit to the future work of the Economic Community. As regards health and safety, contact has also been established between the Commission of the Economic Community and that of Euratom, which is obviously faced in this area with very important special problems of its own.³⁷

The Commission must "act in close contact with Member States, by means of studies, the issuing of opinions, and the organizing of consultations both on problems arising at the national level and on those of concern to international organizations."³⁸ The extensive investigations which formed the basis of the two Exposéés published by the Commission,³⁹ on the Social Situation in the Community were

³¹ SECOND GEN'L REP. paras. 62, 186, 189; see also Bulletin, May 1959, ch. III, para. 33.

³² FIRST GEN'L REP. paras. 39, 104.

³³ SECOND GEN'L REP. para. 189.

³⁴ See below, and for the history: FIRST GEN'L REP. paras. 117-18; SECOND GEN'L REP. para. 165.

³⁵ Especially the work of a group of six experts appointed by the High Authority. Three volumes have so far been published: They deal with sources of labor law, with workers' representation at enterprise level and with job security. It is understood that a fourth volume on the law of strikes and lockouts is soon to be published. Each volume contains a detailed analysis of the law in each of the six countries, preceded by a general report. These volumes are of the highest quality and quite indispensable for any research in this field.

³⁶ Especially the two volumes of synoptic monographs on the social insurance systems of the six countries and of Great Britain.

³⁷ SECOND GEN'L REP. para. 189.

³⁸ Treaty art. 118, para. 2.

³⁹ Pursuant to Treaty art. 122. The first EXPOSÉ SUR LA SITUATION SOCIALE DANS LA COMMUNAUTÉ À L'ENTRÉE EN VIGUEUR DU TRAITÉ INSTITUTANT LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE, dated Sept. 17, 1958, describes the situation at the time of the coming into force of the Treaty (Jan. 1, 1958); the second, dated May 1959, covers the development in 1958 and during the first three months (broadly) of 1959 [hereinafter cited as First EXPOSÉ and Second EXPOSÉ].

carried out with the assistance of the appropriate authorities in the six countries. This is also true of the series of preparatory studies which have been made or are now underway and to which reference is made in the Second Report of the Commission: for example, the studies of the legal and administrative situation in each of the six countries with regard to the entry and employment of foreign workers and their families; the material collected in preparation of a legal instrument directed at the suppression of discrimination; the surveys concerning holidays with pay, hours of work, overtime pay; the legal situation in regard to collective agreements, equal pay for men and women; and the detailed analysis of the labor market and its prospects, of occupational training⁴⁰ and other matters.

The employers' organizations and the trade unions of the Six have established permanent organs of liaison at the seat of the Commission. Through these, and, of course, through the Economic and Social Committee of the Community as well as the Social Affairs Committee of the European Parliamentary Assembly, contacts are established across the borders of the Member States, and between the Commission and its services on one side and representatives of the interests concerned, the "social partners," on the other. One of the most valuable features of the Community may be that it strengthens the ties between employers and unions in Europe and that it may give rise to an international set of "pressure groups" without which a modern constitutional organism is hardly capable of operating. The Treaty itself⁴¹ requires the Commission to consult the Economic and Social Committee before issuing opinions. The Assembly and especially its Social Affairs Committee have taken a very active interest in the social aspect of the work of the Commission.⁴²

Article 118 appears to place the Commission under a duty to aid Member States in shaping their policies with regard to the ratification of I.L.O. Conventions and the application of I.L.O. Recommendations.⁴³ The Commission may conceivably also assist Member States in framing future reports required by the I.L.O. Constitution,⁴⁴ and in formulating policies to be pursued at I.L.O. conferences.

Over and above all this, however, elucidation and compilation

⁴⁰ SECOND GEN'L REP. paras. 174, 178, 179, 181, 183.

⁴¹ Treaty art. 118, para. 3.

⁴² SECOND GEN'L REP. para. 161; see also J'L OFF., *passim*.

⁴³ Adopted pursuant to I.L.O. CONST. art. 19.

⁴⁴ *Id.* art. 19, paras. 5(c), (e); 6(b), (d); 7(b) (iii), (iv), (v).

of facts with regard to social and labor conditions, and comparative legal and statistical studies like those so successfully completed over a number of years by the Coal-Steel Community will be a major benefit which the Community can confer on all those interested in the economic and social situation in the Six.

In Article 118 a number of matters are mentioned as particularly suitable for collaboration, but the Commission has emphasized that this list is enumerative and not exhaustive.⁴⁵ It has pointed out that the Treaty provisions on "the action to be taken by the Community in the social field are in general less rigid than the provisions affecting the economic field" and it considers that "this is in a way balanced by the fact that the field of activity of institutions in the social sphere is not strictly delimited." On this basis the Commission has defined the scope of its activities:

The European Commission has already been able to state to the European Parliamentary Assembly and to the Economic and Social Committee that it is not the Commission's intention that the interpretation (of the relevant Articles of the Treaty) shall be restrictive; it cannot conceive that the Community has no social purpose, and it has grounds for supposing that the other institutions of the Community share its views in this connection.⁴⁶

Among the items of collaboration expressly mentioned in Article 118, "employment" was given place of pride. This aspect of collaboration is closely connected with the implementation of the provisions (especially Article 49(d)) which serve the gradual creation of freedom of movement. The two Exposéés on the Social Situation which the Commission has published to date in accordance with Article 122 of the Treaty contain surveys of the employment situation in the six countries.⁴⁷ The Commission is, however, preparing a general detailed study of the labor market, and, so far as possible, forecasts by geographical and occupational sectors of what the manpower situation in the next few years will be, taking into account economic data, demographic developments, and foreseeable technological changes.⁴⁸ The study will be in two stages: the first will consist in an analysis of the present situation, the second in the formulation of forecasts. It will include an analysis of employment—of men and women separately—from 1954 to 1958, and of the main

⁴⁵ FIRST GEN'L REP. para. 103.

⁴⁶ SECOND GEN'L REP. para. 159.

⁴⁷ FIRST EXPOSÉ ch. A.I.-B.I.; SECOND EXPOSÉ paras. 6-19.

⁴⁸ SECOND GEN'L REP. para. 181.

lines of development (disparities in rates of expansion in different branches of activity or regions, changes in migration and the like) and a study of existing or proposed measures to establish equilibrium (for example, vocational training, decentralization, and regional development). The study is being undertaken jointly by the Directorate-General of Social Affairs of the Commission and the Joint Statistical Office of the three Communities,⁴⁹ with the assistance of a group of statistical and labor experts of the various governments who conferred in January 1959 and approved the scheme. These studies should, when completed, prove to be of great practical interest to all those concerned with the future of the Community. The Commission is also considering a general scheme to coordinate measures aimed at improving employment services.⁵⁰

The subject "occupational and continuation training" which is also singled out in Article 118 as a particularly important topic for cooperation is very closely connected with the problem of freedom of movement as well. As the experience of the Coal-Steel Community shows, it is easier to create conditions of geographical mobility for skilled than for unskilled labor.⁵¹ Moreover, it is a commonplace that this is one of the decisive elements in raising the productivity of labor. Pursuant to Article 125(1)(a) it is one of the purposes of the European Social Fund⁵² to cover one half of the expenses of a state or a public corporation in ensuring productive re-employment of workers by means of occupational re-training. Article 128 requires the Council, on a proposal of the Commission and after the Economic and Social Committee has been consulted, to "establish general principles for the implementation of a common policy of occupational training capable of contributing to the harmonious development both of national economies and of the Common Market." This power and duty of the Council is closely connected with one of the aims of the European Social Fund—achievement of a higher degree of labor mobility in Europe not only in law but in fact. The two Exposéés which have so far been published by the Commission in accordance with Article 122 of the Treaty contain surveys of the institutions for occupational training which exist in the Six and of their significance in statistical terms.⁵³ In

⁴⁹ FIRST GEN'L REP. para. 39; SECOND GEN'L REP. para. 19.

⁵⁰ SECOND GEN'L REP. para. 182.

⁵¹ Spaak Report pt. I, tit. 3, ch. 3, and esp. at 89. And on the labor policy of the E.C.S.C. in general, see HAAS, THE UNITING OF EUROPE 88 *et seq.* (1958); on the application of the here relevant E.C.S.C. Treaty art. 69, see p. 91.

⁵² See PART I, Section G of the text *infra*.

⁵³ First EXPOSÉ ch. B.II; Second EXPOSÉ paras. 20-31; also see note 39 *supra*.

both, analysis of the training of apprentices and other young workers on the one hand, and re-training, re-adaptation, or rehabilitation centers for adults on the other, are separately treated. In its First Report⁵⁴ the Commission expressed the view that, for the time being, no common occupational training policy was feasible, but that it would seek to achieve a measure of coordination, including exchange of information between governments and undertakings, and joint projects. The Second Report⁵⁵ indicates gradual progress: a general program has been drawn up which lays down an order of priority for such action as may be undertaken, but little has so far been done to implement Article 128, which obviously confronts the Commission with a most difficult task. Under the regulations to be issued pursuant to Article 127 for the purposes of the Social Fund⁵⁶ the term "re-training" will have to be defined, a definition which will be of great importance for the social activities of the Community. Draft regulations have, at the time of writing, been agreed on by the Commissioners and passed on to the Council. In these⁵⁷ "re-training" is defined to include all measures concerning the training and adaptation of skilled, semi-skilled, and unskilled workers in accordance with a training scheme. The Commission also attaches great importance to the exchange of young workers which, according to Article 50 of the Treaty, "Member States shall, under a common program, encourage." It proposes⁵⁸ a first program making it increasingly possible for young workers to spend a period of apprenticeship abroad, and then, through regular annual exchange programs, to enlarge the scope of such multilateral and bilateral arrangements as are already in existence, but this scheme is still in a preparatory stage.⁵⁹ In connection with all questions of vocational training, the Commission⁶⁰ cooperates with other international organizations and especially with the I.L.O. Meetings have been held under the auspices of the High Authority of the Coal-Steel Community and of O.E.E.C., and these have been attended by observers from the Commission. From the point of view of the future prosperity of Europe this problem of occupational or voca-

⁵⁴ FIRST GEN'L REP. para. 116.

⁵⁵ SECOND GEN'L REP. paras. 183-86.

⁵⁶ See PART I, Section G of the text *infra*.

⁵⁷ They have not yet been published, but for a detailed summary, see Bulletin, Sept. 1959, paras. 40-41, and on the point discussed in the text, the third sub-paragraph in paragraph 41.

⁵⁸ FIRST GEN'L REP. para. 116.

⁵⁹ SECOND GEN'L REP. para. 185.

⁶⁰ *Id.* para. 186.

tional training may well turn out to be one of the most important aspects of the Common Market. It is a matter of general knowledge that in some parts of Europe, especially in Italy,⁶¹ unemployment and under-employment is most acute among unskilled workers for whose services there is comparatively little demand.

Another subject mentioned in Article 118 as especially important for cooperation is "protection against occupational accidents and diseases." Such protection is closely connected with "industrial hygiene," (also mentioned in this context) and, of course, with social security. The Assembly showed its special interest in these matters in a resolution passed on January 15, 1959,⁶² urging the Council to provide the financial means to enable the Commission to carry into effect a program for the prevention of occupational diseases and industrial accidents, and for compensation for both. The Assembly's Resolution also urged the Council to carry out in conjunction with Euratom and the Coal-Steel Community a program for the coordination of the existing health and safety services. In its First Exposé on the Social Situation the Commission devoted a brief chapter⁶³ to these problems containing a survey of recent legislative changes and administrative arrangements in the Six; this survey was brought up to date in the Second Exposé,⁶⁴ but a great deal of information in this field clearly remains to be collected. Here especially the extensive work done by the High Authority of the E.C.S.C.⁶⁵ ought to be invaluable as an example, and the Commission reports⁶⁶ that it has established contacts with the High Authority, the I.L.O., and the Euratom Commission. The Commission is planning a number of general studies including one on the possibility of extending insurance to accidents and diseases not at present covered by social insurance legislation.⁶⁷ In accordance with a special request of the Parliamentary Committee on Safety, Industrial Hygiene and Health Protection, a list of occupational diseases recognized as such in the Six has been drawn up by the services of the Commission, but this is considered to be only a "first working paper" for the study of occupational diseases. The Commission is to make a systematic

⁶¹ Second EXPOSÉ para. 12.

⁶² [1959] J'L OFF. 163.

⁶³ First EXPOSÉ ch. D.II.

⁶⁴ Second EXPOSÉ paras. 112-19.

⁶⁵ See, *e.g.*, E.C.S.C HIGH AUTHORITY, SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY paras. 234-258 (1959).

⁶⁶ SECOND GEN'L REP. para. 189.

⁶⁷ FIRST GEN'L REP. para. 121.

study of every disease and to publish a series of monographs on the subject. This in turn is to lead to a comprehensive study which will consider medical, legal, technical and statistical aspects.⁶⁸

The problem of geographical mobility of labor in Europe is overshadowed by the housing shortage, and like the High Authority of the E.C.S.C.,⁶⁹ the Commission was almost compelled by the force of circumstances to give it special attention. The significance of the housing shortage is obvious to anyone who reads the especially informative passages on social housing in the First⁷⁰ and Second⁷¹ Exposéés on the Social Situation. For some reason, this topic does not appear among those enumerated in Article 118, a fact which emphasizes the importance of the Commission's conclusion that this enumeration is not exclusive. In its First Report⁷² the Commission expressed its intention to devote special attention to housing problems (as well as to social services generally) and, in collaboration with the employers' and employees' organizations, to undertake as the first order of business a systematic collection of factual data. When the First Report of the Commission came before the European Parliamentary Assembly, questions were addressed⁷³ both to the High Authority of the E.C.S.C. and to the Commission with special reference to a passage in the latter's Report to the effect that the Commission would endeavor to stimulate the raising of additional funds. It was suggested that the two executive bodies should enter into consultation with a view to creating a joint housing service. The answer was to the effect that, although contact had been established in order to make the High Authority's experience available to the Commission and although the Commission would remain fully informed about the activities of the High Authority, a joint service was not feasible by reason not only of the different scopes of activity of the two organizations but also, and essentially, because the Commission lacked the financial resources which were at the disposal of the High Authority. The point was again made in the Second Report.⁷⁴ This is clearly one of the essen-

⁶⁸ SECOND GEN'L REP. para. 190; Bulletin, Sept.-Dec. 1958, ch. III, para. 15; Bulletin, Feb. 1959, pt. III, para. 50.

⁶⁹ See for recent developments of this important branch of the High Authority's activities: E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 65, paras. 226-33.

⁷⁰ First EXPOSÉ ch. D.III (a).

⁷¹ Second EXPOSÉ paras. 120-27.

⁷² FIRST GEN'L REP. para. 122.

⁷³ Question N° 19 & N° 20, [1958] J'L OFF. 553-54.

⁷⁴ SECOND GEN'L REP. para. 192.

tial weaknesses of the European Economic Community compared with the European Coal and Steel Community. In a sense the interest the Commission is taking in "social dwellings for workers, large families, old people, refugees and repatriates, migrants and any other economically weak persons" is bound to be theoretical and to be restricted to obtaining and examining "the necessary information on which to base future action." It remains to be seen whether and to what extent the "re-settlement allowances" which will be payable out of the European Social Fund⁷⁵ will be able to bridge the gap.

The Commission is also concerned with what in its Exposé⁷⁶ and Reports⁷⁷ are called "social services," that is, mainly the voluntary welfare services initiated either by individual firms or by charitable organizations. In its Second Exposé,⁷⁸ special attention was paid by the Commission to the training and status of welfare workers. As pointed out in the Second Report⁷⁹ this too is a matter very closely linked with migration problems. It stands to reason that, in the event that family migrations materialize, specialized welfare services will be necessary. A conference of senior officials in the field, of social service specialists, and of heads of social welfare schools and organizations was held under the Commission's auspices in Brussels in December 1958.⁸⁰

Other topics mentioned in Article 118 as subjects for "close cooperation" include "labor legislation and working conditions" and "the law as to trade unions and collective bargaining between employers and workers." This may, of course, eventually lead to the creation of common standards which do not necessarily have to be legislative in character. Thus, consultation between the "social partners" organized by the Commission may in the fullness of time lead to assimilated collective bargaining practices, provided that trade union organization and the facts of labor-management relations in the Six are sufficiently similar—of which there is no evidence at present.⁸¹ Perhaps it may even lead to collective bargaining on a supranational level, or, on the pattern of the remarkable work done in this field by the I.L.O.,⁸² to supranational safeguards of

⁷⁵ Treaty art. 125 (1) (a) discussed *infra* in PART I, Section G of the text.

⁷⁶ First EXPOSÉ ch. D.III (b); Second EXPOSÉ paras. 128-34.

⁷⁷ FIRST GEN'L REP. para. 122; SECOND GEN'L REP. para. 191.

⁷⁸ Second EXPOSÉ paras. 135-41.

⁷⁹ SECOND GEN'L REP. para. 193.

⁸⁰ Bulletin, Feb. 1959, ch. II, para. 28.

⁸¹ See PART II of this Chapter.

⁸² See JENKS, THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM (1957).

freedom of organization, or even to supranational methods for the prevention or settlement of industrial disputes.

This is only speculation, however. What is now certain is that the important work done by the High Authority of the Coal-Steel Community, in setting up a "working party" of distinguished academic lawyers and the extremely useful series of scholarly comparative studies on "Sources of Labor Law," on "Stability of Employment," and on "Workers' Representation at Enterprise Level" which this group has so far produced⁸³ are more likely to serve as a pattern for the immediate future activities of the Commission's services in this area. The two Exposéés of the Commission contain progress reports on labor legislation as well as on trends in trade union claims and in collective bargaining. In its First Report⁸⁴ the Commission announced that it would have prepared (and would keep up to date) a series of comparative studies on labor law, trade union law, and collective bargaining, as well as on labor conditions, including wages and hours, with special emphasis on matters especially mentioned in the Treaty,⁸⁵ that is, equal pay for men and women, holidays with pay, and overtime remuneration, as well as problems of techniques of production (including automation) and productivity. The Second Report shows that preparatory work on holidays, hours of work, overtime, and working conditions in the more important sectors of the Community is under way, and that a study on labor costs is contemplated. Studies on the law of collective bargaining and on equal pay for men and women have been begun, and a conference on automation is due to be held in the near future.⁸⁶

D. SOCIAL SECURITY

One of the most important fields of cooperation mentioned in Article 118, and in some respects the most promising, is "social security." The problem of social security has, within the framework of the European Economic Community, two distinct aspects: one is linked with the freedom of movement of workers within the Community and the other concerns the elimination of "distortions" and a gradual approach to the distant goal of "harmonization."

⁸³ See note 35 *supra*.

⁸⁴ FIRST GEN'L REP. para. 108.

⁸⁵ Treaty arts. 119, 120 and Protocol cited note 13 *supra*.

⁸⁶ SECOND GEN'L REP. paras. 178-80.

I. THE REGULATIONS CONCERNING MIGRANT WORKERS

The Spaak Report attached some importance to the promotion of freedom of movement in Europe,⁸⁷ and its authors pointed out⁸⁸ that the machinery of re-adaptation⁸⁹ and of centralized financial assistance for unemployed workers might lead to a harmonization of unemployment insurance and that this in turn would facilitate freedom of movement. The Treaty itself went considerably beyond this modest prognostication. Its provisions are based on the insight that social security—like employment and re-training—vitaly affects the facts as distinct from the law concerning freedom of movement. If a migrant worker loses a legally protected expectation of benefits acquired through payment of contributions, or if benefit payments cannot be made across the boundaries of Member States, a serious obstacle is placed in the path of that “free movement of workers” which, according to Article 48, “shall be ensured within the Community not later than the date of expiry of the transitional period.” Even before 1957 a network of conventions had been concluded in Western Europe—partly under the auspices of the Council of Europe and partly under those of the Brussels Treaty and of Western Union⁹⁰—which were designed to protect the social security rights acquired by workers in one country and to make them transferable to another, as well as to facilitate the payment of benefits abroad. On December 7, 1957, the Member States of the Coal-Steel Community signed a Convention concerning the Social Security of of Migrant Workers, arrived at with the assistance of the I.L.O.,⁹¹ and giving effect to these principles on a very broad scale. Although concluded under the auspices of the High Authority, this was merely a Convention; to become law it would have required ratification by the six parliaments. The Treaty of Rome, on the other hand, contains a provision—Article 51—which, in regard to social security provision for migrant workers, permits the adoption of international legislation in the strict sense. The Article requires the Council to adopt, in the field of social security, measures to facilitate the free movement of workers:

⁸⁷ Spaak Report pt. I, tit. III, ch. 3, at 88.

⁸⁸ *Id.* at 91.

⁸⁹ See PART I, Section G of the text *infra*.

⁹⁰ HAAS, *op. cit. supra* note 51, at 374-75; and for an enumeration of these conventions, see Reg. N° 3, *op. cit. supra* note 17, Annex D at 587.

⁹¹ FIRST GEN'L REP. para. 117; SECOND GEN'L REP. para. 165.

The Council, acting by means of a unanimous vote on a proposal of the Commission, shall, in the field of social security, adopt the measures necessary to effect the free movement of workers, in particular, by introducing a system which permits an assurance to be given to migrant workers and their beneficiaries:

(a) that, for the purpose of qualifying for and retaining the right to benefits and of the calculation of these benefits, all periods taken into consideration by the respective municipal law of the countries concerned, shall be added together; and

(b) that these benefits will be paid to persons resident in the territories of Member States.

According to the wording of this Article, the "measures" taken by the Council with the object of encouraging freedom of movement among those in expectation or in receipt of benefits might have been "directives" only. Instead, the Council issued Regulations incorporating the Coal-Steel Community Convention of December, 1957, thereby automatically making its content law in the six countries.⁹²

It is no exaggeration to say that the Regulations concerning the Social Security of Migrant Workers of December 16, 1958,⁹³ and the accompanying Regulations for their Application⁹⁴ are, at the time of writing (autumn 1959), not only the most important step taken by the Community in the fields of labor law and social security, but by far its most significant achievement in legislation altogether. The transformation of the E.C.S.C. Convention into E.E.C. Regulations had been envisaged in a Protocol to the former,⁹⁵ and the preparatory work for the Regulations to be issued by the Council of the E.E.C. had, so to speak, been done before the Community itself had seen the light of day. This was therefore a unique situation in which a very comprehensive piece of Community legislation could be carried into effect within a comparatively short time. As early as April 1958 the Commission made the requisite proposals to the Council, proposals without which, according to Article 51, the Council could not have acted. Some of the governments registered a number of reservations with regard to certain aspects of

⁹² See Treaty art. 189, para. 2.

⁹³ Reg. N° 3, *op. cit. supra*, note 17.

⁹⁴ Règlement N° 4 fixant les modalités d'application et complétant les dispositions du règlement n° 3 concernant la sécurité sociale des travailleurs migrants, [1958] J'L OFF. 597 [hereinafter cited as Reg. N° 4].

⁹⁵ FIRST GEN'L REP. para. 118. This paragraph contains the history of the making of these regulations which is epitomized in the text.

the Convention, but, after the European Parliamentary Assembly had, on June 26, 1958, urged the adoption of the Regulations and expressed its regrets that the unanimous consent of the six governments had not yet been forthcoming, the Council was able, on July 2, to approve the Regulations in principle. All objections having been settled by agreement, the Council could then adopt them on September 25, 1958, by the requisite unanimous vote.⁹⁶ The technical administrative Regulations⁹⁷ for the application of the new scheme were drafted with the aid of the I.L.O. and passed early in December, and on December 16 both sets of Regulations were published in the official journal of the Communities. In accordance with Article 121 the implementation of these measures was assigned to the Commission. For this, too, a unanimous vote of the Council was required, as well as prior consultation with the Economic and Social Committee, actions occurring on February 26 and 27, 1959.⁹⁸ It may be noted that the Regulations are *expressis verbis* based not only on Article 51, but also on Article 227, paragraph 2 of the Treaty, and are applicable to Algeria and the "overseas Departments" of France (Guadeloupe, French Guiana, Martinique, and Réunion) as well as to metropolitan France itself.⁹⁹

The application of these Regulations has been entrusted to a Commission of Administration with far-reaching powers.¹⁰⁰ This Commission consists of representatives of the six governments (who, even prior to the coming into force of the relevant part of the Regulations, met as an informal group of experts; later they transformed themselves into a formal Commission),¹⁰¹ and they are assisted by technical advisers. A representative of the E.E.C. Commission and a representative of the High Authority of the Coal-Steel Community take part in the work of the Commission of Administration, but only in a consultative capacity. The I.L.O. is to give technical assistance in accordance with the Agreement of July 7, 1958, between the I.L.O. and the E.E.C.¹⁰² The Secretariat of the Commission of Administration is provided by the E.E.C. Commission by virtue of the decision of the Council of the 26th and 27th of February.

⁹⁶ Bulletin, Sept.-Dec. 1958, ch. III, para. 14.

⁹⁷ *Ibid.*; FIRST GEN'L REP. para. 119.

⁹⁸ SECOND GEN'L REP. para. 167.

⁹⁹ Reg. N° 3, *op. cit. supra* note 17, Annex A.

¹⁰⁰ *Id.* arts. 43, 44; SECOND GEN'L REP. para. 166.

¹⁰¹ SECOND GEN'L REP. para. 168; Bulletin, Feb. 1959, pt. II, para. 26.

¹⁰² Reg. N° 3, *op. cit. supra* note 17, art. 44 (1) *ad finem*. For the Agreement of July 17, 1958, see note 30 *supra*.

The functions of the Commission of Administration are, as pointed out in the Second Report of the European Commission,¹⁰³ judicial, administrative, and financial. They are judicial inasmuch as the Commission of Administration is required to ensure a uniform interpretation of the Regulations in the six countries, by settling differences among them, by supplying authoritative definitions and the like. They are administrative because it is one of the tasks of the Commission of Administration¹⁰⁴ to draw up the forms of such documents as the certificates and declarations required by the Regulations. The necessary documents for short-term benefits, especially for health insurance, were approved by the Commission of Administration on December 19, 1958, and published in the official journal of the Communities on January 16, 1959,¹⁰⁵ whereas those for pensions and other long-term benefits were published on May 16, 1959.¹⁰⁶ Lastly, the Commission of Administration has financial functions acting as a clearing house by effectuating the payments of the Member States to each other which, as a result of the new European scheme of social insurance for migrant workers, will fall due. For this purpose it will, for example, have to lay down criteria for the fixing of exchange rates and to settle the method of calculating certain lump-sum payments between the various social security institutions. This raises statistical problems which have been studied by a working party. They refer in particular to situations in which benefits are to be supplied or payments are to be made in one country in which the recipient resides on behalf of an institution in another country to which the relevant contributions have been or are being paid.¹⁰⁷ One additional function of the Commission of Administration is to initiate cooperation between the Member States in matters of health and social administration.

As pointed out in the Second Report of the E.E.C. Commission, the Commission of Administration is not a mere consultative body, but a permanent institution, to some extent with executive authority, and part of the constitutional structure of the Community.¹⁰⁸ Dur-

¹⁰³ SECOND GEN'L REP. para. 166.

¹⁰⁴ Reg. N° 4, *op. cit. supra* note 94, art. 2.

¹⁰⁵ Modèles de formules arrêtés par la commission administrative pour la sécurité sociale des travailleurs migrants pour l'application des règlements n°s 3 et 4, [1959] J'L OFF. 37-92; see also SECOND GEN'L REP. para. 168.

¹⁰⁶ Modèles de formules arrêtés par la commission administrative pour la sécurité sociale des travailleurs migrants pour l'application des règlements n°s 3 et 4, [1959] J'L OFF. 581-636; see also SECOND GEN'L REP. para. 169.

¹⁰⁷ SECOND GEN'L REP. paras. 166, 169; Bulletin, Feb. 1959, pt. II, para. 27.

¹⁰⁸ SECOND GEN'L REP. para. 166.

ing the initial period it has been meeting every month to assist in the solution of problems arising from the application of the Regulations.¹⁰⁹

The above-mentioned agreement settled the objections of a number of Member States by incorporation into the Regulations of a number of very important reservations. Thus, the so-called "*frontaliers*"—workers who live in a frontier area and work in a neighboring country—and seasonal workers are largely,¹¹⁰ if not entirely,¹¹¹ excluded as are seamen.¹¹² Other reservations refer to pre-existing international treaties on social security,¹¹³ and to restrictions on payments of certain unemployment benefits outside the country of last employment.¹¹⁴

The provisions setting up the Commission of Administration came into force on December 19, 1958,¹¹⁵ the remainder of both sets of Regulations on January 1, 1959.¹¹⁶ Their general effect is, in the words of the Commission, that "equality of rights between natives and foreigners is made general, periods in insurance are added together and in certain cases benefits are paid out in another Member State." "Consequently frontiers no longer prevent wage earners from benefiting from the rights acquired in the field of social security."

2. ASSIMILATION OF SOCIAL SECURITY LEGISLATION

The first step in fulfilling the much more ambitious and long-term task of gradually assimilating the various social security legislations must be to collect information concerning both the legal and the financial aspects of existing social security, and especially social insurance schemes. In this respect the High Authority of the Coal-Steel Community has done pioneer work of very great importance¹¹⁷ and paved the way for the further studies which the Commission is contemplating.¹¹⁸ The work of the two organizations in this field will be closely coordinated. The Commission plans to embark on a general analysis of the various systems of social insurance

¹⁰⁹ *Id.* para. 169; Bulletin, Feb. 1959, pt. III, paras. 44-46.

¹¹⁰ Reg. N° 3, *op. cit. supra* note 17, art. 4, paras. 3, 4, 7, and Annex C.

¹¹¹ See on this: Bulletin, May 1959, pt. III, para. 31.

¹¹² Reg. N° 3, *op. cit. supra* note 17, art. 4, para. 6.

¹¹³ *Id.* art. 6 and Annex D.

¹¹⁴ *Id.* art. 37 and Annex C.

¹¹⁵ SECOND GEN'L REP. para. 165.

¹¹⁶ *Id.* para. 164.

¹¹⁷ Especially through the series of monographs on the systems of Social Security in the six Member Countries and in Great Britain.

¹¹⁸ FIRST GEN'L REP. para. 120; SECOND GEN'L REP. para. 187.

law in existence within the Community, and on special studies—for example, concerning social security financing and the relationship between social security and labor law. One aim is to arrive at a statistical basis for the comparison of the total labor costs of enterprises, a comparison which presupposes not only an investigation of wages but also of social expenditure by employers.¹¹⁹ The Exposé on the Social Situation will, if one may judge by the two Exposés which have so far seen the light of day, contain valuable information on current developments in this field.¹²⁰ The First Exposé also contains a number of comparative tables¹²¹ which should be of great assistance to the readers of this book.

It is only when this preparatory and informative work is much further advanced that the Commission will be able to initiate substantive measures to assimilate legislation. The aim is in the first place to bring about a measure of uniformity in matters such as administrative procedures, age limits, various time limits, the lists of insurable occupational diseases and the like, and eventually, in application of the European Code of Social Security and the additional Protocol, prepared by, and adopted under the auspices of, the Council of Europe,¹²² to coordinate the systems of social security in the Member States and thus to contribute to an equalization of the conditions of competition. This, however, will obviously require years of study and preparation. Meantime the Commission considers that one of its objects is not only to keep an eye on the effect of social security on the functioning of the Common Market, but also on the repercussions which the operation of the Common Market may in turn have on the various aspects of social security.¹²³

E. THREE SPECIAL PROBLEMS OF HARMONIZATION

Among the factors of “distortion” which should be eliminated by practical measures of assimilation, the Spaak Report¹²⁴ mentions with special emphasis “conditions of labor, such as the relation between the wages of men and women, the systems of working hours, overtime, or vacations with pay.” The authors of the Report consider these topics as particularly important in connection with the harmonization of legislation:

¹¹⁹ SECOND GEN'L REP. para. 188.

¹²⁰ FIRST EXPOSÉ ch. D.I; Second EXPOSÉ paras. 107–11.

¹²¹ There are three tables at the end of First EXPOSÉ showing the scope of Social Security legislation.

¹²² See note 188 *infra*.

¹²³ FIRST GEN'L REP. para. 120.

¹²⁴ Spaak Report pt. I, tit. 2, ch. 2 at 63.

Even if the existing disparities did not give rise to distortions, it would be necessary for the governments to make special effort gradually to harmonize the existing systems with regard to:

- i. the principle of equal pay of men and women;
- ii. the length of the normal working week beyond which overtime is payable, and the rates of overtime pay;
- iii. the length of paid vacations.¹²⁵

If its proposals for the elimination of distortions are rejected, the Commission is, after the end of the first stage, to be entitled to agree to the application of escape clauses. For example it could permit subsidies or the delay of tariff reductions commensurate with the continuing distortions.¹²⁶ Once more it is emphasized that "escape clauses" were, according to the Report, to be applied primarily in connection with the three topics referred to above.¹²⁷

The Treaty has accordingly crystallized the general aspirations of the Community in the areas of labor law and social policy into more tangible policies in these three respects. It mentions (in Article 119) "the principle of equal remuneration for equal work as between men and women workers," "paid holidays" (in Article 120) and (in a very different form and in the Protocol relating to Certain Provisions of Concern to France, No. II) working hours and overtime payment.

I. EQUALITY OF THE SEXES

Of these three provisions the only one to create at once a legal obligation among the Member States is Article 119, the operative first paragraph of which is as follows:

Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

The background of the provision is to be found not only in the proposals of the Spaak Report but also in the Preamble of the Constitution of the International Labor Organization of 1946¹²⁸ and especially in the I.L.O. Equality of Remuneration Convention of

¹²⁵ *Id.* at 65-66.

¹²⁶ *Id.* at 64.

¹²⁷ *Id.* at 66.

¹²⁸ "And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the . . . *recognition of the principle*

1951¹²⁹ which has been ratified by Belgium, France, the German Federal Republic, and Italy, but not by Luxembourg or the Netherlands.¹³⁰ The relationship between the obligations imposed by the I.L.O. Convention and those arising from Article 119 of the Treaty is a matter of some complexity which has been studied by the competent departments of the Commission's organization both in the light of the history and in the light of the wording of the two documents. The Commission hopes to analyze this relationship in a study of the problems raised by Article 119 which it will publish. The Treaty refers to "equal remuneration for equal work," whereas the Convention, in its Article 2, speaks of "equal remuneration . . . for work of equal value," and one of the problems of interpretation is whether these phrases are to be treated as synonymous.¹³¹

Before the Commission has completed the comparative legal and statistical investigation on which it embarked soon after the Treaty came into force,¹³² it is impossible to say to what extent the principle of Article 119 is a social aspiration and to what extent it represents aims which have already been achieved. That it represents a live issue is clear. The Second Exposé of the Commission on the Social Situation in the Community indicates that, at any rate in some countries, trade unions are actively campaigning for the rule of equal pay,¹³³ and an active interest in the problem has been shown in the Assembly. To aid it in elucidating the law and facts obtaining in the Six, the Commission has contacted the governments concerned, the I.L.O. and employers' associations and trade unions.¹³⁴

The legal problems are complex because it is necessary not only to compare constitutional and legislative texts, but also case law and collective bargaining practices of the various countries with one

of equal remuneration of work of equal value. . ." (Emphasis added.) The italicized words were not in the original I.L.O. Constitution of 1919 but were added in 1946.

¹²⁹ Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value [hereinafter cited as Convention 100], I.L.O., Record of Proceedings, 34th Session, Geneva, 1951, at 650-57; I.L.O., 34 OFFICIAL BULLETIN 9-13 (1951). See also I.L.O., 1 THE INTERNATIONAL LABOR CODE 1951 [hereinafter cited as 1 I.L. CODE 1951], arts. 233 (K) -233 (O) at 183-86 (1952).

¹³⁰ This was the state of ratifications at the moment of the entry into force of the Treaty of Rome and was still the state of affairs in the summer of 1959. See also Réponse de la Commission de la Communauté Économique Européenne, [1959] J'L OFF. 851 [hereinafter cited as Réponse].

¹³¹ For all this see Réponse, *op. cit. supra* note 130.

¹³² SECOND GEN'L REP. para. 179.

¹³³ Second EXPOSÉ, para. 64 (Belgium), para. 74 (Italy).

¹³⁴ See Réponse, *op. cit. supra* note 130.

another. Many regulations and other subordinate legislation may also be relevant. Moreover, even a minutely detailed legal analysis will yield no conclusive results regarding the actual facts. This becomes clear from even a superficial comparison of some legal and statistical data. The Preamble to the French Constitution of 1946 laid down the principle that, in every respect, the rights of women should be equal to those of men,¹³⁵ a principle incorporated with the rest of the 1946 Preamble in the Constitution of 1958,¹³⁶ also embodied in French legislation on collective agreements¹³⁷ and applied in the fixing of the National Minimum Wage.¹³⁸ The Basic Law of the German Federal Republic of 1949 in its Article 3 also provides that men and women have equal rights, and legislation at variance with this principle is unconstitutional, null and void.¹³⁹ Moreover, the courts and most learned writers hold that the principle must be applied in collective bargaining.¹⁴⁰ Yet, in 1952 an inquiry instituted by the I.L.O. revealed that in France the average earnings of women workers amounted to only 91 percent of those of men, whereas the corresponding figure for Germany was as low as 78 percent (and for Great Britain 66 percent).¹⁴¹ How much significance attaches in practice to Article 37 of the Italian Constitution of 1947 which guarantees equal pay for male and female workers, and to the prevailing view that this is a norm of positive law and not a mere program,¹⁴² is a matter for conjecture. The difference between embodying the principle of equal pay in law (even constitutional law) and giving it practical effect is evidently great.

We do not know, of course, how far the figures produced by the

¹³⁵ The Constitution of October 27, 1946, "garantit à la femme, dans tous les domaines, des droits égaux à ceux de l'homme." See for the significance of this and of the Preamble: Durand, *Les Sources du Droit du Travail en France*, in E.C.S.C. HIGH AUTHORITY, *ÉTUDE COMPARATIVE DES SOURCES DU DROIT DU TRAVAIL DANS LES PAYS DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 91-113 (1957); BRUN & GALLAND, *DROIT DU TRAVAIL* 54 (1958).

¹³⁶ In the Constitution of 1958, "the French people solemnly proclaim their attachment to the Rights of Man and the principles of National Sovereignty as defined by the Declaration of 1789, confirmed and completed by the Preamble to the Constitution of 1946." [Translation by Campbell & Chapman, Oxford (Blackwell) 1958].

¹³⁷ Law of Feb. 11, 1950, [1950] *Journal officiel de la République Française* [hereinafter cited as J.O.] 1688 (Fr.) inserting into the CODE DU TRAVAIL bk. II, tit. II, *inter alia*, art. 31g, second para., (1) (d).

¹³⁸ 2 DURAND (with the concurrence of André Vitu), *TRAITÉ DE DROIT DU TRAVAIL* 641 (1950) [hereinafter cited as 2 DURAND]; BRUN & GALLAND, *op. cit. supra* note 135, at 451.

¹³⁹ I NIKISCH, *ARBEITSRECHT* 302 (1955).

¹⁴⁰ For a detailed discussion: *id.* at 304.

¹⁴¹ Quoted BRUN & GALLAND, *op. cit. supra* note 135, at 445, n. 1.

¹⁴² MAZZONI, *MANUALE DI DIRITTO DEL LAVORO* 140 (1958).

I.L.O. inquiry of 1952 should be attributed to disparities in wage rates rather than to differences in employment opportunities or (within piece rate systems) of actual performances. The Commission itself, in answering a relevant question in the Assembly,¹⁴³ emphasized that one could not, on the basis of existing statistics, determine with any degree of precision how far in any given country the rule of equal pay had been given effect, and that one would have to undertake "case studies," presumably of selected industries. The Commission promised to prepare a general survey, based on collective agreements, regulations and the like, but it observed somewhat sceptically that no more than a general movement towards adaptation of female to male wages could be reliably ascertained from the existing material.

Although it creates binding obligations among the Member States, Article 119 is very cautiously formulated. The principle of equal pay for equal work does not *ipso facto* become part of the legal systems of the members, and the Council has not even been given power to issue regulations enacting it into law. The Member States have gone no further than to accept an obligation to each other and to the Community to transform their systems of wage rates so as to ensure application of the principle in the course of the first stage of the transitional period. Article 119 does not, therefore, confer any rights or impose any obligations on any individual based on the principle of equality. It does no more than to create an obligation binding the Member States in international law. Furthermore, it would appear that Article 119 implicitly incorporates the same rule which is expressed in Article 2, paragraph 2 of the I.L.O. Convention of 1951, that is, that the states are free to choose whatever method they wish so as to give effect to the principle. Thus, if, in practice, equality is achieved by collective bargaining, legislation is unnecessary. The principle is confined to "remuneration" and does not cover workers' rights of a different character, such as, for example, representation on works councils, trade union membership, or membership of trade union committees or other governing bodies.

The term "remuneration" is, however, defined very comprehensively, and in this respect the relevant provision of the Treaty¹⁴⁴ repeats verbatim the definition of Article 1(a) of the I.L.O. Convention. "Remuneration" includes not only the "ordinary basic minimum wage or salary" but also "any additional emoluments what-

¹⁴³ See Réponse, *op. cit. supra* note 130.

¹⁴⁴ Treaty art. 119, para. 2.

soever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment." This covers merit rates and skill differentials, family allowances and bonuses of all kinds, and also "fringe benefits" such as vacation payments and participation in pension schemes. As regards basic wage rates it means what is generally called the "rate for the job," or in the words of the Treaty: "remuneration for work at time rates shall be the same for the same job."¹⁴⁵ As regards piece rates the Treaty provides "that remuneration for the same work . . . shall be calculated on the basis of the same unit of measurement."¹⁴⁶ This is obviously intended to say that the same rate must be promised for identical units of work, or, in the words of the I.L.O. Convention, it "refers to rates of remuneration established without discrimination based on sex."¹⁴⁷ What it does not mean is that either time merit rates or piece rates have to be calculated in such a way as to make up for any differences in the average performance of men and women which may influence their aggregate earnings. It may even be arguable that an attempt to do so might itself be a contravention of the principle. In other words, wage rates must be fixed so as to give equal opportunities to all, but they need not, and perhaps must not, even out such inequalities of opportunity as are the result of natural differences. The I.L.O. Convention¹⁴⁸ suggests "measures [to] . . . be taken to promote objective appraisal of jobs on the basis of the work to be performed" and goes on to provide that "differential rates between workers, which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed, shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value." This principle must, it is submitted, be considered as being implicitly incorporated in the Treaty. If this submission is well founded, there would, after all, be no difference between "equal remuneration for equal work" and "equal remuneration for work of equal value."

2. HOLIDAYS WITH PAY

The provision on holidays with pay is much more vague. Article 120 requires Member States to "endeavor to maintain the existing equivalence of paid holiday schemes." During the negotiations some

¹⁴⁵ *Id.* art. 119, para. 3 (b).

¹⁴⁶ *Id.* art. 119, para. 3 (a).

¹⁴⁷ Convention 100, *op. cit. supra* note 129, art. 1 (b); see also 1 I.L. CODE 1951, art. 233 (L).

¹⁴⁸ Convention 100, *op. cit. supra* note 129, art. 3; 1 I.L. CODE 1951, art. 233 (N).

expressed anxiety that differences in this area might lead to distortions of competition. In France,¹⁴⁹ Belgium,¹⁵⁰ and Luxembourg¹⁵¹ the employees' right to annual vacations is regulated by statute, whereas in Western Germany¹⁵² and in Italy¹⁵³ it is entirely or mainly based on collective agreements. This is also true of the Netherlands,¹⁵⁴ where, however, the Council of Mediators has certain powers to regulate holidays¹⁵⁵ and where a bill on annual vacations with pay is pending at the time of writing. The fact that in one country paid vacations are based on legislation and in another on collective bargaining does not in itself have any influence on the conditions under which the industries of those countries compete. Collective agreements are, however, plainly more adaptable than statutes to changing conditions of the market. This element of rigidity which is inherent in legislative as distinguished from autonomous industrial regulation may perhaps be considered as the most significant "distorting" factor arising from vacations with pay.

This observation is especially relevant in connection with French law. The French legislation governing annual vacations is very de-

¹⁴⁹ CODE DU TRAVAIL, bk. II, tit. I, art. 54 f, as amended by the law of March 27, 1956, [1956] J.O. 3120 (Fr.). See BRUN & GALLAND, *op. cit. supra* note 135, at 415; 2 DURAND, *op. cit. supra* note 138, at 492.

¹⁵⁰ The relevant Belgian legislation was consolidated by a Royal Decree of March 9, 1951, [1951] Recueil Des Lois et Arrêtés de Belgique 814, but there are additional Decrees. See Horion, *Les Sources du Droit du Travail en Belgique*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 135, at 69.

¹⁵¹ Law of July 27, 1950, [1950] Pasiomie Luxembourgeoise [hereinafter cited as *Pasin. Lux.*] 236, concerning the regulation of the annual vacations of employees (manual workers as well as salaried employees), and, with regard to salaried employees, the provisions of Art. 10 of the law of June 7, 1937, [1937] *Pasin. Lux.* 540 on the contract of employment of salaried employees which are still in force in smaller undertakings. PEMMERS, *LE CONTRAT DE TRAVAIL DES EMPLOYÉS DANS LE GRAND-DUCHÉ DE LUXEMBOURG*, ch. V, paras. 241-55, at 103-09 (2nd ed. 1953).

¹⁵² I NIKISCH, *op. cit. supra* note 139, at 442. Some of the *Länder* have since 1945 issued legislation on vacations with pay, but collective agreements remain of primary importance. There is no federal statute. For decades it has been customary to provide for vacations with pay in collective agreements (under the Nazis in collective "orders"). This has resulted in a principle that the employee is, by custom, implicitly entitled to paid annual vacations, even in the absence of a particular provision. See I NIKISCH, *op. cit. supra* at 444.

¹⁵³ MAZZONI, *op. cit. supra* note 142, at 360. The provision in art. 2109 of the Civil Code is a blank to be filled in by agreement or custom. The statute envisaged by art. 36 of the Constitution has not yet been passed. See Mengoni, *Les Sources du Droit du Travail en Italie*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 135, at 122, 140.

¹⁵⁴ De Gaay Fortman, *Les Rapports Individuels du Travail aux Pays-Bas*, National Report to the 2nd International Congress on Labour Law (Brussels, 1958). See for the pending Bill, Second EXPOSÉ, para. 59.

¹⁵⁵ Under the "Extraordinary Decree on Labour Relations" of 1945, to which reference is made below, in PART II.

tailed, and, especially since the amendment of the Labor Code by a Law of March 27, 1956,¹⁵⁶ is very favorable to the employee. The employee is entitled to one and a half days of paid vacation for each month he has worked for the particular employer, that is, 18 days per year, a minimum which is subject to extension on various grounds. This rigid, detailed and (from the point of view of the employers) onerous system of paid vacations made it desirable from the French point of view to reduce the flexibility of the vacation schemes existing in other Members of the Community, and to ensure that the other Member States would at least do nothing to reduce the existing vacation rights conferred upon employees by legislation, collective bargaining, or usage. No attempt was made in this respect to produce anything like equality between members, an attempt which in view of the complexity and multiplicity of existing vacation schemes would, in any event, have been doomed to failure. Article 120 envisages only that the existing basis of competition should in this respect be "frozen," that is, that nothing should be done to increase whatever distorting effect present vacation schemes may have on the competitive power of the Member States. Article 120 creates no more than a mutual obligation of the members and an obligation of each towards the Community, and even this obligation is couched in terms of "endeavor" and not in terms of an undertaking. It is not very likely to play a major role in practice.¹⁵⁷ What is significant, however, is that the existence of this Article 120 has induced the Commission¹⁵⁸ to undertake surveys concerning vacations with pay and official holidays in what it calls "the more important sectors of the Community." This is no doubt a long term scheme which so far has reached the state of "preparatory work only," but it is another illustration of the fact that in many areas the Treaty is most effective in providing the machinery to obtain better factual information on the conditions of competition.

3. WORKING HOURS AND OVERTIME PAY

With regard to working hours and overtime pay the Treaty itself is silent. It imposes no obligation to adopt the 40-hour week or any particular scheme of overtime pay, nor does it enable the Community to introduce such measures directly into the legal systems of

¹⁵⁶ For details, see BRUN & GALLAND, *op. cit. supra* note 135 at 418.

¹⁵⁷ Katzenstein, *Der Arbeitnehmer in der Europäischen Wirtschaftsgemeinschaft*, 31 BETRIEBS-BERATER 1081, 1084 (1957).

¹⁵⁸ SECOND GEN'L REP. para. 178.

the Member States. Yet, in fact, the French scheme of the 40-hour week, based on the famous "40-hour law" of 1936,¹⁵⁹ and modified by later legislation, especially by the Law of February 25, 1946,¹⁶⁰ has been treated by those participating in the negotiations as a kind of "signpost,"¹⁶¹ which should point the way for the members of the Community. If one considers that, according to French law, the compulsory overtime rate for each hour between 40 and 48 per week is time and a quarter, and for anything beyond 48 hours time and a half, it is possible to understand the anxiety of those representing French interests. This anxiety appears even in legal textbooks,¹⁶² and is probably a result not so much of the legal principle of the 40-hour week itself, as of the system of overtime pay which, with working hours averaging somewhere around 45 per week,¹⁶³ is thought to constitute a considerable handicap in international competition. As the Exposé of the Commission show, working hours have, over the last few years, in France as elsewhere,¹⁶⁴ shown a downward trend—in France from 46 in 1957 to 45.6 in 1958, and as of January 1, 1959, to 44.9. However, and this is not unimportant from the point of view of any given industry, the differences in actual working hours concealed by these averages are very considerable. On March 1, 1959, about 37½% were estimated to work more than 48 hours, and only 8% less than 40 hours.

Conditions such as these form the background of the—at first sight enigmatic—Part II of the "Protocol relating to Certain Provisions of Concern to France" which is "an integral part" of the Treaty itself.¹⁶⁵ The Protocol imposes no obligation on any Member State, but it expresses an expectation on the part of the Member States

. . . that the establishment of the Common Market will result, by the end of the first stage, in a situation where the basic level for overtime payment and the average overtime rates in industry will correspond to those existing in France according to the average figures for the year 1956.

No prescription, then, but once again a prediction. It is, of course, quite impossible to speculate on the chance that the prediction will

¹⁵⁹ Law of June 21st, 1936, [1936] J.O. 6699 (Fr.); CODE DU TRAVAIL, bk. II, tit. I, art. 6. For analysis, 2 DURAND, *op. cit. supra* note 138, at 389.

¹⁶⁰ 2 DURAND, *op. cit. supra* note 138, at 406.

¹⁶¹ Katzenstein, *supra* note 157, at 1084, uses the word "Leitbild."

¹⁶² *E.g.*, in the book by Brun & Galland, *op. cit. supra* note 135, at 397, whose very clear analysis of the law concludes on this note.

¹⁶³ *Id.* at 396.

¹⁶⁴ Second EXPOSÉ, para. 81.

¹⁶⁵ Treaty art. 239.

be fulfilled. The Commission, in an answer given in July 1959 to a question in the Assembly, expressed the hope that it would be,¹⁶⁶ but also pointed out that it was taking the necessary steps to be prepared, as it were, for the worst. This preparatory work now being done by the officials of the Commission consists in the first place in an attempt at a precise assessment of the average overtime rates paid in France in 1956, a task which, in the opinion of the Commission and of the French government experts assisting the Commission in this matter, presents no major difficulties.¹⁶⁷ The Commission has also started preparatory work on surveys concerning working hours and overtime¹⁶⁸ and in the two Exposéés on the Social Situation¹⁶⁹ it has already collected a certain amount of material of interest in the present context. In France, where the normal week is 40 hours, weekly working hours averaged 45.6 in 1958. In Belgium, on the other hand, the normal week of 45 hours (that is five days at nine hours each) was in 1958 the almost universal rule, and, in view of the recession, which hit Belgium harder than the other members of the Community, very little overtime was worked. In the West German Federal Republic the trade unions concentrated their demands in 1957 on the reduction of the normal working week and succeeded during that year in obtaining, without loss of wages, a reduction for two thirds of all workers—in the usual case from 48 to 45 hours. Average working hours (including overtime) were 46.5 in 1957 and 45.7 in 1958. Employees of the *Bund* (including railway, postal, telegraph, and telephone workers) and of the *Länder* have the 45-hour week, the metal, printing, and clothing industries a 44-hour week, and the coal miners in the Ruhr now have a 40-hour week. Information about Italy is not quite so specific, but it appears that in 1958 90.7 percent (as against 90.9 percent in 1957) worked 40 hours or more, and only 9.3 percent (as against 9.1 percent in 1957) less than 40 hours. The average actual monthly hours were 168.07 in 1958 as against 168.58 in 1957. In Luxembourg, the working week is 44 hours for industry, and the unions are trying to achieve a 40-hour week without loss of wages. The 45-hour week prevails in the Netherlands, and the intention is to reduce it cautiously, gradually, and industry by industry or enterprise by enterprise with a view to taking account of individual conditions and to avoiding a major dislocation.

¹⁶⁶ Réponse, *op. cit. supra* note 130, para. 5.

¹⁶⁷ *Id.* para. 6.

¹⁶⁸ SECOND GEN'L REP., para. 178.

¹⁶⁹ First EXPOSÉ, ch. C.I, para. 7 and ch. C.II, para. 16; Second EXPOSÉ, paras. 79-85. The statistical material in the text is based on the Second EXPOSÉ.

In the light of such information only a prophet could predict what the situation is likely to be at the end of the first stage. The possibility cannot be ruled out that at that time working hours and rates of overtime pay may, in the countries of the Community, have reached a point at which the Protocol is of little significance, but on the other hand it may produce a crisis. It would be a fatal mistake to think that the vagueness of the prediction in the Protocol and the absence in it of any legally binding obligation deprive it of practical importance; far from it. If the prediction proves to be wrong, that is, if in any given branch of industry the basic level for overtime pay (the normal working week) and the average overtime rate do not throughout the Community correspond to those prevailing in France in 1956, then

. . . the Commission *shall* [emphasis added] authorize France to take, in respect of branches of industry affected by the inequalities in payments for overtime, measures of safeguard of which the Commission shall determine the conditions and particulars. . . .

What this obviously means is that, as already adumbrated in the Spaak Report,¹⁷⁰ France will have to be permitted to establish or re-establish tariffs or subsidies, or (a possibility not mentioned in the Spaak Report) quantitative import restrictions.

The standard of comparison is the French basic level for overtime pay and the average overtime rate of 1956, and any variations of either after 1956 are to be ignored. The working week and overtime rates of the other members of the Community obtaining at the end of the first stage will have to be compared with the corresponding French figures of 1956.

Moreover, whereas the general prediction of the first paragraph of Chapter II of the Protocol refers to the French economy of 1956 and the economies of the five other Member States as of the end of the first stage, each economy taken *as a whole*, the sanction contained in the second paragraph refers to "branches of industry" ("*secteurs industriels*"). No one seems as yet to know what this phrase means, and, in its answer in the Assembly in June 1959,¹⁷¹ the Commission emphasized the need for an agreed definition. In order to be prepared for the situation at the end of the first stage, the Commission obviously will also have to be informed about working hours and average overtime rates in each "branch of industry" in the Six.

¹⁷⁰ Spaak Report at 64, 66.

¹⁷¹ Réponse, *op. cit. supra* note 130.

In one respect the French development since 1956 will have to be taken into account by the Commission in its delicate and difficult task of comparison at the end of the first stage. The Commission will have to compare the average increase since 1956 in the level of wages paid in the particular "branch of industry" in the various Member States other than France with the corresponding increase in that industry in France itself. If the increase outside France exceeds that in France "by a percentage fixed by the Commission with the approval of the Council acting by means of a qualified majority vote," then the Commission is not to authorize France to take "measures of safeguard" for that particular branch of industry, although the working week and average overtime rates outside France in that branch of industry do not correspond with the French situation in 1956. The Commission has informed the Assembly that ¹⁷² it has organized an inquiry into the cost of labor in a dozen industries which will yield the required data about wages. The inquiry is based on the pattern established by the Coal-Steel Community for the investigations it has conducted for years, and the statistical methods of comparing real wages evolved by the Coal-Steel Community will also be used in assessing wage increases. The questionnaire and other aspects of the inquiry have been discussed and agreed on at two conferences with governmental experts. The governments have been officially notified of the inquiry, and, to give it legal status, the Council will be asked for a decision under Article 213 since, in the opinion of the Commission, such a decision would remove such legal obstacles to the conducting of the inquiry as might exist in the Member States. For example, in Germany this procedure would, in the opinion of the Commission, obviate the need for special legislation with reference to the inquiry. The representatives of the employers' associations and trade unions have also promised their support. The Commission has expressly stated that the Member State governments have been cooperative in this matter, since in a parliamentary question in the Assembly some suspicion had been voiced that the Commission had met with difficulties.¹⁷³

In the present connection it may not be unimportant that, according to the Second Exposé on the Social Situation in the Community published by the Commission,¹⁷⁴ France is the only Member Country in which the level of real wages fell, however slightly, in 1958. This fall was accompanied by a rise in nominal wages (nominal wages

¹⁷² *Id.* para. 3.

¹⁷³ *Question écrite N° 28*, [1959] J'L. OFF. 850.

¹⁷⁴ Second EXPOSÉ, para. 101.

also rose in the other members of the Community) and by a reduction in hours. The situation at the time of writing may thus be said to illustrate the difficulties which will confront the Commission at the end of the first stage in the event of its having to apply Part II No. 2 of the Protocol. Although the Protocol does not say so *expressis verbis*, it seems to be clear—and it seems to be the view of the Commission itself¹⁷⁵—that what will have to be compared will be real and not nominal wages. A comparison of nominal wages would be wholly unrealistic and it would also raise rate of exchange problems of a most delicate character.

The concession made by the members other than France when accepting and signing this Protocol is formidable. How formidable it is one can see if one analyzes the constitutional situation which will arise at the end of the first stage. The Commission—acting if need be by a majority vote¹⁷⁶—is then under an obligation (“shall”) to authorize France to take protectionist measures to make up for disparities in working hours or overtime rates. But the countervailing exception, intended to account for disparities in the development of wage levels since 1956 favorable to French industry from a competitive point of view, can only be applied if the relevant minimum percentage is fixed by the Commission with the approval of a qualified majority of the Council, an approval which can thus be prevented, if she so desires, by France herself, provided she obtains the support of any one member other than Luxembourg.¹⁷⁷

As a German commentator has pointed out,¹⁷⁸ the immediate effect of the Protocol is admittedly nil. Neither the legislation nor the collective bargaining practice of any member of the Community need be affected by it. Nevertheless, the sanction behind the expectation expressed in the Protocol is in a sense much more potent than that behind the obligations as to equal pay for the sexes or vacation with pay, laid down in the body of the Treaty. In a sense the entire future of the Common Market has been made to hinge upon the adoption, in all the six countries, of something like the 40-hour week and the French overtime scheme. The scheme of overtime rates conceivably may prove a more serious hurdle than the principle of the 40-hour week itself.

These then are the directions in which the Treaty seeks to in-

¹⁷⁵ Réponse, *op. cit. supra* note 130, *passim*.

¹⁷⁶ Treaty art. 163.

¹⁷⁷ *Id.* art. 148.

¹⁷⁸ Katzenstein, *supra* note 157, at 1082.

fluence conditions of employment. But the questions discussed so far do not exhaust those concerning labor and labor relations with which the Treaty deals.

F. FREEDOM OF MOVEMENT

I. THE GENERAL PRINCIPLE AND ITS EXCEPTIONS

The principle that workers should be free to move from one country to another—a principle which when implemented will create a common labor market—is, of course, fundamental to the plan for the European Economic Community. The Spaak Report¹⁷⁹ emphasizes a psychological aspect, the need for destroying prejudices and for spreading the elementary truth that an influx of foreign workers may be a source of strength. The Spaak Report also observes¹⁸⁰ that “liberation” of the movement of unskilled as well as skilled workers is necessary. In this respect—and in others—there is, as pointed out in the Spaak Report, a fundamental difference between the European Economic Community and the Coal-Steel Community. The problem of defining skills in the latter was and is a matter of first importance, but a community which is not limited to two specific industries has, as the Spaak Report convincingly demonstrates, an even greater interest in promoting freedom of movement for the unskilled (who are especially exposed to the risk of unemployment) than for skilled workers.

The Spaak Report also sounds a very necessary note of warning: it is dangerous to overestimate the magnitude of the actual movement of labor even in a completely free market. The information published by the Commission in its two Exposéés on the Social Situation in the Community¹⁸¹ confirms the general impression that movement of labor is as yet quite insignificant in Europe. It would be entirely unrealistic to attribute this exclusively or perhaps even principally to legal obstacles. As the Spaak Report says, even within a given country—any European country—men and women are reluctant to change their occupations or their homes. Even if there were no housing shortage (as there is, and it must be counted as an overwhelmingly important factor) “mobility of labor” would not come naturally to people; it must be stimulated. This is not to say,

¹⁷⁹ Spaak Report, pt. I, tit. III, ch. 3, at 88.

¹⁸⁰ *Id.* at 89.

¹⁸¹ First Exposéé ch. A.II, paras. 21–24; Second Exposéé, paras. 15–17. And see Table 6 in the Statistical Appendix to the First Exposéé, and Table 6 in the First Statistical Appendix to the Second Exposéé.

as the Spaak Report also points out, that it should always be stimulated. The most recent tendency (of which the British Distribution of Industries Acts are an example) is to develop employment opportunities on the spot, that is to stimulate the migration of capital rather than of labor. The "European Social Fund"¹⁸² is partly intended to assist in this process and the relevant Treaty provisions thus complement those on freedom of movement. Given the psychological and cultural (including linguistic) inhibitions militating against geographical mobility of labor, it may be especially necessary for an American observer to "think afresh" when considering Europe. It is, to say the least of it, possible that the reluctance to sever one's links with an accustomed environment is rooted in traditions and sentiments which Europe could forego only at the risk of losing the richness and variety of its civilization.

Part II, Title III, Chapter 1 of the Treaty contains the provisions which are intended to remove the legal obstacles to freedom of movement within the Community, that is, in the words of the Spaak Report to establish

. . . the right in all countries of the Community to accept work in fact offered and, in the event of obtaining a job, to live in the particular country without any restriction which does not apply in the same way to workers who are citizens of the country.

Article 7 of the Treaty which appears in the introductory Part I (entitled "Principles") provides that within its field of application "and without prejudice to the special provisions mentioned therein" "any discrimination on the grounds of nationality shall hereby be prohibited." The provisions in Part II, Title III, Chapter 1¹⁸³ are clearly "special provisions." The power of the Council, acting by a *simple* majority pursuant to Article 49, to take measures to give gradual effect to the free movement of workers is by the same token not impaired by the second paragraph of Article 7 under which the Council, acting by a *qualified* majority, may lay down rules in regard to the prohibition of any such discrimination as is mentioned in Article 7, paragraph 1.

Article 7 may, however, be of importance in connection with the rights of persons employed by public enterprises or enterprises to which any Member State grants "special or exclusive rights," for example, concessions. This is by virtue of Article 90, but although

¹⁸² See PART I, Section G of the text *infra*.

¹⁸³ Treaty arts. 48-51.

this may conceivably be of some practical significance to American enterprises in Europe, it is not further considered here because, for the time being, that is as long as the Council has not exercised its rule-making power under Article 7, paragraph 2, this aspect of Article 90 is not operative.

The provisions of Articles 48-51 had been foreshadowed by Article 8 of the Convention for European Economic Cooperation of April 16, 1948, which applies to the (now) 18 Members of the Organization for European Economic Cooperation and which is as follows:

The Contracting Parties will make the fullest and most effective use of their available manpower.

They will endeavor to provide full employment for their own people and they may have recourse to manpower available in the territory of any other Contracting Party. In the latter case they will, in mutual agreement, take the necessary measures to facilitate the movement of workers and to ensure their establishment in conditions satisfactory from the economic and social point of view. Generally, the Contracting Parties will cooperate in the progressive reduction of obstacles to the free movement of persons.

Decisions of the O.E.E.C. can of course be taken only "by mutual agreement of all the members" (Article 14 of the Convention), and, in the absence of such decisions, the O.E.E.C. can implement the policy of Article 8 only through recommendations. One such recommendation¹⁸⁴ is based on Article 16 and Article 17 of the Revised I.L.O. Migration for Employment Recommendation of 1949.¹⁸⁵ It provides that, after five years of residence and employment, foreign workers should be free to accept employment of their choosing. The Spaak Report¹⁸⁶ prefers this method of increasing freedom of movement to another scheme, also proposed by the O.E.E.C., according to which recruitment of foreign labor by any given employer could not be prohibited after the lapse of a maximum period (in principle one month), during which unsuccessful attempts have been made to fill the vacancy, by engaging labor available in the territory. The disadvantage of the latter system is that it may, in the opinion of the authors of the Spaak Report, result in something akin to a game of "musical chairs," that is, a situation in which a vacancy is filled by a workman who in accepting the vacant

¹⁸⁴ Summarized in FIRST GEN'L REP. para. 113.

¹⁸⁵ See 1 I.L. CODE 1951, art. 1511, at 1132.

¹⁸⁶ Spaak Report, pt. I, tit. III, ch. 3, at 90.

job has himself given up another and so on *ad infinitum* so that the occasion for the recruitment of foreign labor never arises. As against this, the O.E.E.C. proposal for a five-year maximum for any restrictions to be placed on choice of employment could, as the Spaak Report says, be the starting point for a more promising development if the period were gradually reduced. A third possibility (also appearing in the Spaak Report, but not in the O.E.E.C. proposals) would be gradually to enlarge (by stages fixed in advance) the number of foreign workers to be admitted for employment, taking as the basis the mean of the numbers of foreign workers admitted during the last three years, and enlarging it annually by at least one percent of the total labor force of the country, all of this to be coupled with escape clauses to protect particular industries in times of unemployment.

None of these specific proposals have been written into the Treaty of Rome.¹⁸⁷ Its relevant provisions are thus more general and vague than the O.E.E.C. proposals. The legal powers wielded by the institutions of the Community, however, are plainly very much greater than those of the organs of O.E.E.C. Thus, although the policies written into Article 8 of the O.E.E.C. Convention and those which are given expression in Article 48 *et seq.* of the Treaty are similar, the means available for their execution are very different. Within the framework of O.E.E.C. a free labor market can only be brought about by agreements between the Contracting Parties (although the organs of O.E.E.C. may, of course, be empowered to prepare and carry into effect such agreements). But under the Treaty a supranational body of law may be created which will take effect during the transitional period, and a supranational principle, which will take effect at the end of the transitional period, has been created by the Treaty itself. This emerges from Article 48 of the Treaty which must be regarded as one of its cornerstones and therefore deserves analysis in some detail. Four points seem to call for special comment.

In the first place it should be noted that, with respect to the establishment of the common labor market, no four-year "stages" are envisaged. Article 48 (1) provides that "the free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period." According to Article 49, the "free movement of workers" is to be brought about "progressively," that is gradually, during the transitional period,

¹⁸⁷ Treaty arts. 48, 49.

but the Treaty is silent concerning the rate or rhythm of progression. The Treaty does, however, indicate the steps which the organs of the Community are to take to make a free labor market possible (Articles 49-51), and it further indicates (Article 49) that these were to be initiated as soon as the Treaty came into force.

The second noteworthy point is that, "at the end of the expiry of the transitional period," legal obstacles to freedom of movement (with certain exceptions) are automatically to disappear. The Treaty does not provide for decisions by any Community institution at that point, but its Article 48 contains substantive law which, if unamended, will come into force in the six countries at the end of the transitional period. Needless to say, this applies to legal obstacles only, for example, to restrictions on immigration or on the employment of foreign workers. Other impediments to free migration, such as those caused by wage differentials, differences in social security expectations,¹⁸⁸ language difficulties, social mores, and national allegiances are either beyond the reach of legislation or dealt with in other provisions of the Treaty.

Thirdly, however, this automatic implementation of the principle of a free labor market in the Community has been expressly limited so that it has no application with regard to "the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands" (Articles 131 and 135) and with regard to "Algeria and the French overseas departments" (Article 227). The "non-European countries and territories" referred to in Article 131 are subject to the special provisions contained in Part IV of the Treaty (Articles 131-136), and are listed in Annex IV of the Treaty. They consist of those territories of the French Community which are situated outside Europe (other than territories such as Algeria which are, for constitutional purposes, part of metropolitan France), of the Belgian Congo and Ruanda-Urundi, of Italian Somaliland, and Netherlands New Guinea.¹⁸⁹ The main

¹⁸⁸ This obstacle has been overcome in so far as the preservation of acquired expectations and the claim to equal treatment is concerned. See Treaty art. 51; Reg. N° 3, *op. cit. supra* note 17; Reg. N° 4, *op. cit. supra* note 94, and with regard to equality of treatment, especially art. 8 of Reg. N° 3. But this does not, of course, bring about an equalization of the substantive rights to benefit, such as that recommended by the Council of Europe in the Interim Agreements drafted by it in 1953 (1 European Handbook 226 *et seq.*), and referred to by the Commission in its First Gen'l Rep. para. 120. For the Council of Europe agreements: Europ. T.S. Nos. 12, 13; *Five European Conventions* put out by the Directorate of Information of the Council of Europe; ROBERTSON, *THE COUNCIL OF EUROPE* ch. 8, at 130-31 (1956).

¹⁸⁹ According to the Protocol relating to the Application of the Treaty to the Non-European Parts of the Kingdom of the Netherlands, which is annexed to the Treaty,

body of the Treaty does not apply to these territories, but the Member States have by Article 131 agreed to associate them with the Community. This is not the place to discuss the politically momentous aspect of this differentiation with regard to the Common Market in general, a differentiation which is regulated in Articles 131-134, and for the first five years from the entry into force of the Treaty by the implementing Convention annexed to it (Article 136). This Convention, although it deals with the "Right of Establishment" in the Overseas Territories (Article 8 of the Convention) and in Algeria and the French overseas departments (Article 16 of the Convention), that is with matters regulated for the European territories of the members in Articles 52 to 58 of the Treaty, has no provisions concerning freedom of movement for workers. This freedom is regulated in Article 135 of the Treaty which provides:

Subject to the provisions relating to public health, public safety and public order, the freedom of movement in Member States of workers from the countries and territories, and in the countries and territories of workers from Member States shall be governed by subsequent conventions which shall require the unanimous agreement of Member States.

If no such conventions can be unanimously agreed on, there will be no freedom of movement from the overseas territories, or into or among them, either at the end of the transitional period or at any subsequent time. This provision in Article 135 does not, however, apply to Algeria or the French overseas departments. Neither, however, do Article 48 *et seq.* on free movement of workers. These are not among the Treaty provisions which, by Article 227(2) of the Treaty, have been made to apply to Algeria and the French overseas departments. The conditions for the application of these and other Treaty provisions not applicable to those territories

. . . shall be determined, not later than two years after the date of [the Treaty's] . . . entry into force, by decisions of the Council acting by means of a unanimous vote on a proposal of the Commission.

the Netherlands may ratify the Treaty so as to include only the Kingdom in Europe and Netherlands New Guinea, thus excluding Surinam and the Netherlands Antilles. The parties to the Treaty are however—according to a Declaration of Intention annexed to it—ready, at the request of the Netherlands, to open negotiations for the economic association of these territories with the Community.

All measures designed to ensure free migration of labor, then, must be confined to the European territories of the Member States, and no one can say how far such measures ever can or will be applied to any overseas territories. It is even more difficult to predict to what extent the free movement of labor which is to be guaranteed by the end of the transitional period in the Community will apply to the overseas territories.

The principle of free movement and of the abolition of legal obstacles to its exercise is further subject ¹⁹⁰—and this is the fourth point of importance—to a number of significant exceptions even where Europe is concerned.

Restrictions on free immigration or emigration or upon the employment of foreigners for reasons of “public order, public safety or public health” (Article 48) can be maintained. It will be a somewhat delicate task for the Court of Justice to distinguish between limitations imposed for economic reasons and limitations prompted by reason of public order, safety, or health. One can think of any number of situations in which these motivations may overlap; for example, where housing or medical facilities are inadequate or where there are political or religious dissensions among groups of workers or disputes concerning trade union organization, or where potential immigrants are not sufficiently familiar with the safety or hygienic requirements imposed by the country of immigration and the like. The need of these exceptions to the principle of freedom of movement is nonetheless clear. This is just another illustration of the difficulties facing an economic community which is to be established in an environment of cultural, political, and legal diversity.

Another exception concerns “employment in public administration” (Article 48(a)), which may also be difficult to interpret. The central and municipal government administrations of the Member Countries are clearly included, but is employment by public corporations? Does the exception in fact mean that the principle of freedom of migration is not to extend, for example, to the railway services which in all European countries are public services? Or to public utilities?

2. CHANGES DURING THE TRANSITIONAL PERIOD

Such questions are even now not entirely academic since pursuant to Article 49 Community institutions are to “lay down the measures necessary to effect progressively the free movement of workers as

¹⁹⁰ Spaak Report, *supra* note 186.

defined in the preceding Article." Indeed, the Commission has, according to its Second Report,¹⁹¹ practically completed the preparatory work which will enable it to draw up proposals for the application of Articles 48 and 49, but before seeking an opinion from the Economic and Social Committee and approval of the Council, the Commission will submit a draft of its proposals to experts in the various countries.

The measures to be taken are to be directed at a gradual achievement of certain legal changes enumerated and explicitly described in Article 48. The matters affected will be these:

1) Discrimination based on nationality between workers of Member States is to be abolished as regards employment, remuneration, and other working conditions (Article 48(2)). Of these "employment" is perhaps the most important. It means not only that nationals of all Member States have equal rights to seek employment^{191a} and to accept it, without any need for the approval of any governmental authority (this point is specifically mentioned in Article 43(3)(a)) but also that employment exchanges must not, in finding employment for workers or workers for vacancies, make any distinction between their own nationals and those of other Member States. It further means that no discrimination must be agreed upon between trade unions and employers or employers' organizations, or be practiced by statutory works councils or by councils of shop stewards, whether such councils are based on statutes or collective agreements.¹⁹² Industrial conciliators, mediators, and arbitrators are bound by the rule of non-discrimination whatever the basis of their authority. As soon as the principle of non-discrimination becomes a rule of law in the Member States (and this might happen—at any rate in some industries—by virtue of measures taken pursuant to Article 49 long before Article 48 gives automatic effect to the principle), individual employers will also be bound by it. An employer could, in accordance with the procedural rules prevailing in the country concerned, be prevented from practicing systematic discrimination in the hiring of labor, and he could certainly be compelled to reinstate an employee upon proof that the worker had been dis-

¹⁹¹ SECOND GEN'L REP. para. 173.

^{191a} Art. 48, para. 3, appears to be enumerative and not exhaustive, but the matter is not free from doubt. The principle established in para. 1 goes beyond the particular instances mentioned in para. 3. This means that workers will be free to enter any Member Country in order to seek work there, and not only to accept work already offered. This is a matter of great importance. An early clarification of this question of interpretation is desirable.

¹⁹² See PART II of this Chapter.

missed because he was a national of a Member State other than that of the employer. Clearly "discrimination as regards employment" refers to "firing" as well as "hiring." It would therefore also be illegal for unions and employers or employers' associations to adopt by collective agreement any principle of "seniority" which would, in the event of dismissals, give preference to nationals of one Member State over those of another. Works councils, arbitrators, and the like would be similarly restricted.

2) Discrimination with regard to remuneration is less likely to occur, at any rate as a systematic measure. The word "remuneration"¹⁹³ clearly covers not only wages and salaries of various kinds (time and piece rates, overtime rates and the like), but also "fringe benefits," and discrimination regarding fringe benefits, especially among salaried employees, may be more likely than wage discrimination. Discrimination between nationals of the Community states with regard to paid vacations, to pension schemes, or to bonuses is forbidden, and the same prohibition applies to other "working conditions."

3) Two matters of very great potential importance are not expressly referred to in Article 48—social security rights and trade union membership.

Social security rights are not expressly covered by Article 51 because this provision, which is concerned with assimilation of qualification periods and benefit payments, does not deal directly with the question of the equal treatment of workers employed in the same country. Any differences of treatment in this area would nevertheless clearly violate the spirit of Article 48, and provision against it is therefore within the powers vested in the Council under Article 49. The question has in fact been settled by Article 8 of the Council's Regulation No. 3, concerning the Social Security of Migrant Workers.¹⁹⁴ It provides that all residents of one of the Member States to whom the Regulation applies are subject to the obligations and entitled to the rights established by the social security legislation of each Member State under the same conditions as the nationals of that State.

Trade union membership raises a much more formidable problem. In this respect the experience of the American courts in relying on the Equal Protection Clause of the Federal Constitution may

¹⁹³ See the definition in art. 6 (1) (a) (i) of the I.L.O. Migration for Employment Convention (Revised), 1949, in 1 I.L. CODE 1951, art. 1499, at 1110. Article 6 also deals with trade union rights, social security, and kindred matters.

¹⁹⁴ See Reg. N° 3, *op. cit.* *supra* note 17, art. 8.

perhaps be of some assistance. It may be arguable that the rule against non-discrimination makes it incumbent on unions not to reject any applicant for membership for reasons condemned by law, but such a principle, however desirable, is obviously very difficult to enforce. As is true in a similar situation in the United States,¹⁹⁵ the rule against non-discrimination can perhaps be more usefully applied to collective bargaining practices of unions than to their membership policies. Article 48 might, in other words, play a role comparable to that of American provisions which make the union the statutory bargaining representative of all members of the bargaining unit and invalidate any agreement purporting to discriminate between members and non-members in so far as non-membership is in fact the result of the non-members' nationality. It might, moreover, implicitly provide a check on expulsions from trade union membership which are in fact based on discriminatory policies.

4) Freedom of movement implies not only the "right . . . to accept offers of employment actually made" (Article 48(3)(a)), but also the right to move about freely in order to do so, a right to stay in the country in which one has found employment, and—a point of great importance—a right to continue to live in the country of employment even after the loss of the actual job. All these matters are mentioned in Article 48(3)(b), (c), and (d), but the last is subject to "implementing regulations laid down by the Commission."¹⁹⁶ The effectiveness of the entire scheme may well depend on these regulations. If a foreign worker has to face expulsion in the event of a loss of his employment, he is not in fact on a par with indigenous workers, and would moreover find himself in a state of dependence which is undesirable. On the other hand, in the event of protracted unemployment a repatriation of foreign workers may become an urgent economic necessity. The regulations to be issued by the Commission are clearly a matter of great importance. The Treaty is silent as regards the right of the worker's family to live in the country of his employment,¹⁹⁷ and silent as regards his rights in relation to the allocation of housing accommodation, the schooling of his children, public assistance, and public

¹⁹⁵ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

¹⁹⁶ When laying down these Regulations, the Commission ". . . shall take due account, in so far as the Grand Duchy of Luxembourg is concerned, of the particular demographic situation of that country." Treaty, *Protocol Concerning the Grand Duchy of Luxembourg*, art 2. The number of foreign workers in Luxembourg is proportionately very large: see First EXPOSÉ A. II, para. 24 *ad finem*.

¹⁹⁷ See arts. 16, 17 of the I.L.O. Migration for Employment Recommendation (Revised), 1949, in 1 I.L. CODE 1951, art. 1511 at 1132.

health services (other than those based on social security legislation). In this respect as in others the scheme of the common labor market is still fragmentary.

3. METHODS OF GIVING EFFECT TO THESE CHANGES

The powers vested in the Council by Article 49 for the purpose of gradually effecting the free movement of workers are far-reaching. The Council has been placed under a duty to (it "shall") adopt measures by means of directives or regulations. Neither a unanimous decision nor a qualified majority vote is required so that the Council can in this case¹⁹⁸ create law applicable in each Member State by majority vote provided the measures it adopts are based on the required proposals of the Commission¹⁹⁹ and provided the Economic and Social Committee has been consulted. Whether, in fact, the Council is likely to act by means of regulations and whether the measures mentioned in Article 49 would not more appropriately take the form of directives is a matter of opinion. The Commission in its Second Report leaves the matter open, speaking of a "legal instrument" which is in course of preparation.²⁰⁰

Article 49 requires immediate steps to achieve the aims of Article 48, and two methods of doing so are envisaged: (1) the removal of certain restrictions on the employment of foreign nationals (Article 49(b) and (c)), and (2) the improvement of employment opportunities by reforms in the employment exchange services (Articles 49(a) and (d)).

1) The Commission emphasized in its First Report²⁰¹ that its proposals would have to deal with three fundamental problems: access to work, freedom of movement, and the possibility of residing, and settling down in, the country of employment. It further stated that the progressive removal of restrictions "according to a plan" as required by Article 49 would have to take account of the experience of the Coal-Steel Community in applying Article 69 of the E.C.S.C. Treaty and also the decision of the O.E.E.C.²⁰² It indicated more particularly that during a first phase the lapse of time between application for work permits and their grant or refusal would have to be reduced to a minimum and grounds for their refusal restricted to reasons of public order and health. Renewal

¹⁹⁸ Treaty arts. 148 (1), 149.

¹⁹⁹ *Id.* art. 149.

²⁰⁰ SECOND GEN'L REP. para. 175.

²⁰¹ FIRST GEN'L REP. para. III.

²⁰² See text preceding note 184 *supra*.

procedures would have to be improved by lengthening the duration of permits and liberalizing the grounds for extension, and reform and unification of procedures for acquiring permission to enter and remain in a country—which are at present extremely complex—would also be needed. The Commission envisaged measures to implement the Recommendation of the O.E.E.C. that foreign workers should have complete freedom of choice of employment after five years' residence and that this period should be gradually reduced.²⁰³

This program, although "preliminary," is sufficiently ambitious to require very extensive preparations, and the Second Report of the Commission contains an account of the preparatory work done so far. A systematic comparative analysis of the legal position of foreign workers in the six countries has been completed,²⁰⁴ but not published. It includes a study of the conditions of entry and residence for workers and their families as well as of labor permits, whether based on legislation or administrative practices or bilateral and multilateral treaties, as well as of methods of bringing together offers of work and persons seeking it. A draft of an "instrument" has also been prepared by the Commission which will have "limited objectives and will cover only a first stage,"²⁰⁵ affecting the entry of workers and their families, employment and residence, the right to remain in the territory entered, and the right of establishment there. The Commission will also initiate "a thorough and systematic study of the legal position of nationals of Member States who have established themselves in the territory of another Member State."²⁰⁶ Finally, a committee is to be set up to assist the Commission and to propose practical measures by which freedom of movement is to be created.²⁰⁷

At the end of this first phase the need for labor permits, time limits restricting the free choice of jobs (Article 49(c)) and exclusion from certain, or from all but certain, occupations (Article 49(d)) should have disappeared—whether they were created by the law of any Member State or by existing treaties.

2) A reform of the system of labor exchanges to promote freedom of movement can be brought about by instituting a common system of such exchanges. This can be done either by close collaboration of the national labor administrations (Articles 49(a)) or (Article

²⁰³ FIRST GEN'L REP. paras. 112-13.

²⁰⁴ SECOND GEN'L REP. para. 174.

²⁰⁵ *Id.* para. 175.

²⁰⁶ *Id.* para. 177.

²⁰⁷ *Id.* para. 175.

49(d)) it can be effected by a supranational machinery designed to even out regional unemployment and regional excesses in the demand for labor over its supply. The Treaty describes the latter as the:

appropriate machinery for connecting offers of employment and requests for employment, with a view to equilibrating them in such a way as to avoid serious threats to the standard of living and employment in the various regions and industries.

The reorganization of the labor exchanges is obviously a necessary preliminary for the establishment of a common labor market.

The Commission hopes ²⁰⁸ to improve the liaison between the employment services of the Member States, to promote direct contacts between employers and workers and to ensure that workers can make use of employment exchanges. It also hopes to create a coordinating agency to study labor market developments, to cooperate with national employment services in helping employers to find workers in other Member Countries, to promote closer contacts between existing employment services and to suggest improvements. When the Assembly received the Report of the Commission which contains this program, it passed a resolution ²⁰⁹ strongly recommending the creation of a European Employment Exchange with a view to coordinating the activities of the national employment exchanges. The "legal instrument" of which the Commission has prepared a draft does not go quite so far, but it provides for measures of cooperation between labor exchanges to bring together supply and demand and for the general coordination of their work under the aegis of the Commission. The Commission further aims ²¹⁰ at a gradual harmonization of the working methods of labor exchanges and at a regular exchange of information between them.

4. EXCHANGE OF YOUNG WORKERS

The best that measures to be taken by the Council can be expected to achieve is the removal of legal obstacles to the free fluctuation of supply and demand in labor markets. They cannot by themselves overcome the economic and ideological barriers which separate the

²⁰⁸ See FIRST GEN'L REP. para. 114; SECOND GEN'L REP. para. 176; Bulletin, Feb. 1959, pt. II, para. 49.

²⁰⁹ Résolution sur les questions traitées dans le premier rapport général sur l'activité de la Communauté Économique Européenne, pt. IV, paras. 11 and 12, [1959] J'L OFF. 168.

²¹⁰ SECOND GEN'L REP. para. 176.

unemployed or under-employed worker and potential employers. The Treaty does, however, envisage during the transitional period action in several directions in addition to the progressive abolition of legal and administrative restrictions on employment. Besides measures (already taken) in the field of social security the Treaty envisages that "Member States shall, under a common program, encourage the exchange of young workers" (Article 50). Unlike the social security measures, this program is not to be effected by supranational legislation, but by the Member States themselves. No organ of the Community has been assigned specific tasks in this respect, except, of course, that the Commission, by virtue of Article 118, is to promote close cooperation among Member States in this as in other employment matters.

The importance of such exchanges to the creation of "Europe" could be great, and it augurs well that the Commission proposes a first program making periods of apprenticeship abroad for young workers more feasible.²¹¹ Bilateral and multilateral understandings to this effect already exist, but the Commission believes that an annual program is needed so as to make foreign apprenticeships available to a substantial number of workers.

G. THE EUROPEAN SOCIAL FUND

"The European Social Fund is intended to be a cornerstone in the edifice of social security which is to be built up side by side with the measures of economic expansion in the Community."²¹² The need for it arises, in the words of the Spaak Report,²¹³ from the "risks which accompany the changes" demanded by economic progress. The aim is to protect labor against these risks and to "reconcile the necessary mobility and the stability of employment," which must not be confused with a policy permitting workers to cling to their jobs. The authors of the Spaak Report, in proposing what they called an "adjustment fund" (*fonds de réadaptation*) were convinced that this device, by protecting the worker against the consequences of labor mobility, would promote mobility. They also thought that the fund should be used to assist workers who were undergoing re-training or changing their homes. The Treaty accordingly defines the aim of the Fund as one of "promoting within the

²¹¹ FIRST GEN'L REP. para. 116.

²¹² SECOND GEN'L REP. para. 170.

²¹³ Spaak Report, pt. I. tit. III, ch. 2, at 83.

Community employment facilities and the geographical and occupational mobility of workers.”²¹⁴

A similar policy is embodied in the Treaty instituting the European Coal and Steel Community,²¹⁵ but in a number of respects the structure and function of the European Economic Community are so different from those of the Coal-Steel Community that the arrangements applicable to the latter have not been able to serve as a pattern. Under the E.C.S.C. Treaty this policy is carried out by the High Authority by means of funds raised through the Coal-Steel Community's “taxing” power, but the Treaty of Rome confers no corresponding powers either on the Commission or on the Council. The European Economic Community has no power to levy taxes, and for the time being²¹⁶ the revenues of the Community consist of the financial contributions of the Member States.²¹⁷ These contributions are not intended to cover expenses incurred in assisting Member States to implement Treaty policy. Therefore a special fund will be established to be known as the European Social Fund.²¹⁸ This is in accordance with the proposals of the Spaak Report,²¹⁹ but the Spaak Report also pointed out²²⁰ that the system of readjustment grants would have to differ from that administered by the High Authority of the E.C.S.C. in respects other than the source of the funds. Inevitably such a scheme, if applied to a general common market, has to be different from a scheme applied to two particular industries. It is, for example, quite impossible to require—as the Coal-Steel Community Treaty does²²¹—that the payment of grants to workers be justified by proof that the loss of employment resulted either from the introduction of technical processes or new equipment or from the operation of the Common Market—that is, from increased freedom of competition and movement. Further, under the Coal-Steel Community Treaty, grants presuppose that the state to which a grant is made will itself make a

²¹⁴ Treaty art. 123.

²¹⁵ Treaty Instituting the European Coal and Steel Community, art. 56. Convention containing the Transitional Provisions, sec. 23. See on this: Bebr, *Labor and the Schuman Plan*, 52 MICH. L. REV. 1007, 1010 (1954); HAAS, *THE UNITING OF EUROPE* 88 (1958).

²¹⁶ Treaty art. 201 envisages the possibility that eventually the Community may have its own revenue, *e.g.*, from the common customs tariff.

²¹⁷ Treaty art. 200 (1).

²¹⁸ *Id.* arts. 123-28.

²¹⁹ Spaak Report, *supra* note 213, at 84.

²²⁰ *Id.* at 83.

²²¹ Compare E.C.S.C. Treaty art. 56 and E.C.S.C. Treaty, Convention containing the Transitional Provisions, pt. 3, ch. 1, sec. 23, with Treaty art. 125.

grant over and above its normal payment of unemployment insurance benefits or assistance.²²² This rule, too, was regarded by the authors of the Spaak Report as not easily applicable to the European Economic Community. They thought that the principle of re-adaptation grants should gradually be integrated into the general systems of unemployment insurance or assistance, and that these systems might be harmonized in the process, which in turn would aid in rendering labor more mobile. They pointed to the American system of unemployment insurance to show how one could arrive at harmony of legislation without "federalizing" the administration of the scheme.

Hence, neither the requirement of causal nexus between the operation of the Common Market and the dislocation of labor nor the requirement of special financial assistance by the state concerned have been incorporated in the Treaty. The basic function of the Fund²²³ is to cover, at the request of a Member State, 50 percent of the expenses incurred by that state or by a body under public law²²⁴

. . . for the purpose of:

(a) ensuring productive re-employment of workers by means of:

—occupational re-training,
—resettlement allowances; and

(b) granting aids for the benefit of workers whose employment is temporarily reduced or suspended as a result of the conversion of their enterprise to other productions, in order that they may maintain the same wage level pending their full re-employment.

The fund is fed by financial contributions of the Member States according to a special scale laid down in Article 200, paragraph 2. This special scale differs substantially from the general scale of contributions. This, too, is in accordance with the Spaak Report proposals,²²⁵ which are to the effect that contributions to the Fund

²²² See for these provisions of the E.C.S.C. Treaty and their operation in practice: HAAS, *op. cit. supra* note 215, at 92 *et. seq.* Since the above was written, the text of E.E.C. Treaty art. 56 has been amended so as to enable the High Authority to grant assistance in the event of dislocation due to fundamental changes in marketing conditions (1960). Section 23 of the Convention on Transitional Provisions expired on Feb. 9, 1960.

²²³ Treaty art. 125 (1).

²²⁴ For the meaning of this term in this context see p. 356 *infra*.

²²⁵ Spaak Report, *supra* note 213, at 84.

should be proportionate to the total of wages and statutory or agreed social insurance contributions, that is, to total (direct and indirect) labor costs (except in sectors covered by the Coal-Steel re-adaptation scheme). The differentiation between the proportionate distribution of the general contributions to the Community and those to the Social Fund is important. It means that the highly industrialized countries contribute proportionately more than the potential sources of labor emigration. Germany and France pay 32 percent each of the expenses of the Social Fund, but only 28 percent of those of the Community in general, Belgium pays 8.8 percent of the expenses of the Social Fund, as against 7.9 percent of general expenses. Italy, however, contributes only 20 percent of the Fund compared with 28 percent of the general expenses.

The Fund is established by Article 123 of the Treaty "in order to improve opportunities of employment of workers in the Common Market and thus contribute to raising the standard of living." This is entirely in accordance with the general principle underlying the proposals of the Spaak Report. The Report—rejecting the view that the Fund should intervene only where unemployment could be shown to be the result of the Common Market itself—indicated that the Community was interested in progressive change in the industrial structure, in the rationalization of undertakings, and in better employment of the labor force; it was interested in all of these because they will increase productivity and improve standards of living. Such aims justify the Community in bearing part of the cost of protecting labor against the risks which accompany such changes. The drafters of the Treaty wholly accepted this general principle, and, although they did not adopt many of the detailed proposals of the Spaak Report,²²⁶ the general rule that the Community would bear 50 percent of these costs (as the Report suggested) has been adopted, but adopted as a rule not of prospective but of retrospective participation. The Spaak Report indicated²²⁷ that the distributive trades and professional and other services should be brought within the orbit of the Social Fund only from the moment and to the extent to which they would come within the Common Market, but no such limitation has been written into the Treaty. On the other hand, only wage-earners and not small independent craftsmen or peasants may benefit from the fund, whereas the authors of the Spaak Report took the view that the latter might

²²⁶ Not, *e.g.*, the proposal to use the Fund towards assisting enterprises in "staggering" closures: Spaak Report, *supra* note 213, at 85.

²²⁷ *Id.* at 87.

be made eligible for Fund aid if they were also eligible for re-adaptation assistance provided by Member States.

The Fund will be administered by the Commission which will be assisted by a Committee presided over by a Member of the Commission and composed of government, trade union, and employers' association representatives.²²⁸ The Committee has not yet been formed.²²⁹ The activities of the Fund will be circumscribed by regulations to be issued by the Council (by qualified majority vote) on a proposal of the Commission, and after the Economic and Social Committee and the Assembly have been consulted.²³⁰ The Commission submitted its proposal to the Council on July 1, 1959, and shortly thereafter draft regulations were sent by the Council to the Economic and Social Committee and to the Assembly in order to obtain their views.²³¹ The Fund can and will begin to operate as soon as that Committee and the Assembly have been consulted and the Council has made its decision.²³² The Assembly has already expressed the opinion that the Commission should be given the widest possible scope of action and that the Fund at its disposal should be sufficiently large for the creation of opportunities for employment and for the improvement of the free circulation of manpower.²³³ The Assembly also expressed the view that, in administering the Fund, the Commission should cooperate with the European Investment Bank and with the High Authority so as to prevent unemployment, for example, in regions in which coal mines have to be closed down on a large scale. In accordance with a desire expressed by the Assembly, the principles underlying the draft Regulations were discussed in its Social Affairs Committee,²³⁴ and a statement on the subject was also made to the Economic and Social Committee. In preparing its draft, the Commission ascertained from the Member Governments²³⁵ what action had been taken and what expenses had been incurred by them or by public bodies under their jurisdiction in 1958 for purposes which would qualify for assistance by

²²⁸ Treaty art. 124.

²²⁹ Its jurisdiction and procedure will be regulated by the Third Part of the Regulations to be passed under art. 127: see SECOND GEN'L REP. para. 171; Bulletin, Sept. 1959, pt. III, para. 41.

²³⁰ Treaty art. 127.

²³¹ Bulletin, Sept. 1959, pt. III, para. 40.

²³² Bulletin, Feb. 1959, pt. III, para. 49.

²³³ This opinion was expressed in a European Assembly Resolution after receipt by the Assembly of that part of the Commission's First Report dealing with social questions. Résolution, *op. cit. supra* note 209, pt. II, para. 6, at 167-68.

²³⁴ SECOND GEN'L REP. para. 172.

²³⁵ FIRST GEN'L REP. para. 115.

the Fund. The draft consists of three parts, one which defines the scope of activity of the Fund and the conditions under which its assistance can be claimed, a second which lays down the procedure for obtaining a grant, and a third which deals with the advisory committee.²³⁶ Experts in the ministries of labor and finance in each of the Member States have been consulted, and contact had been made with employer and union representatives.²³⁷ In preparing its draft, the Commission obviously faced a difficult problem of definition since the relevant concepts—for example, “unemployed worker” or “occupational re-training”—vary from country to country and had to be precisely determined for the purposes of the Fund.²³⁸

The functions of the Council should be distinguished: it has to issue the regulations, but it must also adopt the budget of the Social Fund. The provisions fixing the conditions on which assistance can be granted and the categories of enterprises whose displaced workers are to benefit must be adopted by a qualified majority vote,²³⁹ so that any two members, neither of which is Luxembourg, have the power of veto. The weighing of the votes for the adoption of the budget relating to the Social Fund is however differently regulated²⁴⁰ by reason no doubt of the difference in rates of contribution. Here a majority of at least 67 out of 100 votes is required, which gives the veto power to any two members either of which is Germany or France and neither of which is Luxembourg, while Germany and France together with any other member except Luxembourg can carry a favorable vote.

“Within the framework of the rules” laid down by the Council the Fund can in accordance with Article 125 make certain grants. These grants are never made to private firms or to individual workers, but always to a Member State or to a “body under public law.” The quoted words presumably refer to public corporations—the Belgian *Office National de Placement et du Chômage*, the German *Bundesanstalt für Arbeitsvermittlung und Arbeitslosenversicherung*, the Italian *Istituto Nazionale della Previdenza Sociale*, the Luxembourg *Office National du Travail*, or the Netherlands *Algemeen Werkloosheidsfonds*.²⁴¹ (There is no system of un-

²³⁶ The draft has not yet been published at the time of writing, but for a detailed description, see: Bulletin, Sept. 1959, pt. III, paras. 40–41.

²³⁷ Bulletin, May 1959, pt. III, para. 32.

²³⁸ SECOND GEN'L REP. para. 172.

²³⁹ Treaty art. 148, which requires 12 out of 17 votes.

²⁴⁰ Treaty art. 203, para. 5.

²⁴¹ All these are public corporations whose activities fall within the purposes of the Fund.

employment insurance in France.) The state or public body can, however, never recover more than 50 percent of the expenses incurred. Within these limits there are three kinds of grants:

1) *Occupational re-training grants.* These can only be made towards expenses incurred for re-training workers who cannot find employment except in a new occupation. It is not a grant for re-training in general, but only assistance towards overcoming the consequences of unemployment. Moreover—and in this respect the structure of the system inaugurated by the Treaty differs materially from that proposed in the Spaak Report—the grant is retrospective, that is, it cannot be made until the re-trained workers have been productively employed for at least six months in the new occupation. The Fund is not, therefore, to participate in re-training experiments, but only to reimburse part of the expenses of successful re-training. This retrospective character of grants made it possible to dispense with a number of additional “controls” proposed in the Spaak Report, for example, that grants could only be made where undertakings or plants were totally or partially closed down or where partial shut-downs or dismissals affected at least 10 percent of the workers of an enterprise. The fact that the grant is retrospective, following a change of occupation, guarantees that the resources of the Fund will be spent on cases originating in structural economic changes. Though the methods of the Treaty differ from those recommended in the Spaak Report, their object is, of course, the same—to promote occupational mobility.

2) *Resettlement allowances.* Here the object is to promote geographical mobility. The assistance granted is conditional upon the unemployed workers having been obliged to change their residence within the Community. This may prove to be important in those cases in which effective freedom of migration depends on financial assistance, and this aspect of the Social Fund is thus clearly a corollary to the provisions in Article 48 *et seq.* concerning freedom of movement from one country to another within the Community. The power to make grants is not, however, restricted to such cases, but extends to changes of residence within any one Community country. Thus the Fund could participate, for example, in the expenses of the re-settlement of Italian workers in France or in Belgium, but it could also do so if workers from one part were to be re-settled in another part of Italy. Here, too, the grant is retrospective since it can only be given in respect of workers who have been “in productive employment for a period of at least six months

in their new place of residence." What was said above about the relation between the proposals of the Spaak Report and the Treaty with regard to occupational re-training grants applies *mutatis mutandis* to the resettlement grants as well.

3) *Aids for the benefit of workers temporarily displaced as a result of the conversion of their enterprise to other production.* Workers will be benefited who have not lost their employment permanently, but who have suffered temporary wage cuts or suspensions or whose work weeks have been reduced—in the words of the Treaty "whose employment is temporarily reduced or wholly or partly suspended." The object of the grant is to assist in maintaining wage levels pending full re-employment, the Fund paying half the lost wages if the government or public corporation concerned pays the other half. In this case no grant can be given except on proof that the suspension of employment was the result "of the conversion of the enterprise to other production," but—as the Spaak Report has suggested—it is not necessary to show that the conversion was in turn the result of the operation of the Common Market.

The conditions of this type of grant are particularly stringent in other respects, too. Not only is the grant retrospective in the sense that the grant cannot be made before the workers concerned have again been fully employed in the same enterprise (not necessarily in the same plant) for at least six months, but the conversion plan for the particular enterprise, including a plan setting out the financing of the re-conversion, must have been drawn up by the enterprise in advance, the government concerned must have submitted it to the Commission and the Commission must have given its approval. This is in accordance with the Spaak Report proposals. But the proposal in the Report of a special system of grants to assist in staggering the closing-down of undertakings in order to prevent sudden mass unemployment has not been incorporated in the Treaty, although there is, of course, nothing in it to prevent the Commission from giving especially favorable consideration to such cases provided they are within the reach of Treaty provisions. In this respect as in others much will depend on the Regulations to be issued by the Council.

As especially emphasized in the Spaak Report,²⁴² this system of grants imposes no obligation on states should they find it difficult to finance increased unemployment benefits, but it is intended to give each Member State a powerful financial incentive to make financial

²⁴² Spaak Report, *supra* note 213, at 86.

provision for various kinds of re-adaptation grants. The American scheme of financial incentives, which is part of the United States system of unemployment insurance law,²⁴³ has doubtless to some extent served as a model. The Commission hopes²⁴⁴ that, "through its retrospective financial activities the Fund will serve as a powerful corrective helping those states and bodies under public law which have taken positive action in connection with re-employment to prevent the workers in certain economic sectors or certain areas from being harmed by the structural changes which are inevitable, and which can even be considered desirable."

But, as the Commission also says in its Second Report, the Fund may achieve a great deal more. By fostering occupational re-training (and also re-settlement) it may help to make freedom of movement a reality and thereby aid in "the attainment and continued existence of a high level of employment."

This plan for grants has been devised for the transitional period. At its end various procedures may be adopted²⁴⁵ to terminate part of the assistance functions of the Fund, and also to entrust it with new tasks. These, however, must be within its general mandate which is to promote employment facilities and the geographical and occupational mobility of workers in order to improve employment opportunities and thus to contribute to the raising of living standards.

H. CONCLUSIONS

In many ways one of the most important activities of the Community is likely to consist in the collection of social and economic facts and the explanation of social and economic trends. Experience has already shown the great value of the work of the Commission in this respect, as could have been expected from the precedents set by the International Labor Office and the High Authority. In concluding this analysis of the Treaty provisions on labor and social policy special emphasis can therefore appropriately be placed on Article 122, which requires the Commission in its annual report to the Assembly²⁴⁶ to include a special chapter on the social situation within the Community. The first two of these Exposéés, on the social situation at the beginning of 1958 and on its development from early 1958 to March 1959, are mines of information. For the future the Commission is particularly anxious to promote comparative studies

²⁴³ *Id.* at 84.

²⁴⁴ SECOND GEN'L REP. para. 170.

²⁴⁵ Treaty art. 126.

²⁴⁶ *Id.* art. 156.

of the structure of wages,²⁴⁷ and of—and this may prove very important—the costs of labor in the six countries.²⁴⁸ The preparation of this latter study is being undertaken jointly by the Directorate-General of Social Affairs and the Joint Statistical Service, in conjunction with the competent department of the High Authority. A joint conference of these bodies was held in November 1958²⁴⁹ to which the heads of the Statistical Departments of the Member Governments were also invited. If and when this study reaches fruition, it may yield the most valuable information to those interested in investing in the industry of any of the six countries.

The Assembly also may invite the Commission to draw up reports on special problems concerning the social situation, presumably on such matters as safety measures, minimum wage laws, methods of wage payment and the like. A broad interpretation will probably be placed on the words "social situation" so as to make them cover not only such questions as employment, wages, social security, and housing conditions but also education and health services, all of which are closely connected with labor and with social security. The existing Exposéés show a welcome tendency to deal with such things as superannuation schemes, private housing schemes, private insurance against illness and funeral expenses and other "special services."²⁵⁰ The work of the Commission may thus open up the possibility of providing the factual information required for a unified and enlightened social policy in Europe.

It is obvious—and the Commission and its officials appear to be very much aware of the fact—that the success of these inquiries depends to no small extent on the cooperation of the governments concerned and on that of the representatives of labor and management. During the summer of 1959 a major question of policy in this connection was raised in the Assembly.²⁵¹ Did the Commission consider the cooperation of governments, labor, and management so important that it would refrain from an inquiry unless it had obtained the approval of all of them or at any rate of the latter two? Did not the Commission consider that it had a measure of autonomy in selecting topics for inquiry? To this searching question (which goes to the essence of the relation between the Community and its members) the Commission, as might have been expected, gave a

²⁴⁷ FIRST GEN'L REP. para. 108.

²⁴⁸ SEC. GEN'L REP. para. 188.

²⁴⁹ Bulletin, Sept.-Dec. 1958, pt. III, para. 16.

²⁵⁰ First EXPOSÉ ch. D.III (b); Second EXPOSÉ paras. 128-41.

²⁵¹ *Question écrite N° 28*, para. 7, [1959] J'L OFF. 850.

highly diplomatic answer. It said²⁵² that it was free to deal with all questions connected with the application of the Treaty, within the framework of its own organization and within the limits of its budget. Yet the Commission considered the closest collaboration with governments and the two sides of industry as valuable in itself and as absolutely necessary for the performance of its own obligations and for the achievement of the objects of the Treaty. Is it an exaggeration to say that the pattern of the relation between governments and representatives of labor and management, which has become an essential feature of western democracy, is beginning to find its counterpart at an international level?

Despite the limitation of the labor and social provisions of the Treaty to the European territories of the Member States,²⁵³ the investigative functions of the Commission may extend to the overseas areas. On January 15, 1959, the Assembly passed a Resolution²⁵⁴ inviting the Commission to study carefully the social conditions of the overseas peoples and as soon as possible to report its findings. The services of the Commission in conjunction with government experts have now drafted a working plan for this purpose.²⁵⁵ The significance of this matter for the Overseas Development Fund needs no emphasis.²⁵⁶

The Treaty's provisions on labor and on social policy create a network of policies and promises rather than a set of legal principles which can be immediately translated into practice. The effect on labor law in the Six is, therefore, for the present not likely to be conspicuous. The trend towards harmonization of the various legal systems is unmistakable, but it is anyone's guess how far it will go. For a long time to come those interested in the labor conditions and relations of the Six will, therefore, have to consult national legal sources.

II. A SKETCH MAP OF LABOR LAWS IN THE SIX

Despite the great diversity of the systems of labor legislation in force in the Six they share a number of common features of basic importance. To Continental lawyers, employers, or trade unionists

²⁵² *Id.* at 852.

²⁵³ Treaty arts. 131-36.

²⁵⁴ Résolution sur les problèmes concernant l'association des pays et territoires d'outre-mer, para. 3, [1959] J'L OFF. 170.

²⁵⁵ Bulletin, May 1959, pt. III, para. 49.

²⁵⁶ Treaty, *Implementing Convention relating to the Association with the Community of the Overseas Countries and Territories*, arts. 1-7.

these basic characteristics are matters of course, but they are unfamiliar to many Americans. Even though they are unfamiliar to an American lawyer, however, his European colleague may fail to draw his attention to them simply because he recognizes no need for doing so. An attempt will therefore be made in the following pages to explain five fundamental characteristics of Western European labor law and with regard to each of them to indicate what the laws of the Six have in common and in what respects they differ. It goes without saying that this can be no more than an introductory survey. The five matters which have been singled out for discussion are: (a) the role of legislation in shaping labor-management relations and defining the rights and obligations arising from employer-employee relationships; (b) the method and legal significance of collective bargaining; (c) councils or committees at plant or enterprise level which represent the interests of the employees or are entitled to be consulted concerning, or to cooperate in resolving, questions of management; (d) the settlement of conflicts, collective and individual, including the structure of labor courts; and (e) the restrictions imposed by law or collective agreements on the power of the employer to terminate the contract of employment. These five matters are likely to be relevant to the routine work of anyone engaged in business on the Continent, or in advising businessmen in the Community.

A. THE ROLE OF LEGISLATION ²⁵⁷

The simple fact is that legislation in that part of the European Continent with which we are concerned is of greater importance in regulating labor relations than it is in the United States or in Great Britain. There is, to be sure, an important and voluminous body of labor legislation in the United States, but its principal role is to ensure that the collective bargaining process can work and can produce the substantive rules which are to govern labor-management relations. On the Continent, however, the bulk of legislation is

²⁵⁷ See for information on the content of this section: E.C.S.C. HIGH AUTHORITY, *ETUDE COMPARATIVE DES SOURCES DU DROIT DU TRAVAIL DANS LES PAYS DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* (1957). This is the first of a series of monographs published by the High Authority of the E.C.S.C., and written by a group of six experts. In this volume the part on Germany is by Prof. G. Boldt, the one on Belgium by Prof. P. Horion, the one on France by Prof. P. Durand, the one on Italy by Prof. L. Mengoni, the one on Luxembourg by President A. Kayser, and the one on the Netherlands by the late Prof. A. N. Molenaar. Prof. Molenaar also wrote the general introductory summary.

designed to regulate these relations directly. A great many things which in the English-speaking countries are left either to collective bargaining or custom are subject to more or less detailed statutory regulation. Such statutory regulation is frequently (but not always) mandatory, that is, it cannot be avoided, at any rate not to the detriment of the employee, either by contract of employment or by collective agreement. In some cases collective agreements can do what the individual contract cannot do, that is, vary in either direction the terms of employment provided for by statute.²⁵⁸ In other cases the statute provides no more than an optional norm which can be displaced by the contract of employment between the individual employer and worker. As a general rule, however, statutory provisions on labor are mandatory, and—a point which an American observer may find difficult to grasp at the outset—even in countries with a very highly developed and efficient collective bargaining system (such as Belgium or Germany) important aspects of the labor-management relation are not subject to collective bargaining since they are regulated by mandatory legislation. In Belgium “there are no collective agreements which deal with the terms of notice: this question is the object of very detailed statutory provisions.”²⁵⁹ A similar observation could be made about Germany. The decisive bearing of legislation on the discharge of employees (so unfamiliar in America) will have to be constantly borne in mind by anyone interested in labor relations in any of the Six.

To some extent, but with great variations in the six countries, the constitutions themselves contain principles of law which have a direct bearing on the relation between management and labor. This is true of France, Germany, Italy, and Luxembourg, but not of Belgium, and only to a very limited extent of the Netherlands. In some cases the constitution contains positive law. For example, one of the provisions of the Basic Law of the Federal German Republic on “fundamental rights”²⁶⁰ declares that any agreement which aims at restricting or impairing the freedom of organization of any person is null and void, with the result that “yellow-dog” contracts as well as closed-shop agreements are illegal and invalid, and with the further result that an employer cannot discharge any employee

²⁵⁸ *E.g.*, with regard to working hours in Germany and with regard to terms of notice in the Netherlands.

²⁵⁹ Horion, National Report for Belgium on Contents of Collective Agreements 8, 2nd International Congress on Labor Law (Geneva, 1957).

²⁶⁰ Basic Law of the Federal Republic of Germany, art. 9, para. 3.

by reason of his membership or non-membership in a, or in any particular, trade union.²⁶¹ The act of discharge would be invalid and the obligation to pay wages would continue.

Another equally important example of the direct effect of constitutional norms on the labor relationship is that of Article 40 of the Italian Constitution of December 27, 1947,²⁶² according to which "the right to strike is exercised within the framework of the laws by which it is regulated." The highest Italian court and the prevailing opinion among learned writers consider this as a norm of positive law, and not merely as a legislative program, and the highest court has held that, as a result of this provision, contracts of employment are not terminated but merely suspended by a strike and the strikers have an automatic right of reinstatement. This direct effect of constitutional provisions on labor-management relations may in itself be familiar to American lawyers, but it may come as a surprise that such an effect has also been ascribed to seemingly programmatic pronouncements such as those contained in the Preamble to the French Constitution of 1946, which has been expressly incorporated in and confirmed by the Constitution of 1958. Freedom to organize, is, for example, guaranteed by the Preamble to the Constitution which also provides that "no one may be injuriously affected in his work or in his employment by reason of his origin, his opinion or his belief."²⁶³ Moreover, the highest French court has drawn from the Preamble of the Constitution of 1946 precisely the same conclusions, in regard to the right to strike, which the highest court of Italy came to on the basis of a similar clause in the body of the Italian Constitution.²⁶⁴

On the other hand, it is very common to find in Continental constitutions provisions which are not intended to be applied as rules binding the individual and the courts, but as programs addressed to the legislature, either in the form of general ethical, social, or economic maxims or in the form of specific mandates to legislate on a particular matter. The Italian Constitution contains provisions of this kind with reference to hours of work, to the effect of collective

²⁶¹ NIKISCH, *ARBEITSRECHT* 574 (1955); SPYROPOULOS, *LA LIBERTÉ SYNDICALE* 199-200 (1956).

²⁶² MAZZONI, *MANUALE DI DIRITTO DEL LAVORO* 142 (1958); Mengoni in *E.C.S.C. HIGH AUTHORITY, LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES PAYS MEMBRES DE LA C.E.C.A.* 251 (1958).

²⁶³ *Préambule de la Constitution du 27 octobre 1946: "Nul ne peut être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances."*

²⁶⁴ 3 DURAND (with the concurrence of Vitu), *TRAITÉ DE DROIT DU TRAVAIL* paras. 26, 252, 292 (1956) [hereinafter cited as 3 DURAND].

agreements, to workers' councils and other matters.²⁶⁵ The Constitution of the Netherlands²⁶⁶ supplied the programmatic foundation for the Dutch law of 1950 concerning the Economic and Social Council, which exercises important consultative functions, and concerning the various kinds of Industrial Councils comprised in each case of labor and management representatives, which are intended to exercise consultative, and also to some extent regulatory, functions for particular industries. The Constitution of Luxembourg was amended in 1948 in order to guarantee to each citizen the right to work, and to enjoin the legislature to provide for social security, for the protection of the health of all workers and of their hours of rest and for guarantees of the freedom to organize. All of this is nothing more than a program for legislation, except that the courts have held that the concluding words concerning freedom of organization confer an immediate right to strike.²⁶⁷

These examples should suffice to emphasize the fact that European constitutions can be very misleading. One must in each case look at the decisions of the courts and at the opinions of learned writers in order to determine the extent to which a given provision of a constitution creates rights and obligations of labor and management, and to what extent it merely holds out promises of future legislation. This is especially important if one's view is colored by American constitutional law since American and European canons of interpretation differ greatly. On the Continent it is the object of a constitution not only to define the limits of legislation but, to some extent, to provide a blue-print for it—that is, to say what the legislature should do and not only what it may not do. Whether the legislature will accept the assigned tasks is generally determined by political considerations (as is vividly illustrated by the debates concerning the implementation of Article 39 of the Italian Constitution).²⁶⁸ The courts can do nothing to enforce such constitutional mandates unless they decide that they embody norms of positive law, and whether they will do so or not cannot be predicted. Where courts are unfavorably disposed towards policies embodied in constitutional provisions, they are unlikely to see in such provisions more

²⁶⁵ *Italian Constitution*, art. 36 (3), art. 39, art. 46. See Mazzoni, *op. cit. supra* note 262.

²⁶⁶ Molenaar, *Les Sources du Droit du Travail aux Pays-Bas*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 257, at 161, 166.

²⁶⁷ Kayser, *Les Sources du Droit du Travail dans Le Grand-Duché de Luxembourg*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 257, at 152.

²⁶⁸ See Mazzoni, *Il Diritto dei Rapporti Collettivi di Lavoro in Italia*, in I RAPPORTI COLLETTIVI DI LAVORO 45, 90 (1959).

than legislative programs. This fact explains to some extent court decisions in Germany between 1919 and 1933, and these decisions in turn explain why so many of the constitutional provisions of the Bonn Basic Law are expressly formulated as positive norms. On the other hand, the important clauses on labor law and social policy contained in the Constitution of the Fourth French Republic and now incorporated in that of the Fifth were written into the Preamble rather than the body of the Constitution in order to make it impossible for the then competent "constitutional committee" to scrutinize legislation with regard to its compatibility with these provisions.

In France and in the three Benelux countries, it should be added, judges have no power to declare a law unconstitutional, and in Germany and in Italy this power is reserved to a "constitutional court" to which all litigation must be submitted in the event of an allegation of unconstitutionality. Under the Constitution of the Fifth French Republic the Constitutional Council can be asked to determine on the constitutionality of legislation prior to its promulgation, but the right to submit ordinary legislation to the Council is reserved to the President of the Republic, the Prime Minister, and the presidents of the two houses of Parliament.²⁶⁹

The question of the distribution, in matters concerning labor relations, of legislative powers between a federal parliament and the parliaments of members of a federation arises only in Germany.²⁷⁰ Labor law and social insurance belong to the sphere of "concurrent legislative jurisdiction" of the Federal Republic and its states (*Länder*). This means that as soon as the Federal Republic has exercised its legislative jurisdiction (as, in fact, it has in most fields of labor and social security) the field is "pre-empted" and the *Länder* can no longer legislate. Labor and social security problems clearly require uniform solutions, and the federal government is therefore expected to enact legislation in these areas.²⁷¹ Nonetheless some areas remain—industrial arbitration is one—where some laws of the *Länder* are still in force. Anyone concerned with German labor legislation must keep an eye not only on the legislation of the Federal Republic but also on that of the states, as well as on some still existing

²⁶⁹ For the foregoing: E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 257, *passim*; CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE art. 61 (1958).

²⁷⁰ Except with regard to the Italian "regions." This matter is not further pursued here.

²⁷¹ See Boldt, *Les Sources du Droit du Travail en Allemagne*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 257, at 51-62; arts. 72, 74, No. 12 of the Basic Law of the Federal German Republic.

remnants of legislation of the Inter-Allied Control Council and of the transitional legislative bodies which preceded the formation of the Federal Republic. A vast amount of consolidation and simplification of legislation has been achieved in the last few years, but there are still vestiges of the chaos which prevailed during the years following the collapse of the Nazi State.

The status accorded to treaties by constitutions is important to an understanding of labor law in the Six not only because of the need for analyzing the relation between the Treaty of Rome and the municipal laws of the Member States, but more importantly in order to have a clear understanding of the status in municipal law of conventions of the International Labor Organization which have been ratified by the Member States. Nothing in the laws of the Six corresponds to the provisions of the United States Constitution concerning the treaty-making power or stating that treaties form part of the "supreme law of the land." The provisions of a treaty do not acquire the force of law so as to impose obligations or to confer rights upon any individual unless the treaty has been ratified or approved by an act of the legislature. In some of the Member States ratified international agreements are said to prevail over ordinary legislation. This principle was expressed in the Constitution of the Fourth French Republic,²⁷² but according to the present Constitution²⁷³ the principle applies only if the other contracting parties fully apply the treaties or agreements concerned.²⁷⁴ In the case of I.L.O. conventions the obligation of the governments concerned to place the matter before their legislative organs "for the enactment of legislation or other action" is based on the Constitution of the I.L.O. itself.²⁷⁵

All the six countries have, at one stage of the development of their legislation, enacted a civil code. The extent to which the provisions of those codes are now of importance in regard to the law governing labor relations depends largely on the date at which the particular code was enacted. The French and Belgian Civil Codes were enacted at a time when industry was in its infancy and when legislation was still dominated by the economic principles of *laissez-faire*. They have almost completely lost their importance in prac-

²⁷² CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE art. 28 (1946).

²⁷³ CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE art. 55 (1958).

²⁷⁴ The complexity of the matter emerges from the fact that in Belgium treaties have no stronger legal force than statutes, but in Luxembourg they have. See Horion, *Les Sources du Droit du Travail en Belgique*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 257, at 80; Kayser, *supra* note 267, at 152.

²⁷⁵ 1946 I.L.O. CONST. art. 19 (5) (b).

tice: their special provisions concerning the contract of employment were, in France, either repealed or incorporated in the Labor Code (*Code du Travail*).²⁷⁶ In Belgium the Code was superseded by later legislation, notably the statutes of 1900 and 1922, amended in 1954 and 1955, regulating the contract of employment of manual and of non-manual employees, but no labor code has ever been enacted in Belgium. In Luxembourg the Civil Code, to which much special legislation has been added, continues to apply to manual workers, but as regards non-manual workers it has been superseded by legislation first enacted in 1919 and then considerably amended in 1937. In the Netherlands the Civil Code would have suffered the fate of the French and Belgian Codes had it not been, as it were, rejuvenated by the law on the contract of employment of 1907, which (differing from legislation enacted elsewhere) took the form of a comprehensive amendment of the Code itself. Italy got an entirely new Civil Code in 1942, and, consequently, the provisions of the Civil Code (Articles 2096–2129) are of greater importance in Italy than in any other of the six countries. In Germany the amended provisions of the Civil Code of 1896 are still of importance, but they are supplemented and partly superseded by special rules contained (with regard to industrial workers and employees) in the Industrial Code (*Gewerbe-Ordnung*) originally of 1869 and often amended, in the Commercial Code (with regard to clerical workers) and in many special enactments.²⁷⁷ The Industrial Code comprises the bulk of the protective rules on labor in factories.

It goes without saying that labor legislation in all countries is voluminous. Legislation concerning health, safety, and welfare of workers in factories, mines, and offices, and in the various branches of transport, concerning hours of work and the employment of women, children, and young persons, concerning the payment, and to some extent the amount, of wages, concerning collective bargaining, trade unions, labor disputes and their settlement, labor courts, labor inspection and employment exchanges, and many other matters besides, has been passed in all six countries. Everywhere there is a vast and unwieldy mass of statutes and statutory regulations which only specialists can hope to master. French law, however, differs in one respect from legislation in the other Community countries. In France an attempt has been made to consolidate the existing labor legis-

²⁷⁶ See text *infra* at footnote 278.

²⁷⁷ For this information and for further details, see E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 257, *passim*.

lation in what is misleadingly called a "labor code" (*Code du Travail*), originally enacted (in installments) between 1910 and 1927²⁷⁸ and more or less kept up to date by means of amendments. Although the work is (and presumably always will be) incomplete, the volume of the "non-codified" texts being many times that of the Code, the consolidation has made it a little less difficult to find one's way through French legislation than through that of the other nations. In Germany a private venture, the looseleaf publication of labor legislation by H. C. Nipperdey,²⁷⁹ performs up to a point a similar service.

As was said above, legislation plays a greater role in the regulation of labor relations on the Continent of Europe than it does either in the United States or in Britain, but the extent to which this is true differs greatly in the six countries of the Common Market. With some exaggeration one may say that the role of legislation in determining the rights and obligations of employers and employees in a given country is inversely proportional to the quality of its collective bargaining machinery. The stronger the latter, the less need there is for invoking the aid of the legislature, and the strength and quality of collective bargaining in turn depend very much on the structure of the trade union movement. The political and other difficulties which beset the French trade unions²⁸⁰ and in particular their disunity should be kept in mind when trying to understand the role played by labor legislation in France. Legislation is more important than collective bargaining as a source of the mutual rights and obligations of employers and employees in France, much more than in Germany, Belgium, or the Netherlands, and certainly no less so than in Italy. Thus in Belgium²⁸¹ collective bargaining functions well, largely, though not exclusively, through standing bilateral committees known as *commissions paritaires*. Consequently, if one compares the situation with that half a century ago, "state intervention emerges today as very much less important: this is a fruit of trade unionism."²⁸²

The increasing importance of collective bargaining is exemplified by the shift in methods of shortening hours of work in Belgium.

²⁷⁸ For its history and structure: I DURAND & JAUSSAUD, *TRAITÉ DE DROIT DU TRAVAIL* para. 98, at 117-120 (1947) [hereinafter cited as I DURAND].

²⁷⁹ NIPPERDEY, *ARBEITSRECHT* 5th ed. (1958).

²⁸⁰ See LORWIN, *THE FRENCH LABOR MOVEMENT* (1954), esp. at 145.

²⁸¹ The structure of Belgian industrial relations in some ways resembles that in Britain. See text at note 310 *infra*.

²⁸² Lagasse, *National Belgian Report on Individual Labour Relations* 7, 2nd International Congress on Social Legislation (Brussels, 1958).

"Fifty years ago one thought only in terms of legislative intervention or intervention of the executive (for example, the law of December 31, 1909 concerning working hours in mines). In 1921, the law established the general principles of the eight-hour day and of the 48-hour week, but appealed to collective bargaining (at industry or plant level) to introduce divergent schemes (that is, schemes more favorable to the workers). In 1936, when the question of reducing the working week to 40 hours arose, Parliament was content to invite the bilateral committees to take the initiative in this direction. More recently, in 1955 and 1956, when the trade unions started a movement for the five-day week, no proposal for legislation was laid before the Chambers (of Parliament): reform was carried into effect exclusively by agreements with the employers' associations, first at the inter-industrial, then at the industrial, and finally at the plant level."²⁸³

This should be contrasted with the development in France. The 40-hour week was introduced by statute in 1936, and the system of overtime pay was again changed by legislation in 1946. Collective bargaining has made much progress since the enactment of the law of 1950,²⁸⁴ but a very large proportion of all collective agreements in France continue to be agreements about wages only, leaving all such matters as working hours and overtime pay, holidays and holiday remuneration, or the employer's obligation to compensate the employee in the event of dismissal, to regulation by statute. Two of the most distinguished French authorities on labor law have, indeed, attributed the slowness of the growth of collective bargaining to the impoverishing effect which the rapid development of labor legislation has had on the content of collective agreements.²⁸⁵ One may wonder, however, whether the tendency to invoke the aid of the legislature (so markedly different from the tendency in Belgium) was not itself partly a result of the weakness of the collective bargaining machinery caused both by the structure of the French economy and by the split among the trade unions.

Despite the complete destruction of the German trade unions by the Nazi government and the cessation of all collective bargaining between 1933 and 1945, collective agreements are in many respects of far greater importance in Western Germany today as sources of

²⁸³ *Ibid.*

²⁸⁴ Law of Feb. 11, 1950, [1950] J.O. 1688, the basis of collective bargaining in France today.

²⁸⁵ ROUAST & DURAND, PRÉCIS DE LÉGISLATION INDUSTRIELLE para. 196, at 253 (4th ed. 1951). See also Lorwin, *op. cit. supra* note 280, at 134.

rights and obligations than statutes. The rapid and spectacular revival of collective bargaining in the Federal Republic since 1945²⁸⁶ is partly due to the unity of the German trade union movement which distinguishes it so dramatically from the French. It would be wrong to attribute this unity exclusively to the virtual absence of Communist influence in the West German trade unions, but that this is a contributing factor cannot be doubted. In any event the regulation of the details of the employment relationship by collective agreement has become the rule to such an extent in Germany that legislative intervention affecting the contract of employment has, in this century, been comparatively inconspicuous.²⁸⁷ The "statute law concerning the contract of employment . . . is still essentially that of the codifications of the end of the 19th century, that is, in particular of the civil code and the commercial code. This self-restraint on the part of the legislature was only possible because the collective parties had taken the development of labor law in this area out of its hands."²⁸⁸ The great exception to this general statement is that of the law of *Kündigungsschutz* which protects the employee in the event of dismissal and fulfills to some extent the function of the American collective agreements on seniority.²⁸⁹ This is a significant example of a matter which, in Germany and in France, is governed by statutes²⁹⁰ but which Americans do not see as a subject of legislation.

Italian labor law is still in a state of transition, and it is more difficult to gauge the relative importance of legislation and collective bargaining in shaping labor relations in Italy than it is in the other five countries. Fascist legislation has disappeared,²⁹¹ but the promise—held out by Article 39 of the Constitution of 1947—of legislation to define the legal status and effect of collective agreements has not yet been fulfilled. A provisional and transitional statute of 1959 has, however, empowered the Government for the period of one year to issue decrees fixing legally binding minimum

²⁸⁶ Kerr, *Collective Bargaining in Postwar Germany*, in CONTEMPORARY COLLECTIVE BARGAINING IN SEVEN COUNTRIES (Sturmthal ed. 1957). See also Second EXPOSÉ para. 68.

²⁸⁷ This observation does not, of course, apply to matters such as protection of health, safety, and welfare, or to the organization of the works' council system, to be discussed *infra*.

²⁸⁸ Dietz, National German Report on Collective Labour Relations, submitted to the 2nd International Congress on Social Legislation (Brussels, 1958).

²⁸⁹ See PART II, Section E, Subsection 3 *infra*.

²⁹⁰ The matter is discussed below in section E. As will be seen, what has been said here about France and Germany cannot be applied to all the six countries. In Italy collective bargaining is today more important in this context than legislation.

²⁹¹ Law Decree of Nov. 23, 1944, No. 369, [1943-44] Lex, *Legislazione Italiana* 521.

wages and other conditions of employment. These are to correspond in substance to collective terms agreed upon prior to the coming into force of the statute.²⁹² The constitutionality of this statute will remain doubtful until the Constitutional Court has spoken.

At the moment of writing no one can predict which of the many definitive legislative projects under discussion in Italy will be translated into law.²⁹³ It is noteworthy that, despite the absence of legislation on collective bargaining and despite the complicated and voluminous legal controversies which surround the status of the trade unions and of their agreements with employers and employer associations, collective bargaining has had a considerable development since the end of the second World War.²⁹⁴ One of the most remarkable features of this development is the formulation—chiefly by two “inter-industrial agreements” of October 18 and April 21, 1950—of certain principles of procedure to be observed, and concerning indemnities to be paid, in the event of individual discharges or discharges caused by reduction of personnel.²⁹⁵ These agreements, which have been sustained by the courts, amplify the relevant provision of Article 2120 of the Code of 1942 and embody what is probably the closest parallel to the American conception of “seniority” agreements to be found in Europe today. Nevertheless, in spite of the survival or revival of collective bargaining in Italy, the over-all picture seems to resemble that of France. “State legislation certainly constitutes the most abundant source of provisions with regard to the regulation of labor relations, and one can even observe an unmistakable tendency on the part of the legislature to reserve to its own jurisdiction an increasingly important range of topics which are thus withdrawn from that of the autonomous organizations in industry. With regard to certain topics the Constitution itself provides that they will be regulated by legislation, for example, working hours, the weekly period of rest, and annual vacations (Article 36); legal status in industry and working conditions of women and children (Article 37); restrictions on the right to strike (Article 40); and the participation of workers in the man-

²⁹² See for the situation apart from the statute of 1959, Mazzoni, National Italian Report on Collective Labour Relations, 2nd International Congress on Social Legislation (Brussels, 1958). The statute of 1959 is further discussed below.

²⁹³ On the bill submitted by Signor Rubinacci in 1951, the most widely discussed of these attempts to solve the problem, see Mazzoni, *supra* note 268, at 99.

²⁹⁴ Sanseverino, *Collective Bargaining in Italy*, in CONTEMPORARY COLLECTIVE BARGAINING IN SEVEN COUNTRIES 210 (Sturmthal ed. 1957). However, compared with the development in Germany, that in Italy is modest. Second EXPOSÉ para. 73.

²⁹⁵ Mengoni, *supra* note 262, at 278; see also Mazzoni, *supra* note 268, at 109, where the relevant cases are cited.

agement of undertakings (Article 46). On the other hand, one topic, and, of all things, that which concerns wages, appears, on principle at any rate, to have been withdrawn by the Constitution from legislative intervention and to have been reserved to collective agreements." ²⁹⁶ The legal status of collective bargaining in Italy more nearly resembles that of collective bargaining in Britain and in the United States than that of the other Member States, but its significance, compared with legislation, cannot—or, perhaps, cannot yet—be compared with that of its counterparts in the English-speaking countries.

It is only in the Netherlands of all the Community countries that wages and conditions of employment are subject to the control of a governmental institution, the Council of Mediators.²⁹⁷ Nevertheless—or perhaps because of the stimulus which the Council has deliberately given to collective bargaining since 1945—the number of agreements and the number of workers subject to agreements has risen spectacularly.²⁹⁸ The Netherlands is one of the European countries in which collective bargaining flourishes. The significance of legislation in shaping the employment relation is nevertheless great, greater probably than in Belgium or in Germany, both because the law concerning the contract of employment of 1907 (which amended the Civil Code of 1838) was a comprehensive measure of 70 articles, and because an important law concerning the termination of contracts of employment was enacted on December 17, 1953.²⁹⁹ As in France and in Germany provision has been made by statute not only for the periods of notice to be given by the employer to the employee prior to the termination of the contract but also for compulsory payment by the employer of a special compensation in the event of an unfair use of the right to give notice.³⁰⁰ Although the Council of Mediators has in some cases made supplementary provision for the regulation of the termination of contracts of employment, this important statute of 1953 remains the principal source of law and is therefore decisive, *inter alia*, in that area which corresponds to the American regulation of "seniority" rights.

²⁹⁶ Mengoni, *Les Sources du droit du travail en Italie*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 237, at 122.

²⁹⁷ See on this Levenbach, *Collective Bargaining and Government Wage Regulation in the Netherlands*, 16 MODERN LAW REVIEW 453 (1953).

²⁹⁸ Pels, *The Development of Collective Employment Agreements in the Netherlands*, in CONTEMPORARY COLLECTIVE BARGAINING IN SEVEN COUNTRIES 98 (Sturmthal ed. 1957).

²⁹⁹ See de Gaay Fortman, National Netherlands Report on Individual Labour Relations, 2nd International Congress on Social Legislation (Brussels, 1958).

³⁰⁰ PART II, Section E *infra*.

In Luxembourg there is a very marked difference between the position of manual and non-manual workers. The position of the latter is controlled by a fairly up-to-date codifying enactment, but there is no corresponding statutory regulation for manual workers. It is perhaps a fair generalization to say, therefore, that the importance of collective bargaining overshadows legislation in determining the relation of manual workers to their employers.³⁰¹

This very brief survey should suffice to convince the reader that any analysis of the mutual rights and obligations of employers and employees in the Six must take legislation as well as collective bargaining into account. The I.L.O. has long since recognized that standards established by it can be adopted, and obligations to introduce such standards can be implemented, by either method.³⁰² By the same token "harmonization" pursuant to the Treaty will lead nowhere unless bargaining practice as well as legislation is taken into account. In France paid holidays are regulated by statute, in Germany mainly by collective bargaining, and in the Netherlands regulation of paid holidays is in a state of transition from one to the other. From the point of view of harmonization, what matters, of course, is the substance of the mutual obligations, not their source.

B. THE METHOD AND LEGAL SIGNIFICANCE OF COLLECTIVE BARGAINING³⁰³

Where bargaining methods and the legal effect of collective agreements are concerned, European ideas and practices differ from those

³⁰¹ See Kayser, *supra* note 267, at 151. The law concerning salaried employees dates from 1937.

³⁰² *Preface* to I INTERNATIONAL LABOUR CODE 1951 at lxxvi (1951).

³⁰³ General Reference is made to the following works:

- a) COMPARATIVE LABOR MOVEMENTS (Galenson ed. 1952).
- b) CONTEMPORARY COLLECTIVE BARGAINING IN SEVEN COUNTRIES (Sturmthal ed. 1957).
- c) STEINMANN-GOLDSCHMIDT, GEWERKSCHAFTEN UND FRAGEN DES KOLLEKTIVEN ARBEITSRECHTS (1957).
- d) E.C.S.C. HIGH AUTHORITY, ETUDE COMPARATIVE DES SOURCES DU DROIT DU TRAVAIL DANS LES PAYS DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER (1957).
- e) Kahn-Freund, *Collective Labour Relations*, Report prepared for the 2nd International Congress on Social Legislation, Brussels, 1958 (published in English in RIVISTA DI DIRITTO INTERNAZIONALE E COMPARATO DEL LAVORO, Vol. 3, pp. 353-409 (1960)).
- f) Among the national treatises, the third volume of Durand's TRAITÉ DE DROIT DU TRAVAIL (1956) is of special importance.
- g) Much the best comparative treatise on the matters discussed under this sub-heading is Spyropoulos's "Le Droit des Conventions Collectives de Travail dans les Pays de la Communauté Européenne du Charbon et de l'Acier," 16 TRAVAUX ET RECHERCHES DE L'INSTITUT DU DROIT COMPARÉ DE L'UNIVERSITÉ DE PARIS (1959). The present writer expresses his special indebtedness to this excellent monograph.

in the United States, and there are some important differences among the Six as well.

I. BARGAINING BY EMPLOYERS' ASSOCIATIONS

Without any doubt the most important difference between collective bargaining all over Europe (on the Continent as well as in Britain) and in the United States is the prevalence of bargaining in Europe by employers' associations. Collective bargaining by individual employers is not unknown and indeed it is inevitable where—as is true of railways all over Europe, of coal mining in France and partially of coal mining in the Netherlands, and of the postal, telephone, and telegraph services everywhere—the bargaining employer is either the state or a public corporation administering an industry as a public enterprise. Even in such cases, however, the bargaining unit on the employer's side is likely to be the enterprise and not the plant. It is, in American terms, "company-wide" and not "plant-wide" bargaining.

The usual bargaining partner of a trade union or unions is, however, an employers' association or a number of such associations. This does not necessarily mean that bargaining is nation-wide. In France district bargaining is very common, whereas, for example, in Germany "industry-wide" or "nation-wide" bargaining prevails, as it does in Italy and the Benelux countries.

Plant-wide bargaining is, not without reason, viewed with a certain amount of suspicion, especially in France.³⁰⁴ Hence French law, according to what is probably the correct solution of "one of the greatest riddles" in the law of collective bargaining, seeks to counteract the danger that, "within the framework of a plant, agreements might be concluded between an employer and a union which is too accommodating."³⁰⁵ Although the matter is not free from doubt, it appears that under French law only that organization which is "most representative" (a highly technical term explained below), and therefore sure to be independent, can enter into collective agreements which cover only one plant or several enumerated plants. Moreover, in the absence of a national, regional, or local agreement such an "*accord d'établissement*" or plant agreement can only deal with wages, and in the presence of a national, regional, or local agreement it can modify its terms only in favor of the employees. The details of the highly technical distinction between

³⁰⁴ See the reference to the debates in the National Assembly preceding the passing of the law of Feb. 11th, 1950, in 3 DURAND para. 181.

³⁰⁵ 3 DURAND para. 241.

"accords" and "conventions" need not be further discussed here.³⁰⁶

The reason or reasons why collective bargaining in Europe has in this respect developed along lines so different from those which its development has followed in America cannot be explored either. They must be sought in the history of industrial relations and in general economic and political trends. Clearly, however,—whether this be a cause or an effect of bargaining by employers' associations or both—collective bargaining in Europe has a very important function in determining relationships between enterprises or management units as well as those between labor and management. It helps to regulate competition and to prevent certain kinds of undercutting. Moreover, it is quite impossible to understand the law relating to collective agreements without realizing that, in principle, there are two kinds of firms from the point of view of collective bargaining, those who have and those who have not joined the appropriate employers' associations. The distinction among workers between organized and unorganized labor has its counterpart, therefore, among employers—that between federated and non-federated firms. Once an agreement has been concluded by an employers' association, its members are very likely to be interested in the "extension" of its terms to non-federated employers. Such an extension is not normally effected by collective bargaining, however, since non-federated firms will frequently be those unwilling to bargain with unions. Only the law can effect such extensions and this is one of the reasons, but not the only one, why the law has played such a prominent role in the evolution of collective bargaining in the Six. In five of the six countries there exist, in one form or another, procedures to extend, by administrative act, the effect of collective agreements to "non-federated" employers, and in the sixth country, that is, in Italy, similar legislation was—in substance though not in form—provisionally introduced in 1959.³⁰⁷

From the point of view of an American firm wishing to operate in one of the six countries this point is important. The American employer cannot, in the countries of the Community, remain outside the nexus of collective bargaining if he is inclined to do so, any more than he can in the United States. To some extent the "extension," and similar, provisions of European legislation fulfill a function like that of American laws which compel employers to bargain in good faith. The non-federated employer must contemplate at least the

³⁰⁶ *Id.* para. 242.

³⁰⁷ It is, however, controversial whether this provisional statute is constitutional in view of Art. 39 of the Constitution.

possibility of being placed under a legal obligation to observe the terms of an agreement on which he had no influence. In view of the legal requirements to be fulfilled as a condition for an "extension" or similar order,³⁰⁸ the likelihood of this happening may be less in some cases than in others, but the possibility is always there, and its practical corollary is the advisability of joining an employers' association.

Collective bargaining is, then, on the whole, more centralized in Europe than in America. This is reflected in the structure of the trade unions. By and large, the powers of the "local" or "branch" union compared with those of the district or national organs are smaller in Europe than in America. Even in France, where a strong tradition of decentralization inside the unions grew out of the organizational and ideological traditions of the labor movement,³⁰⁹ the real power rests with the central union institutions. It would be very misleading to compare the functions of an American "local" with those of its European counterpart, and the causes of the difference can only partly be found in the size of the United States as contrasted with that of any of the Six. The process of centralization does not stop at "industry-wide" bargaining. For example in Germany, in Italy, and in Belgium confederations of trade unions (that is, the equivalents of the A.F.L.-C.I.O.) enter into compacts on vital questions with central associations of employers' federations. In Luxembourg, the smallest of the Six, this phenomenon is particularly marked.

2. CONTRACTUAL AND INSTITUTIONAL BARGAINING

Another aspect of collective bargaining in the Six which might strike an American as unfamiliar is the existence of two types of bargaining machinery, which—for want of a better word—might be called "contractual" and "institutional." In two of the six countries, Germany and Italy, bargaining machinery is purely "contractual" (as it mainly is in the United States). The bargaining partners, normally organizations on both sides, occasionally a single employer on one side and a union or unions on the other, meet, discuss, and, if all goes well, arrive at a contract. At the opposite extreme is Belgium, where collective bargaining is highly developed, but in a form more reminiscent of the British than of the American type. Begin-

³⁰⁸ *I.e.*, an order extending the legal effect of a collective agreement to non-federated employers and making it a "common rule." See below. This applies to France, Germany, Luxembourg, and the Netherlands, and, in substance, also to Belgium.

³⁰⁹ See LORWIN, *op. cit. supra* note 280, pt. I.

ning shortly after the end of the first World War, the two sides of industry have there set up—and for a long time they were entirely outside the law—bilateral committees (*commissions paritaires*) consisting of equal numbers of employers and employees, that is, employers' association and trade union representatives in equal numbers. These committees fixed wages and other conditions of employment by unanimous decisions and sought to settle industrial conflicts, in very much the same way as British "joint industrial councils" and similar bodies do.³¹⁰ They were (and are) generally established on an industry-wide basis, although sometimes their scope is national and sometimes district-wide. Originally they had no official status whatever, but were simply collective bargaining organs established by the joint action of the unions affiliated to certain top organizations and of the employers' organizations. In 1945, after the Liberation, they were given legal status.³¹¹ Each of them now has an impartial president and vice-president (usually civil servants), a secretarial staff and the like, appointed by the Minister of Labor, but only the management and labor representatives can vote. They usually meet at the offices of the Ministry. The whole of Belgian economic life is now covered by the more than 100 existing committees, some of which deal only with manual workers, whereas others deal with salaried employees, and still others with both. The resolutions (*accords*) adopted by a committee (necessarily unanimously) can be given a legally binding effect by royal decree. This possibility is certainly important, but the overwhelming majority of these "resolutions" are never made legally binding, and are neither contracts nor enforceable norms, but, like British collective agreements, no more than social compacts. Collective bargaining outside the committees is not insignificant, prevailing for example in the textile industry around Verviers and in the cement industry, but the overwhelming majority of all collective agreements are today resolutions of the permanent bilateral committees.

The collective bargaining system of Luxembourg resembles that of Belgium. In Luxembourg there is only one bilateral committee (*commission paritaire*) established by a Decree of 1945³¹² as part of

³¹⁰ See for the *commissions paritaires*: Horion, *supra* note 259, Van Goethem, National Report for Belgium, 2nd International Congress on Social Legislation (Brussels, 1958); STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 303, at 94 *et seq.*

³¹¹ Law Decree determining the status of *Commissions Paritaires* of June 9th, 1945, [1945] *Moniteur Belge* 4337.

³¹² Decree of the Grand Duchess of Oct. 6, 1945, arts. 1-5, [1945] *Pasin. Lux.* 540. Much of the information in this paragraph (and elsewhere in this chapter) concerning Luxembourg is derived from a series of answers to a questionnaire of the Institute of

the National Conciliation Office. As in Belgium, most but not all collective agreements are concluded in the form of resolutions of this committee, which consists of three employer and three union representatives but, unlike the Belgian bilateral committees, the Luxembourg committee consists of representatives of the top organizations and not of the individual unions, a type of bargaining which can, of course, only exist in a very small country—at any rate as the normal type of bargaining. Again, whereas in Belgium some of the committees deal with salaried employees, there has so far been virtually no collective bargaining for salaried employees in Luxembourg, their conditions of employment being largely governed by a comprehensive statute.³¹³ There is a very appreciable difference between the legal effect of collective agreements in Belgium and in Luxembourg, the law of Luxembourg being in this respect much more akin to French than to Belgian law.

Generally speaking, the French type of collective bargaining is “contractual” rather than “institutional.” Nevertheless, a very strong “institutional” element has been introduced by legislation.³¹⁴ Joint committees (*commissions mixtes*) are, and in some cases have to be,³¹⁵ summoned by the Minister of Labor ad hoc, that is, for the sole purpose of concluding a collective agreement capable of being “extended” by the Minister to non-federated employers, and thus of being made a “common rule” of industry. Only the “most representative organizations”—that is, in practice, on the employers’ side, the National Council of French Management³¹⁶ (the French National Association of Manufacturers) and, on the employees’ side, the C.G.T.,³¹⁷ the *Force Ouvrière* (F.O.), and the C.F.T.C.³¹⁸ (the three leading French top organizations)—are represented on these committees, which are presided over by a representative of the Minister, who does not vote. Some of these committees operate on a national and others on a regional or local basis.

Unlike the Belgian and Luxembourg bilateral committees, the joint committees are not, then, normal bargaining bodies, but oper-

Comparative Law at the University of Paris. The author expresses his gratitude to M. G. van Verwecke, Secretary of State in the Ministry of Labor, and to M. F. Ewen of the same Ministry for having put this and other material at his disposal.

³¹³ Law of Oct. 21st, 1919, substantially amended by Law of June 7, 1937, [1937] *Pasin. Lux.* 119.

³¹⁴ CODE DU TRAVAIL bk. I, tit. II, art. 31f, introduced by the Law of Feb. 11th, 1950, [1950] *J.O.* 1688 (Fr.).

³¹⁵ See the detailed analysis in 3 DURAND, para. 219.

³¹⁶ Conseil National du Patronat Français.

³¹⁷ Confédération Générale du Travail.

³¹⁸ Confédération Française des Travailleurs Chrétiens.

ate only in those exceptional (but also exceptionally important) situations in which "the most representative organizations" are called upon to agree to terms and conditions which the Minister can then convert into a "law for the trade." In addition, French law³¹⁹ provides for a purely consultative body, made up of representatives of both sides of industry and of other interests, the Higher Committee on Collective Agreements (*Commission Supérieure des Conventions Collectives*) which is called upon to advise the Minister of Labor in the event that management and labor cannot agree and also in the event of an application to "extend" the terms of an agreement to outsiders. Its most important function is in connection with the fixing of the statutory over-all minimum wage.

In the Netherlands the pattern of collective bargaining is largely determined by the existence and the powers of the Council of Mediators, which, being a body of impartial outsiders appointed by the government, cannot be compared with the representative committees of Belgium, Luxembourg, and France, quite apart from the fundamental difference in functions and in jurisdiction. Nevertheless, the Foundation of Labor, in which labor and management cooperate and which is completely independent of the government, gives to collective bargaining—seen from a social rather than a legal point of view—the imprint of the "institutional" pattern. The Foundation has only consultative functions but the Council of Mediators neither approves nor disapproves of an agreement without consulting it, and normally, when the Foundation recommends approval, the Council will approve.³²⁰

3. UNION STRUCTURES AND IDEOLOGIES³²¹

An American looking at the European scene is likely to find much that is unfamiliar not only in trade union structures but also in trade union ideologies, and he will soon realize that these ideological differences have had their effect on collective bargaining methods and on the substance of collective bargaining. In the first place he cannot fail to notice the continuing strength of working class solidarity. Each union is, and sees itself as, not only an organization for the defense of the interests of its members but also a part of the working class movement. In the second place, however, Western European trade unionism is linked with political programmes and

³¹⁹ CODE DU TRAVAIL, bk. I, tit. II, art. 31v.

³²⁰ Pels, *supra* note 298, at 119; see also Levenbach, *supra* note 297.

³²¹ No more than a few suggestions are given here. Reference is made to the literature quoted in note 303 *supra*.

ideas and with religious persuasions—although this differs greatly from country to country. In the Netherlands there are unions with Socialist, Communist, Protestant, and Catholic leanings; in France there are three types of unions whose tendencies are, broadly speaking, Communist, Socialist, and Christian; whereas in Germany, as a result of the dire experience of the Nazi system, the division among “free” (that is, Socialist), “Christian” and “Liberal” (nationalist) unions was eliminated in 1945 when the present “united” trade union movement came into being. This dual phenomenon—working class solidarity and the political-religious affiliation of trade unions—has meant that “splits” between unions and jurisdictional disputes are not normally the result of purely “organizational” rivalries, but rather of conflicts concerning lines of demarcation, for example, between two craft unions which cannot come to terms concerning the allocation of certain work processes or between unions of different political persuasion. Working class solidarity certainly does not mean trade union unity, since the ideological differences remain, but it does mean that, vis-à-vis the employer or the employers’ association, the various unions, however divided among themselves, can form a united front. Joint collective bargaining by trade unions of different political and religious persuasions is common and, where industrial unionism is not fully developed, unions with the same political or religious persuasion but organizing different types of workers or employees, may, and often do, appear as joint bargaining partners. This is one of the principal reasons why the American observer will look in vain for anything corresponding to the procedures for the determination of the “statutory bargaining representative” with which he is familiar. There is no need for determining *the* union which may bargain since many unions may bargain together.

Moreover, the structure and the ideology of the European trade union movements leave little room for a counterpart of the American “union security agreement.” Trade unions everywhere aim at 100 percent trade union organization in the industries in which they operate, and everywhere they may, if the law allows them to do so, go to the point of obtaining the agreement of an employer or employers not to hire anyone who is not a member of *a* trade union or perhaps of a trade union of a particular political persuasion or one affiliated to a particular federation of unions, although even these types of agreements appear to be rare in Europe. But the American variety of union security agreement, tending to reserve employment

to members of the contracting union, though perhaps not unknown in Europe, is certainly not frequent. In France all discriminations in hiring and firing based on membership or non-membership in a union have been made illegal by statute,³²² and to some extent the same applies in Belgium under a law of 1921.³²³ In Germany the courts have held closed-shop agreements to be illegal as against public policy.³²⁴ In the Netherlands a closed-shop agreement of what above has been called the American variety has been declared void by statute³²⁵ (as it has been, of course, in the United States), but a closed-shop agreement excluding non-union labor without seeking to reserve employment to members of a particular union³²⁶ is valid, although it cannot be "extended" so as to bind non-federated employers. But agreements of this kind appear to be of no great significance in community countries with the exception of France. The exception is explained by the conflict between the Communist C.G.T., the Socialist F.O. and the Catholic C.F.T.C. The recent French statute of 1956 was an attempt to give some protection to the smaller groups vis-à-vis the C.G.T.

Within this very broad framework the differences among the union movements in the Six are very great, and what separates them is as important for an understanding of the law as what they have in common. The contrast between the situation in France and in Western Germany illustrates the point. In France the trade union movement has been split along political lines for many years, and of all its various schisms that of 1947 was the most important. The decisive events of 1947 themselves were closely connected with the international political situation (the opening of the rift between East and West), and the French trade unions have in many respects remained at the mercy of political upheavals. The policy of the C.G.T. has in the past been all too obviously subservient to that of the Communist party, and the general revulsion against Communism all over Europe which the events in Hungary in 1956 created

³²² Law of April 27, 1956, [1956] J.O. 4080 (Fr.). This made it unlawful for an employer to take any account of the union membership of his employees or to exercise any pressure in the direction of joining or not joining an organization. The "check-off" is also illegal.

³²³ Law of May 24, 1921, [1921] Recueil des Lois et Arrêtés Royaux de Belgique 956; see Van Goethem, *supra* note 310, at 8.

³²⁴ Judgment of Apr. 6, 1922, 104 Entscheidungen des Reichsgerichts in Zivilsachen 328 (Ger.).

³²⁵ Law of Dec. 24, 1927, art. I, para. 3, [1927] Staatsblad van het Koninkrijk der Nederlanden [hereinafter cited as Stb.] No. 415.

³²⁶ Law of May 25, 1937, art. 2, [1937] Stb. No. 801 (Neth.).

led to widespread resignations from the C.G.T. The inherent weakness of the French trade unions stems not only from their disunity but also from the low percentage of workers organized, which is only partly to be accounted for by disunity. It is estimated that of something like 20 million persons gainfully employed only two million are members of trade unions—approximately one million of the C.G.T., 400,000 of the C.F.T.C. and about 300,000 of the F.O. unions (the latter being to a very large extent civil servants and white collar workers).³²⁷

In Western Germany trade unions were compelled in 1945 to start their organization "from scratch." They were not burdened with the *damnosa hereditas* of the inter-war tradition from which they were separated by the gulf of twelve years of suppression. Before Hitler, the German unions, too, had been split on ideological lines, and the "free" (socialist) unions always occupied a position of overwhelming strength. In 1945, however, the unions rallied behind a drive for "unity," with the result that, at any rate as far as manual workers are concerned, there are today no ideological schisms in the German trade unions. Sixteen "unified unions" (*Einheits-Gewerkschaften*) are combined in one top organization, the D.G.B.,³²⁸ the total number of D.G.B. union members being estimated at well over six million.³²⁹ German union structure and "official" German trade union ideology exhibit an impressive but perhaps slightly deceptive simplicity.

In France and in Germany, as elsewhere in Europe, the principle of industrial union organization clearly prevails over that of craft unionism. This is a tendency inherent in the development of modern industry. In France craft unionism survives at a few not very significant points—in Germany it seems to be dead, as far as manual workers are concerned. The result of this development towards industrial unionism is of course most important from the legal point of view because it minimizes the risk of demarcation disputes, and the difficult problems connected with the simultaneous application of several agreements in one enterprise. Industrial unionism makes for large and powerful unions: the German metal workers union (*I.G.*

³²⁷ These figures are given by Prof. G. Friedel of the University of Nancy in his National Report for France on Collective Labour Relations, made to the 2nd International Congress on Social Legislation (Brussels, 1958), at 3.

³²⁸ D.G.B. stands for "Deutscher Gewerkschafts-Bund."

³²⁹ For this, and other statements on German trade unions and employer's association: 2 HUECK & NIPPERDEY, *LEHRBUCH DES ARBEITSRECHTS* 128 (6th ed. 1955-57).

Metall) has over 1.6 million members, and the union organizing transport workers and workers employed by municipal authorities well over 800,000.³³⁰

Nevertheless, there is in one respect an important difference between the principles of union organization in Germany and in France. In France the non-manual workers (civil servants, teachers, white collar workers) belong to unions affiliated with the same top organizations with which manual worker unions are affiliated. In Germany, however, whereas about one million white collar workers and civil servants belong to industrial unions affiliated with the D.G.B., others belong to separate unions affiliated with separate, comparatively small, top organizations such as the D.A.G. the D.B.B.³³¹ and a few very much smaller ones. This deviation from the principle of industrial unionism is closely connected with the German tradition of a separate status for non-manual workers, a tradition reflected in social insurance law.³³² It does not, however, involve a conflict between the various organizations concerned. In fact, for collective bargaining and other purposes the D.G.B. and the D.A.G. cooperate, a cooperation to which both were formally committed by a solemn resolution adopted by both in 1953. The number of organized workers and civil servants in 1956 totalled more than seven million of the 18.6 millions employed.

In Italy, as in Germany, trade unions had to be rebuilt following a period of totalitarian dictatorship, and, as in Germany, an attempt was made to overcome the ideological rifts of the past and to erect a structure of unified organizations.³³³ But, for a number of reasons connected with the past history of Italian trade unionism, with the economic structure of the country, and with the resulting influence of Communism, the attempt, which was successful in Germany, proved abortive in Italy. The present situation in Italy is reminiscent of that in France—there are three principal groups of trade unions of which one, the C.G.I.L. (*Confederazione Generale*

³³⁰ See 2 HUECK & NIPPERDEY, *op. cit. supra* note 329, and the very informative survey by Kerr, *supra* note 286, esp. at 176. Special reference should also be made to Taft, "Germany," in *Comparative Labor Movements* 243 (Galenson ed. 1952), but its statistical material is slightly out of date having been published in 1952. This is, for an American reader, the best introduction to the history and background of the German situation.

³³¹ D.A.G. stands for "Deutsche Angestelltengewerkschaft," D.B.B. for "Deutscher Beamten Bund."

³³² Separate organization for old age and survivors pensions. See PART III *infra*.

³³³ For Italy, see LA PALOMBARA, *THE ITALIAN LABOR MOVEMENT, PROBLEMS AND PROSPECTS* (1957); Adams, *Italy*, in *COMPARATIVE LABOR MOVEMENTS* 410 (Galenson ed. 1952); Sanseverino, *supra* note 294.

Italiana del Lavoro) is regarded as being under Communist influence, one, the C.I.S.L. (*Confederazione Italiana Sindacati dei Lavoratori*) is generally considered to be politically close to the Christian Democrats, and one, the U.I.L. (*Unione Italiana del Lavoro*) is said to favor the Socialist and Republican Parties. Reliable information concerning the strength of these groups is apparently unobtainable,³³⁴ but it is clear that the C.G.I.L. is far stronger than either of the others, and that the C.I.S.L. is stronger than the U.I.L. Broadly speaking, the unions affiliated to these groups are industrial unions, called federations. In short, there is a close factual resemblance between the French and Italian unions, despite important differences in their legal situation. Collective bargaining is generally on a national basis.

The situation in Belgium differs fundamentally from that in France and in Italy. It also differs from that in Germany since Belgian trade unions have not succeeded in unifying the two large politically-orientated groups, the General Federation of Labor in Belgium (*Fédération Générale du Travail en Belgique*) (which in some respects cooperates with the Socialist Party) and the Catholic Confederation of Christian Unions (*Confédération des Syndicats Chrétiens*). Trade unions affiliated to the former group were thought to have some 681,000 members in 1955, and those in the latter group some 625,000 members in 1953. Both groups cooperate closely in collective bargaining and also as political pressure groups.³³⁵ In addition there are in certain occupations and localities unions affiliated with the General Central Office of Liberal Unions (*Centrale Générale des Syndicats Libéraux*) said in 1952 to number about 90,000 members. These are the three groups of unions which are represented in the bilateral committees (*commissions paritaires*), but the latter two are not on all of them. The Communists appear to be quite insignificant, and are not represented at all on the bilateral committees. The employers' associations represented on these committees are affiliated to the Federation of Belgian Industries (*Fédération des Industries Belges*). The very high standard of development of collective bargaining is demonstrated not only by the organization of the bilateral committees, but also by the significant agreements on particular topics reached by the top union organizations, especially the agreement concerning shop steward

³³⁴ See LA PALOMBARA, *op. cit. supra* note 333, at 106; Adams, *supra* note 333, at 447, states that accurate statistics are unobtainable.

³³⁵ Figures and other statements from Steinmann-Goldschmidt, *op. cit. supra* note 303, at 85.

organization—that is, the representation of the unions at plant or enterprise level—concluded in 1947. In France and in Western Germany such representation is regulated by statute (consultative, as distinguished from representative organization in the individual undertakings being regulated by statute in Belgium as well).³³⁶ The over-all picture of collective bargaining in Belgium is one of centralization, coupled with a minimum of legal intervention or enforcement. In such a scheme of things there is little room for craft unions or for agreements between unions and individual firms.

A comparison between Belgium and the Netherlands reveals great contrasts but also striking similarities. The Dutch trade unions, like their Belgian counterparts, are split on ideological lines, with the difference, however, that the divisions are much more complicated. The largest group is the Netherlands Federation of Trade Unions (N.V.V.) which is loosely linked with the Labor Party, and which (in ideology but not in proportional significance) corresponds to the *Force Ouvrière* in France. Others are the Catholic Workers' Movement, and the (Protestant) Christian National Federation of Trade Unions in the Netherlands. "Each of these trade union organizations comprises, for instance, trade unions of workers in the metal industry, the building industry, food establishments, transport undertakings, miscellaneous branches of industry, as well as unions of government servants, office staff, and the like."³³⁷ What is more, there are three groups of employers' associations, one non-denominational, one Catholic and one Protestant. The strength of denominational feeling, which may reflect the dramatic history of the Netherlands, appears to have very little impact on the social realities of collective bargaining. The three groups of trade unions and the three groups of employers' associations customarily engage in joint collective bargaining, and such other groups, for example, Communist groups, as exist are not significant. To this extent the picture presented by the Netherlands is not too different from that of Belgium. "Nationwide" bargaining between associations is usual in both countries, the coverage of central regulation of wages and other conditions of employment is broad in each country and both the Dutch and Belgian wage regulation systems operate efficiently.

Here, however, the similarities end. The second World War and its aftermath—which included the separation of Indonesia from

³³⁶ See PART II, *Section C infra*.

³³⁷ Pels, *supra* note 298, at 105.

the Netherlands—made it necessary in the Netherlands—as it apparently still is—to counteract inflationary tendencies by governmental control of wages and conditions of employment. The Netherlands is the only country in the Community to impose a system of maximum wages. Collective agreements require the approval of a board of experts, the Council of Mediators appointed by the government. This Council can itself issue regulations, and the number of persons affected by these regulations is apparently larger than that of persons within the scope of collective agreements.³³⁸ The importance of the distinction between collective agreements and central regulation can, however, easily be exaggerated. The Council of Mediators acts in close cooperation with the Foundation of Labor, a central organization comprising both the trade union and the employers' top organizations, and it appears that, far from suppressing collective bargaining, state regulation of wages and conditions since 1945 has helped to stimulate it in the Netherlands. The difference between the situation in the Netherlands and that obtaining in the other five Member Countries may be more one of legal form than of social substance. The fact remains that, within the Community, Belgium (together with Italy) today represents the minimum, and the Netherlands the maximum of legal regulation of collective bargaining.³³⁹

Luxembourg has a very highly developed system of collective bargaining on an industry-wide basis. In 1956 four-fifths of all industrial workers (including mining) were covered by collective agreements. An official memorandum of March 1957 states that all agreements have been concluded in accordance with a general pattern; they cover not only wages and hours, the making and unmaking of the contract of employment, holidays and vacations, as well as family allowances and bonuses, but also the settlement of differences by a bi-partite commission at the enterprise level. In the event of failure of settlement the matter must be taken before the "National Conciliation Office."³⁴⁰ The memorandum adds that

³³⁸ *Id.* at 103.

³³⁹ The Exposé on the Social Situation attached to the Commission's Second Report shows that, compared with the other members of the Community (except Luxembourg) the Netherlands has had remarkably few strikes in the recent past. Only 7,214 working days were lost in 1957, and 37,241 in 1958. The Commission attributes this partly to the "spirit prevailing in the (Netherlands) Economic and Social Council in which employers, workers and the general interest are represented," and partly "to the fact that the Council of Mediators has the power to impose, in case of conflict, compulsory regulations." (Second Exposé para. 77).

³⁴⁰ Decree of Oct. 6, 1945, art. 9, [1945] *Pasin. Lux.* 540.

“since the conclusion of these collective agreements and the establishment of the National Conciliation Office, strikes have practically ceased to exist in the Grand Duchy of Luxembourg.”³⁴¹

The collective agreements cover manual workers in both the private and public sectors of the economy, whereas the working conditions of clerical, technical, and administrative employees are regulated by a rather elaborate statute.³⁴² It is a unique feature of collective bargaining in Luxembourg that it is, generally speaking, a function not of the unions but of the top organizations. There are, as in Belgium, two principal confederations of unions, and collective bargaining is entrusted to a committee which they have jointly formed.

4. LAW OF COLLECTIVE BARGAINING IN GENERAL— FREEDOM OF COLLECTIVE BARGAINING AND ITS RESTRICTIONS

The legal aspects of collective bargaining and of collective agreements in the Six are complex, and only some of the problems thought to be of special importance for readers of this book can be touched on here. The topics of principal significance are freedom of contract with regard to collective agreements, the effect of the agreement as a contract, its effect as a compulsory norm, its extension to outsiders, its enforcement through administrative and similar measures, and the publicity which by law must be given to collective agreements.

The legislative treatment of collective agreements is profoundly different in France, Germany, and the Netherlands on one hand and Belgium, Italy, and Luxembourg on the other. In France, Germany, and the Netherlands systematic and comprehensive legislation has been passed to regulate the conclusion and the effect of collective agreements, whereas such legislation as exists in the remaining three countries is unsystematic and fragmentary. The relevant legislation is:

—in France, the Law of Feb. 11, 1950, which has considerably amended the Labor Code (*Code du Travail*);

—in Germany, the Law Concerning Collective Agreements (*Tarifvertrags-Gesetz*) of April 9, 1949, originally applicable in the American and British Zones of Occupation only, and extended to the entire Federal Republic by the Law of April 23, 1953;

—in the Netherlands, the Law on Collective Agreements of De-

³⁴¹ The Commission notes in para. 75 of the Second EXPOSÉ that Luxembourg had no strikes in 1957 or 1958.

³⁴² See note 313 *supra*.

cember 24, 1927, the Law of May 25, 1937, concerning the binding force of collective agreements, and the Emergency Decree of October 5, 1945, on labor relations.

In Belgium the relevant legislative texts are the Decree of June 9, 1945, concerning bilateral committees, and certain provisions in the Law concerning contracts of employment, consolidated by the Decree of July 1955. What legislation there is in Luxembourg is contained in the Decree of October 6, 1945, concerning the National Conciliation Office. Article 39 of the Italian Constitution of 1947 provides that legislation should be passed to give legal effect to collective agreements, but no such legislation has yet been passed, nor can it be expected in the near future. A provisional statute has been approved by both Houses of the Italian Parliament, however, and this law of 1959 regulates in a fragmentary way the effect of collective agreements. There is, however, considerable doubt whether it is constitutional.

In five of the six countries freedom of contract prevails in relation to collective bargaining in the sense that, in so far as a collective agreement has legal effect as a contract or as a compulsory norm binding on individual employers and employees, it derives this effect from the act of contracting as such and no consent or approval of any governmental authority is required. In the Netherlands, however, the so-called "Extraordinary Decree" of October 5, 1945, provides that no collective agreement is valid without the consent of the Council of Mediators whose task it is to protect the economy against potential inflationary effects of the bargaining process, a function which may remind Americans of that of the former War Labor Board in the United States. The Council is in close contact with labor and management, and its powers do not seem to be regarded as a serious encroachment on the freedom of industry, no strong agitation for its abolition being apparent.

In a different sense, however, freedom of collective bargaining is much more seriously "hedged in" in the Six than in either the United States or in Great Britain. Mandatory legislation is of importance in the Six (though not of the same importance everywhere), and there is a general rule that any provision of a collective agreement which runs counter to mandatory legislation is null and void. Where, as, for example, in Germany, France, Luxembourg, and the Netherlands,³⁴³ the election or appointment and the functions of shop stewards are regulated by statute, collective agree-

³⁴³ See PART II, *Section C infra*.

ments at variance with the statute are void, so that even by agreement between unions and employers or their associations the powers and duties of shop stewards cannot be restricted, though they may perhaps be enlarged. Similarly, where, as in Germany, Belgium, the Netherlands, and to some extent in Luxembourg, the law fixes periods of notice which the employer and the employee must observe when terminating the contract of employment, collective agreements concerning terms of notice are valid only to the extent to which the relevant statutes expressly provide that their provisions may be abrogated in this way (as is the case, within certain limits, in the Netherlands).³⁴⁴ A similar observation could be made about the regulation by statute of the employer's obligation to continue wage or salary payments in the event of the employee's sickness. Where such payments are concerned as well as with regard to the regulation of working hours,³⁴⁵ German law provides examples of mandatory statutory provisions of which the effect can be rendered inapplicable by collective agreement but not by an individual contract of employment. This is also true of the Belgian law with regard to working hours.³⁴⁶ It is as if in America a statute, such as the Fair Labor Standards Act, could be derogated from by collective agreement but not otherwise.

The two most significant restrictions on the freedom of collective bargaining imposed by legislation are, however, those which concern freedom of organization and minimum wage standards. In all of the Member States any collective agreement which seeks to restrict the employee's freedom to join a union would be null and void. In France, under the Law of April 27, 1956, in Germany by virtue of the relevant provision of the Bonn Basic Law and of general principles, and to some extent in Belgium and in the Netherlands this means that union security agreements are void, and, although this is not so clear, the same result, based on general principles, is likely to be reached in Italy.³⁴⁷

Far more important, however, is the limitation which minimum wage legislation imposes on freedom of collective bargaining. The French National Guaranteed Minimum Wage (*Salaire Minimum*

³⁴⁴ See on all this: PART II, *Section E infra*.

³⁴⁵ BÜRGERLICHES GESETZBUCH [hereinafter cited as BGB] para. 616; Decree on Working Hours of April 30, 1938, para. 7, [1938] Reichsgesetzblatt [hereinafter cited as RGBl.] I, 448 (Ger.).

³⁴⁶ Law of June 14, 1921, arts. 2, 5, 7, [1921] I Recueil des Lois et Arrêtés Royaux de Belgique 1028.

³⁴⁷ See note 322-26 *supra*, and for Italy: MAZZONI, MANUALE DI DIRITTO DEL LAVORO 92 (1958).

National Interprofessionnel Garanti—S.M.I.G.)³⁴⁸ is comparable to the American Federal Minimum Wage under the Fair Labor Standards Act in that it constitutes a "floor" for all wages and makes it impossible, either by individual contract or by collective agreement, to undercut in any way the specified minimum. A similar system exists in Luxembourg under two Decrees of 1944 and 1956,³⁴⁹ but no comparable institution exists now in any of the other four Common Market countries. In its economic and social functions, however, the French National Minimum Wage Act differs considerably from the scheme inaugurated by the American Fair Labor Standards Act. The French National Minimum Wage is not (as is the corresponding Luxembourg minimum wage) fixed as a rigid absolute figure. It is constantly kept under review, and, through a complicated system of computation, linked with the cost of living index. It moves up if the monthly average expenditure of an average family in Paris (as ascertained by the National Institute of Statistics) rises by more than five percent, although it can never by the operation of this sliding scale be altered more than once in any four-month period. This system was introduced by an amendment of the Labor Code in 1952, and whereas all sliding scales in collective agreements were forbidden by the Order of January 7, 1959,³⁵⁰ as part of the program of the De Gaulle government to stabilize prices and the currency, the automatic sliding scale applicable to the statutory minimum wage was expressly preserved.

Nor is the cost-of-living sliding scale the only method of keeping the statutory minimum wage flexible. Under the Law of 1950,³⁵¹ by which free collective bargaining for wages was re-introduced in France, after being suppressed since the outbreak of the second World War, a method was provided for and is still used by which the minimum can be changed by government decree on the basis of a recommendation made by the Higher Committee on Collective Agreements. This recommendation does not, however, bind the government. The minimum is fixed for the Paris region, and reduced for other regions in which the cost of living is lower. Since all these

³⁴⁸ See on this: Sturmthal, *Collective Bargaining in France*, in CONTEMPORARY COLLECTIVE BARGAINING IN SEVEN COUNTRIES 151 (Sturmthal ed. 1957); LORWIN, *op. cit. supra* note 280, at 219; 2 DURAND *paras.* 338 *et seq.*, and more up to date: BRUN & GAL- LAND, DROIT DU TRAVAIL 449 (1958).

³⁴⁹ Decree of Dec. 30th, 1944, and Decree of Dec. 31st, 1956, [1957] *Pasin. Lux* 485.

³⁵⁰ See on this Second EXPOSÉ, para. 49, and for the most recent developments of the National Minimum Wage, paras. 47-51 in general.

³⁵¹ CODE DU TRAVAIL bk. I, tit. II, art. 31x, introduced by the Law of Feb. 11, 1950, [1950] J.O. 1688 (Fr.).

minima are fixed on an hourly basis, they immediately affect the system of overtime pay to which reference has already been made. Although in practice the wages paid in industry exceed the national minimum, the National Minimum Wage doubtless plays a far greater role in the economic and social life of France than does the federal minimum wage in the United States. The French system is (through the interaction of a number of statutes with conflicting tendencies) extraordinarily complex, and only a very superficial idea of its operation can be gleaned from the above remarks. In collective bargaining the National Minimum Wage operates, as one author puts it, as a "minimum of minima."

The term "minimum wage legislation" is (somewhat misleadingly) also used for a different type of statutory wage regulation of which the British law is today the principal example.³⁵² This "selective" system, under which there is no national over-all minimum, but minima can be fixed for particular industries in which collective bargaining does not function satisfactorily, was introduced (for wages and other conditions of employment) in the West German Federal Republic by a law of 1952.³⁵³ It is not, however, of great importance in practice. Similar legislation exists in Belgium, France, and the Netherlands³⁵⁴ for homeworkers, and, in a different form in Italy, for homeworkers and also for caretakers and similar personnel.³⁵⁵ The Italian provisional statute of 1959³⁵⁶ to which reference was made above restricts the freedom of contract of the parties in the sense that, once the government has regulated the wages or other conditions of employment of a given category of workers on the basis of an existing agreement—and the agreement is only the pattern on which the government moulds its decree—any subsequent collective agreement applicable to the same workers is invalid in so far as it purports to derogate from the governmental decree to their detriment.

More important even than these restrictions on the parties' freedom of contract (with the exception of this temporary Italian law

³⁵² Agricultural Wages Act, 1948, 11 & 12 Geo. 6, c. 47; Wages Councils Act, 1959, 7 & 8 Eliz. 2, c. 69; Kahn-Freund, *Minimum Wage Legislation in Great Britain*, 97 U. PA. L. REV. 778 (1949).

³⁵³ Law on Fixing Minimum Conditions of Employment, Jan. 11, 1952, [1952] Bundesgesetzblatt [hereinafter cited as BGBl.] I, 17 (Ger. Fed. Rep.). See also Dietz, *supra* note 288, at 8.

³⁵⁴ On Belgium, France, and the Netherlands: STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 303, at 78, 99, 117.

³⁵⁵ Law No. 23 of Feb. 4, 1958, [1958] 1 Lex, Legislazione Italiana 506; Law No. 264 of Mar. 13, 1958 [1958] 1 Lex, Legislazione Italiana 1135.

³⁵⁶ Law of July 14, 1959, No. 741, *Norme transitorie per garantire minimi di trattamento economico e normativo ai lavoratori*, [Sept. 18, 1959] Gazzetta Ufficiale (No. 225).

of 1959 if constitutional) is the power of the Dutch Council of Mediators to fix wages and other conditions of employment by collective regulations. These are absolutely binding, that is, they do not permit any variation in favor of the employers or of the employed. But since in the Netherlands collective agreements require the approval of the Council of Mediators and since, on the other hand, the Council does not decide either on the issue of collective regulations or on the approval of agreements until it has consulted with both sides of industry and especially with the Foundation of Labor on which they are both represented, there would not, from a practical point of view, appear to be any appreciable difference between the two types of collective determination of the conditions of employment.³⁵⁷

5. THE COLLECTIVE AGREEMENT AS A CONTRACT

It is today generally recognized on the Continent that a collective agreement has a dual legal function: to create obligations between those who have concluded it, that is, between the organizations on both sides, or between the union or unions and an individual employer, and also to establish a code for the individual employers and employees in the industry. It is customary to refer to these two aspects of a collective agreement as its contractual and normative effect. Perhaps it is unnecessary to point out that, whether or not these or similar terms are actually used in the United States, in substance collective bargaining has this same dual function there as everywhere, and it may be sufficient to refer to the two decisions of the Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*³⁵⁸ on the one hand, and in *J.I. Case Co. v. N.L.R.B.*³⁵⁹ on the other, to illustrate the point.

The question whether a collective agreement is a contract is, as the American experience has shown, of very great practical importance indeed. More than that, given an affirmative answer to the question, a second question arises concerning the obligations implied by the contract. There is no unanimous agreement concerning answers to either of these questions in the Six. In France, Germany, Luxembourg, and the Netherlands³⁶⁰ a collective agreement can clearly be enforced as a contract between those who have concluded

³⁵⁷ See Pels, *supra* note 298, *passim*.

³⁵⁸ 353 U.S. 448 (1957).

³⁵⁹ 321 U.S. 332 (1944).

³⁶⁰ France: 3 DURAND paras. 209 *et seq.*; Germany: HUECK & NIPPERDEY, TARIFVERTRAGSGESETZ art. 1, notes 57-111 (1951); Luxembourg: Bill on Collective Agreements of Nov. 16, 1955, art. 8, which is deemed to codify the present law; Netherlands: Leven-

it. In Belgium, however, the question whether a collective agreement operates as a contract between the organizations which have concluded it appears to be a question of fact to be decided in accordance with the intentions of the parties,³⁶¹ and this applies to agreements which take the form of a resolution of a bilateral committee and to others. Where an agreement operates as a contract, each party is under the usual duty to "keep the peace," to see to it that its members carry out the terms of the agreement, and each is liable for damages in the event of breach.³⁶² Moreover, there is nothing to prevent the parties from creating by express provision additional obligations, a matter of special importance in view of the contractual and non-statutory basis of the appointment and operation of shop stewards.³⁶³

In this respect as in others the situation in Italy³⁶⁴ is complicated by the fact that the Fascist so-called "syndicates" were abolished by a law of November 23, 1944, but the same law provided that the collective and individual relations would continue, subject to subsequent modification, to be governed by the terms of the existing collective agreements, awards and the like. Article 39 of the Constitution of 1947 provides for legislation under which registered unions and employers' associations would make agreements having the force of law *erga omnes*, but such legislation has not yet been passed. In the meantime the old collective terms continue to apply (in so far as they have not been modified) and new—so-called "post-corporative"—agreements have been concluded by the organizations set up since the fall of the Fascist regime. There are thus at the moment two kinds of collective terms—those which survive from the Fascist era under the law of 1944, and those which have since been agreed upon. The former have survived the parties who made them, and, although they continue to operate as norms binding individual employers and employees, they cannot have any contractual effect because the parties to the contracts from which they arose were suppressed. The "post-corporative" agreements on the other hand have contractually binding effect on the organizations which are parties to them.

bach, Netherlands National Report on Collective Agreements 8, 2nd International Congress on Labor Law (Geneva, 1957).

³⁶¹ Horion, *supra* note 274, at 76.

³⁶² STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 303, at 101.

³⁶³ Horion, *supra* note 259, at 6.

³⁶⁴ Mazzoni, *Il Diritto dei Rapporti Collettivi di Lavoro in Italia*, in *I Rapporti Collettivi di Lavoro* 45 (1959).

The importance of this—and particularly to the reader of this book—is that, generally speaking, the right to resort to hostile action in labor-management relations, the “freedom to strike” and the “freedom to lockout” is to a very large extent restricted by the law of collective bargaining. There is no such thing on the Continent as a concept of “unfair labor practices,” nor is there an administrative agency comparable to the American National Labor Relations Board. The borderline between that which is permissible and that which is forbidden in collective labor management relations is in some degree drawn by what corresponds to the law of tort and to the criminal law, but much more importantly by the “peace obligation” which, even if unexpressed, is deemed to be implied in a collective agreement. The legal principles governing this “peace obligation” have been mainly developed in Germany, and subsequently in France. With important exceptions, the obligation is deemed to be “relative.” This means that both sides implicitly undertake not to resort, during the term of the agreement, to hostile action in an attempt to alter terms of the agreement. The organizations on both sides are “bound to do nothing which might jeopardize the loyal performance of the agreement.”³⁶⁵ These words are contained in the French Labor Code but they summarize the essence of the “peace obligation” everywhere. It follows that there is nothing to prevent the parties from resorting to or supporting a strike or lockout for purposes unconnected with the agreement, for example, to obtain an advantage in connection with matters not regulated by it, or to enforce the agreement, or in response to a breach by the other party, or for political or purely economic reasons.³⁶⁶ The parties may, however, by an express clause in the agreement extend the peace obligation making it “absolute.” In regard to agreements capable of “extension,” the “peace obligation” has been made absolute by French,³⁶⁷ but not by German, law. The German Courts have, however, gone very far in their definition of what acts constitute a breach of the peace obligation, as is illustrated by a recent decision of the Federal Labor Court³⁶⁸ to the effect that arrange-

³⁶⁵ CODE DU TRAVAIL bk. I, tit. II, art. 31q, inserted by the law of Feb. 11, 1950, [1950] J.O. 1688 (Fr.). (“*Tenus de ne rien faire qui soit de nature à en compromettre l'exécution loyale.*”)

³⁶⁶ 3 DURAND 594. For Germany: HUECK & NIPPERDEY, *op. cit. supra* note 360, notes 74 *et seq.* to para. 1 of the 1949 law.

³⁶⁷ CODE DU TRAVAIL bk. I, tit. II, art. 31g(1) No. 8; see 3 DURAND 595.

³⁶⁸ Judgment of Oct. 31, 1958, 6 Entscheidungen des Bundesarbeitsgerichts [hereinafter cited as BARbG] 321 (Ger. Fed. Rep.), a case arising from the Schleswig-Holstein metalworkers' strike which began on Oct. 24, 1956 and ended on Feb. 14, 1957.

ments for a trade union poll concerning a possible strike is a breach of a collective agreement. Both judgments for damages and injunctions or their equivalent may follow in the event of a breach.

Both parties to a collective agreement (as a rule the organizations on both sides) are further under an obligation to draw their members' attention to its provisions and to the need for implementing them, and Dutch law expressly creates such a duty.³⁶⁹ In Germany and in the Netherlands³⁷⁰ the parties must go even further to ensure loyal performance of the agreement. They are bound to make use of such powers to this end as the by-laws or rules of the organization put at their disposal, including if necessary, the power to expel members. French law does not go nearly so far.³⁷¹

In addition the parties are, of course, bound to fulfil such special provisions in the agreement as impose obligations with regard, for example, to the establishment of organs of conciliation or arbitration, agencies to administer agreed vacation schemes, social welfare schemes and the like.

This contractual function of collective agreements is enforced through actions for injunctions, including mandatory injunctions (or their equivalent), and for damages—the threat of which is a formidable weapon. Such actions belong in France to the jurisdiction of the ordinary courts, and in Germany to that of the labor courts.³⁷² In Germany, only the parties to the agreement (normally the organizations) can be parties to such actions, except that as a result of the third party beneficiary doctrine embodied in the German Civil Code,³⁷³ a member of one organization may sue the organization which is the other party to the agreement. This is of little practical importance, however. In France³⁷⁴ and in the Netherlands,³⁷⁵ however, the members of the organizations are subject to a similar liability.

6. THE COLLECTIVE AGREEMENT AS A LEGALLY ENFORCEABLE CODE

The "normative function" of a collective agreement means, in the first place, that in the absence of an express agreement to the

³⁶⁹ Netherlands: Law of Dec. 24, 1927, art. 4, [1927] Stb. No. 415.

³⁷⁰ This is the so-called "Einwirkungs-Pflicht": see HUECK & NIPPERDEY, *op. cit. supra* note 360, notes 62 *et seq.* For the Netherlands: Law of Dec. 24, 1927, [1927] Stb. No. 415.

³⁷¹ 3 DURAND 597.

³⁷² See PART II, Section D *infra*.

³⁷³ BGB para. 328.

³⁷⁴ CODE DU TRAVAIL bk. I, tit. II, art. 311. See 3 DURAND 601.

³⁷⁵ Law of Dec. 24, 1927, art. 9, [1927] Stb. No. 415 (Neth.).

contrary between the individual employer and the individual employee, their mutual rights and obligations are governed by the relevant collective agreement. This rule is expressly stated only in two Belgian laws—that of 1954 in regard to manual workers and that of 1955 in regard to salaried employees³⁷⁶—and it applies whether or not the employer or employee is a member of the organization or union which is a party to the collective agreement. This is, however, doubtless the law in all six countries. In French this is often called the “automatic effect” of the agreement.

In Germany,³⁷⁷ France,³⁷⁸ and the Netherlands³⁷⁹ express legislation provides that this effect is not only “automatic” but also “compulsory.” In France this principle applies to the relations between an employer who is a party to the collective agreement or member of an organization which is a party and all his employees, irrespective of their union membership. In Germany and in the Netherlands it applies only if the employee is a member of a contracting organization, but in the Netherlands³⁸⁰ the employer may be liable to damages or to an injunction on the complaint of a trade union party to the agreement if he does not, in relation to unorganized workers, fulfil the terms of the collective agreement.

The effect of this legislation is that any agreement between an individual employer and individual employee which is at variance with the collective agreement is ineffective and replaced by the corresponding terms of the collective agreement, unless it is expressly permitted by the collective agreement or more favorable to the worker than the terms of the latter. In Belgium this applies only to such resolutions of bilateral committees as have been declared legally binding by royal decree—and these represent a minority of existing agreements.³⁸¹ In Luxembourg, on the other hand, it is

³⁷⁶ Horion, *supra* note 259, at 10; Van Goethem, *supra* note 310, at 2. The relevant clause which is contained in both statutes says that if no decision of a *commission paritaire* which has been made binding by Royal Decree applies, and if the parties to the contract of employment have failed to deal with a matter, the terms laid down in collective agreements or non-binding decisions of *commissions paritaires* apply as implied terms of the contract of employment. Similarly the Dutch law of Dec. 24, 1927, art. 13, [1927] Stb. No. 415.

³⁷⁷ Law of April 9, 1949, para. 4, [1949] Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes [hereinafter cited as WiGBL.] 55 (Ger.), extended to the entire territory of the Federal Republic by Law of April 23, 1953, [1953] Bundesgesetzblatt, I, 156. The parties to the contract of employment cannot waive their rights arising herefrom, except with the consent of the parties to the collective agreement.

³⁷⁸ CODE DU TRAVAIL bk. I, tit. II, art. 31e.

³⁷⁹ Law of Dec. 24, 1927, art. 12, [1927] Stb. No. 415 (Neth.).

³⁸⁰ *Id.* art. 14.

³⁸¹ See Horion, *supra* note 259; STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 303, at 103.

thought that this principle, although incorporated expressly only in a draft bill, is nevertheless part of the existing law.³⁸² The situation in Italy is less clear than that in the other five countries, since Italian law is still in transition, but the courts appear generally to assume that such a compulsory effect attaches both to the surviving agreements of the Fascist era and to the "post-corporative agreements" which have since been concluded.³⁸³

It may not be obvious to an American observer at first sight why there should be a differentiation between members and non-members of a union, but it must be remembered that the American concept of a "statutory bargaining representative" is alien to European law. In Europe, however strongly it may be union policy to induce or compel employers to apply the terms of collective agreements to non-organized as well as to organized labor, the union "represents" no one except its members. Moreover, union policy with regard to the treatment of non-organized labor is far from uniform, and the desire to prevent undercutting by outsiders still conflicts with the desire to restrict the privilege of the "union wage" as an inducement to joining the union.

7. THE EXTENSION OF COLLECTIVE AGREEMENTS

Whatever may be the policy of a given legal system with regard to the compulsory effect of collective agreements on contracts between organized employers and unorganized employees, the problem of the position of unorganized employers remains. This is the problem of "extending" the collective agreement so as to make it a "common rule" of the trade irrespective of the membership of the employer in a contracting organization. With certain important variations the German Law of 1949/1953,³⁸⁴ the French Law of 1950,³⁸⁵ the Dutch Law of 1937 as modified by the Decree of 1945,³⁸⁶ the Belgian Decree of 1945,³⁸⁷ and the Luxembourg Decree of the same year³⁸⁸ all provide for such extension procedure.

In Germany, where this procedure was first introduced in 1918, the extension order is made by the Minister of Labor after consultation with a committee consisting of representatives of the top organi-

³⁸² Art. 8 of the Bill of 1955.

³⁸³ Mazzoni, *supra* note 364, at 118.

³⁸⁴ Law of April 9, 1949, para. 5, [1949] WiGBl. 55 (Ger.), extended by Law of April 23, 1953, [1953] B.G. Bl. I, 156.

³⁸⁵ CODE DU TRAVAIL bk. I, tit. art. 31.

³⁸⁶ Law of May 25, 1937, art. 2, [1937] Stb. No. 801; Extraordinary Decree of Oct. 5, 1945, art. 15, [1945] Stb. No. F 214 (Neth.).

³⁸⁷ Decree of June 9, 1945, arts. 12 and 13, [1945] Moniteur Belge 4337.

³⁸⁸ Decree of Oct. 6, 1945, art. 22, [1945] Pasin. Lux. 540.

zations on both sides, upon application by one or more of the parties to the collective agreement. It is a condition of extension that those employers who are either themselves parties to the agreement or members of organizations which are parties employ at least 50 per cent of the employees coming within the terms of the agreement. The extension also must appear to the Minister to be required by the public interest.

In France extension orders were first introduced in 1936: under the present law they are made by the Minister of Labor and Social Security but only if the Higher Committee on Collective Agreements makes a positive recommendation to this effect. The conditions which must be fulfilled in France to enable the Minister to make an extension order differ from those in Germany. Only agreements made by the "most representative organizations" within the framework of a "joint committee" summoned for this purpose can be so extended: the criterion is not, as in Germany, the factual significance of the agreement, but the character of the parties, the degree to which they are "representative" (their *représentativité*).³⁸⁹ This depends on a number of factors listed in the statute, including their membership, the total amount of dues, their independence, their experience and length of standing, and their patriotic attitude under the German occupation. Agreements which are to be extended may have been concluded on a national or on a regional basis. If they are national agreements, they must comply with very stringent and detailed provisions as to their compulsory content. They must, for example, guarantee freedom of organization and opinion and regulate not only wages (providing for equal pay for men and women), but conditions of "hiring and firing," terms of notice, the functions of shop stewards, vacations with pay, conciliation proceedings, apprenticeship and so forth. They may also deal with many other matters.³⁹⁰ In the Netherlands the power to make extension orders was, under the Law of 1937 by which they were introduced, vested in the Minister of Social Affairs, but it was transferred by the Emergency Decree of 1945 to the Council of Mediators. The extension order presupposes an application by the "industrial council"³⁹¹ or by one or more of the parties to the agreement, and it can only be made with regard to agreements which cover the majority of those to whom they apply.

³⁸⁹ This is defined in CODE DU TRAVAIL, bk. I, tit. II, art. 31(f). See 3 DURAND 628.

³⁹⁰ CODE DU TRAVAIL, bk. I, tit. II, art. 31(g).

³⁹¹ Law of May 25, 1937, art. 3, [1937] Stb. No. 801. "Industrial council" is a body on which both sides of industry are represented.

The corresponding orders which can be made under the laws of Belgium and of Luxembourg have a different character. In Belgium only resolutions of bilateral committees come within the relevant provisions,³⁹² and the order is made by royal decree upon application either of the bilateral committee which has passed the resolution or of one of the organizations. Its effect is to give the resolution obligatory force, to convert it into a "law of the trade" which cannot be avoided by contract. In Germany, France, and the Netherlands a collective agreement cannot be avoided by individual contracts, at any rate to the detriment of the employee, between organized employers and organized workers. In France this is also true where organized employers and unorganized workers are concerned, and it is true in all three countries whether or not it has been "extended," the "extension" merely binding unorganized employers to the same extent that organized employers are in any event bound. On the other hand a Belgian royal decree is necessary to make the agreement compulsory for organized as well as unorganized employers: it transforms an optional into a compulsory norm for all those concerned.

In Luxembourg³⁹³ the situation is in fact similar to, though in law different from, that in Belgium. Only agreements concluded before or confirmed by the National Conciliation Office, normally that is, agreements made within the bilateral committee, can be declared to be "generally binding." This is done by the government on the basis of a unanimous application of the bilateral committee and on a recommendation of the organizations on both sides, which in turn may consult their members. An organization which has consulted its members cannot recommend the making of an order unless two thirds of the members concerned have voted in favor. On the other hand, no organization can refuse to recommend the making of the order unless it has consulted its members and the majority have voted against the order. The effect of this is in Luxembourg, as it is in Germany, France, and the Netherlands, to extend to "outsiders" the compulsory effect which, even without the order, the agreement has on "insiders." Legally it differs, therefore, from the corresponding royal decree in Belgium.

Article 39 of the Italian Constitution of 1947, which envisages a system enabling unions and employers' organizations to register, and, when registered, to conclude agreements with binding force

³⁹² See note 387 *supra*.

³⁹³ Decree of Oct. 6, 1945, art. 22, [1945] *Pasin. Lux.* 540.

throughout the trade, that is, constituting a "common rule," has not yet been implemented by legislation. It is useless to analyze here the numerous draft bills which have been produced. No one knows which, if any, of them will ever become law, and when.

Meanwhile, in the face of a lively discussion of the extraordinarily complex constitutional situation, Parliament has passed a temporary statute which seeks to circumvent the constitutional issue—whether successfully or not remains to be seen. According to this statute the Government can issue orders with legally binding force, in order to secure to workers of a given category minimum standards which cannot be bargained away (*minimi inderogabili di trattamento economico e normativo*). These "minimum wages and conditions orders" must in substance be in accordance with the relevant collective agreements which have been deposited in the Ministry of Labor and Social Security. Only agreements made prior to the coming into force of the statute (summer, 1959) are taken into account, and no orders can be made more than one year after its coming into force. The object of the statute, is, of course, to produce the effect of an order making collective agreements into "common rules" without violating Article 39 of the Constitution which reserves this universally binding effect to agreements made by unions registered under a procedure which has not yet been introduced. Hence the provision that the terms of the order have to "conform" to existing agreements, but that the orders do not incorporate them or extend them.

The effect of an extension or similar order is everywhere that no one concerned can avoid the collective agreement by contract to the detriment of the worker (in the Netherlands any derogation from the terms of the agreement either to his advantage or detriment is prohibited).

8. SANCTIONS AND PUBLICITY

The sanctions which protect the standards established by collective agreements are not civil sanctions only. In France it is a criminal offense for an employer to pay wages lower than those provided for in an extension order,³⁹⁴ and labor inspectors are under a duty to see that the relevant provisions are observed.³⁹⁵ Much the same applies to violations of resolutions of Belgian bilateral committees which have been declared binding by royal decree. These are also en-

³⁹⁴ CODE DU TRAVAIL, bk. I, tit. II, art. 312b.

³⁹⁵ *Id.* arts 31y and 31zc.

forced by inspectors.³⁹⁶ In the Netherlands³⁹⁷ and Luxembourg³⁹⁸ any violation of a collective agreement by an employer is an offense, and in Luxembourg this applies also to an employee. German law has no penal sanctions, but the civil sanctions, including injunctions, of German law³⁹⁹ are available to enforce provisions such as those concerning limitations on the number of apprentices and generally concerning the making rather than the content of the contract of employment, which in other countries cannot be directly enforced. The new Italian law also provides for penal sanctions and for enforcement by inspectors.⁴⁰⁰

In France⁴⁰¹ and Germany⁴⁰² the employer must exhibit in the plant the wording of relevant collective agreements, and in the other countries this is often required by the agreement itself. In Germany all collective agreements are entered in a Register kept in the Ministry of Labor where they can be inspected.⁴⁰³ In France they are deposited in the local labor court (*conseil des prud'hommes*) or failing this, the general local court.⁴⁰⁴

C. EMPLOYEE REPRESENTATION IN THE PLANT AND IN THE UNDERTAKING⁴⁰⁵

Statutory employee representation at workshop or enterprise level is alien to American thinking and experience. Nevertheless any American, whether businessman, lawyer, or trade unionist, who has anything to do with labor-management relations in any of the Six will be inevitably and almost immediately concerned with questions of employee representation as day-to-day problems.

Two things should be mentioned at the outset. In the first place, there are two distinct, though often related,⁴⁰⁶ social objectives which the institutions to be discussed are intended to serve: one is

³⁹⁶ Decree of June 9, 1945, arts. 14-16, [1945] *Moniteur Belge* 4337.

³⁹⁷ Extraordinary Decree of Oct. 5, 1945, arts. 17, 21, [1945] *Stb. No. F 214* (Neth.).

³⁹⁸ Decree of Oct. 6, 1945, art. 26, [1945] *Pasin. Lux.* 540.

³⁹⁹ HUECK & NIPPERDEY, *op. cit. supra* note 360, notes 40 *et seq.* to para. 4 of the Law of 1949.

⁴⁰⁰ Discussed pp. 401 *supra*.

⁴⁰¹ CODE DU TRAVAIL bk. I, tit. II, art. 311; see also *id.* art. 312 as to the public display of the extension decree.

⁴⁰² Law of April 9, 1949, para. 7, [1949] *WiGBI.* 55 (Ger.).

⁴⁰³ *Id.* para. 6.

⁴⁰⁴ CODE DU TRAVAIL bk. I, tit. II, art. 31d. The general local court is the "justice de paix." The agreement does not take effect until one day after having been so deposited.

⁴⁰⁵ In addition to the books listed in note 303 *supra*, see in particular E.C.S.C. HIGH AUTHORITY, *LA REPRÉSENTATION DES TRAVAILLEURS SUR LE PLAN DE L'ENTREPRISE DANS LE DROIT DES PAYS MEMBRES DE LA C.E.C.A.* (1959).

⁴⁰⁶ *E.g.*, in the case of threatened closures or changes in production liable to lead to reduction of personnel, see Law of Oct. 11, 1952, para. 72, [1952] *BGBI.* I, 681 (Ger. Fed. Rep.).

the representation of the employees' interest at plant level, the other is joint consultation on, and, in some cases (notably in Germany) ⁴⁰⁷ joint administration of, the affairs of the enterprise by employer and employees. In the second place, although the union or unions may in fact and even in law have a strong influence on the formation and operation of these organs of representation and consultation, they are independent from the unions. It is necessary to emphasize this because the representative function which they exercise closely resembles that of shop stewards in English-speaking countries, but unlike shop stewards they do not generally speak for the unions; they are representatives of the employees of the plant or enterprise, irrespective of whether those employees belong to a particular or to any union. To this there is one exception: *Délégations syndicales du personnel*, or shop stewards are elected in Belgium pursuant to collective agreements and represent the unions at plant level, functioning along side the statutory works councils (or *conseils d'entreprise*).

The legal basis on which this representative and consultative machinery rests may be either legislation or collective agreements. It is entirely statutory in France, Germany, Luxembourg, and the Netherlands; it is (for the time being) entirely a matter of agreement in Italy; and it is a mixture of both in Belgium.

The French legislation is contained in the following enactments:

Order on Works Councils (*comités d'entreprises*) of February 22, 1945, as amended by a law of May 16, 1946;

Law of April 16, 1946, on Employees' Representatives (*délégués du personnel*);

Decree of August 1, 1947, on Health and Safety Committees (*Comités d'Hygiène et de Sécurité*).

The principal German enactments are:

Law of October 11, 1952, concerning the Constitution of the Plant (*Betriebs-Verfassungsgesetz*);

Law of October 8, 1951, concerning Protection of Employees in Case of Dismissal (*Kündigungsschutzgesetz*);

Law concerning Co-Determination by the Employees in the Undertakings of the Mining and Iron-and-Steel-Producing Industries of May 21, 1951;

Law Supplementary thereto of July 8, 1956.

⁴⁰⁷ In the mining, iron and steel industries under the Co-determination Law, May 21, 1951, [1951] BGBl. I, 347 and the Supplementary Law, Aug. 7, 1956, [1956] BGBl. I, 707 (Ger. Fed. Rep.).

In Luxembourg older legislation has been largely superseded by:

Decree of October 30, 1958, concerning the Institution of Workers' Representation in Industrial, Commercial and Craftsman's Undertakings; and

Decree of November 21, 1959, regulating elections thereto.

Still in force are:

Law of June 7, 1937, concerning the contract of Employment of Salaried Employees, and

Decree of May 11, 1938, on the Institution of Salaried Employees' Representations.

In the Netherlands the relevant statute is:

Law on Works Councils (*Onderneemingsraden*) of May 4, 1950.

In Belgium the principles are found partly in statutes and decrees and partly in collective agreements which, without having the force of law, operate in fact as regulatory provisions:

Law of September 20, 1948, concerning the Organization of the Economy (*Portant l'Organisation de l'Économie*), Section IV (Works Councils);

Decree of October 6, 1958, concerning Works' Councils; National Collective Agreement (*Accord National*) of July 16, 1958, relating thereto;

National Collective Agreement relating to the General Principles governing the Organization of Shop Stewards (*Accord National relatif aux principes généraux du statut des délégations syndicales du personnel des entreprises*) of June 16-17, 1947;

Law of July 17, 1957, concerning committees dealing with safety, health, and amenities at the place of work. (This is only the principal of several enactments on these *comités de sécurité, d'hygiène, et d'embellissement des lieux de travail*).

In Italy the works committees (*commissioni interne*) have been established on the basis of the "interconfederal" national agreement (between the top organizations) of May 8, 1953. There is a special agreement concerning salaried employees, dated October 23, 1950.

In all Continental countries a distinction is made between the plant or workshop (*établissement, Betrieb*) and the undertaking or enterprise (*entreprise, Unternehmen*), the first being a technical or

organizational unit, the second commercial or financial. This distinction is relevant because, where, as in the case of most large undertakings, one company or other undertaking operates a number of plants, it stands to reason that the "representative" function of employees' representatives is most naturally exercised at plant level, and much if not all of their "consultative" function at enterprise level. This leads to a certain complexity of organization. In Germany, which has much the most elaborate scheme of employee representation in Europe, the representative function is exercised by works councils which are elected for each plant. These works councils have the task of representing the employees' interests in relation to the employer. For example, they make (within the framework of the existing collective agreements) "plant agreements" with him concerning matters such as the beginning and end of the daily hours and intervals, the time and place of wage payments, vacation schemes, apprenticeship, administration of welfare schemes and institutions, discipline, piece rates, principles and methods of remuneration, and health and safety measures.⁴⁰⁸ They must try to induce the employer to remedy grievances of the employees, and to see to it that statutes, orders, collective agreements and the like, which are designed to serve the interests of employees, are applied in the plant.⁴⁰⁹ Finally, they exercise such statutory functions as the workers' representatives have in connection with the hiring and discharge of employees.⁴¹⁰ All this takes place within the plant, and, although the law provides that where an undertaking consists of two or more plants a "joint works council" can be formed, that council does not supersede the individual works councils nor are they subordinated to it.⁴¹¹ Its jurisdiction is restricted to such necessarily exceptional cases as concern more than one plant.

On the other hand, and generally speaking, the organs of joint consultation operate at the enterprise level. If the total number of employees in one undertaking (that is, the aggregate number of employees in all plants belonging to the undertaking) exceeds 100, a joint consultative committee will be formed for that undertaking, known as a *Wirtschafts-Ausschuss*⁴¹² consisting of an equal number of employee and employer representatives which meets once a month. It is the employer's duty—within the limits of the required

⁴⁰⁸ Law on Constitution of the Plant, Oct. 11, 1952, paras. 1 and 56 ff., [1952] BGBl. I, 681 (Ger. Fed. Rep.).

⁴⁰⁹ *Id.* para. 54.

⁴¹⁰ *Id.* paras. 60 ff.

⁴¹¹ *Id.* paras. 46 ff.

⁴¹² *Id.* paras. 67-69.

secrecy—to keep this committee informed about the affairs of the firm (“the economic development of the undertaking”), including methods of production, production programs, the volume of production and sales, and other matters “which intimately concern the interests of the employees of the undertaking.” This has to be done in the light of such documentary material as in the employer’s discretion is needed to explain his statement, and the employer must explain to the joint consultative committee the annual balance sheet and profit and loss account. Four times a year the employer, together with the joint consultative committee and the works council in each plant, gives an oral or written account of the development of the undertaking which is addressed to the employees in their entirety.⁴¹³ On similar lines, and again at the enterprise rather than the plant level, it is the policy of the law to associate the employees with the larger undertakings by providing that one third of the supervisory board (*Aufsichtsrat*) of all those corporations (normally the larger ones) which are by law required to have such a board, must consist of elected representatives of the employees.⁴¹⁴ All this is under the general law, and it amounts to very much less than the special system of “co-determination” or “joint management” which under the statute of May 21, 1951, applies to the mining and iron-and-steel-producing industries. In these industries (and by virtue of the supplementary law of 1956 also in the holding companies of those industries) membership of supervisory boards consists half of employees and half of shareholder representatives under an impartial chairman. One member of the board of directors (the *Vorstand*) is a “labor director” appointed, normally in consultation with the trade unions, by the supervisory board. In the operating companies, he may not be appointed if the employee members of the supervisory board vote against him.

This is the barest outline of what is meant by “co-determination” (*Mitbestimmung*), an institution which does not appear to have any parallel in other European countries (and to which, for example, British trade unions are, on the whole, strenuously opposed). “Joint consultation” on the other hand (which in practice means very much less since the powers of the supervisory board vis-à-vis the board of directors in an ordinary German company vary greatly and are mal-

⁴¹³ See for all this: *Id.* paras. 67 and 69.

⁴¹⁴ *Id.* paras. 76 and 77. See Conard, Chapter VIII, where he discusses the difficulties of translating such terms as *Aufsichtsrat*. The term which he adopts, “supervisory board,” is hereinafter used. The *Aufsichtsrat* either makes the policy or (if the *Vorstand* does so) does nothing at all. It does not “supervise.”

leable) is a very general phenomenon in Europe. German law has arrived at a compromise between these two principles by confining "co-determination" to the mining and heavy industries, that is, broadly speaking, to those which come within the jurisdiction of the Coal-Steel Community. The reasons for this compromise are purely historical: they are of course connected with the very special place which the German coal, iron, and steel industries have occupied in the political destinies of Germany and indeed of Europe.

Both joint consultation and co-determination aim at a closer association of the employees with the undertaking as an economic unit. Where the special interests of the employees are concerned, the relevant unit is the plant, even where the law restricts the managerial power of the employer. This is indicated by those provisions of German law ⁴¹⁵ which confer a right of co-determination on the works councils of all plants with normally more than 20 employees who are entitled to vote for the council. This right can be exercised when management is planning changes which may have a detrimental effect on the workers, such as cutting down, closure, or transfer of a plant or any essential part thereof, its amalgamation with another plant (whether or not in the same undertaking) or fundamental changes in production or equipment (unless clearly caused by the needs of the market), or fundamentally new working methods (unless clearly the result of, or the means towards, technical progress). In all such cases the works council (not the joint consultation committee) must be asked for its consent, and, failing agreement between employer and works council, a mediation procedure may be set in motion before an impartial tri-partite body the chairman of which will, if necessary, be nominated by the President of the competent Court of Appeal. This body has no compulsory power; but if the employer resorts without adequate reason to measures at variance with an agreement arrived at with the works council or with a recommendation made by the tri-partite body, he must compensate any employee discharged as a result of these measures being put into effect.

Emphasis has been placed here on the difference between those provisions which operate at plant level and those which operate at the level of the undertaking because the latter do not apply to foreign companies, that is, according to the principles of the conflict of laws generally accepted in Continental countries, to such cor-

⁴¹⁵ Law on Constitution of the Plant, Oct. 11, 1952, paras. 72-75, [1952] BGBl. I, 681 (Ger. Fed. Rep.).

porations as have their central management and control (*siège social effectif, Verwaltungssitz*) abroad. Those operating at plant level, apply to all plants within the territorial jurisdiction of the country from which the relevant legislation emanates, irrespective of the nationality or domicile of the company, for example, irrespective of whether the plant belongs to an American corporation or to its local subsidiary.

The separation of representative and consultative functions is known in the six countries,⁴¹⁶ though the corresponding distinction between organs operating at plant and at enterprise level has nowhere been developed as fully as in Germany. In France there exist side by side the works councils (*comités d'entreprises*) and the employees' representatives (*délégués du personnel*). The consultative function is exclusively reserved to the former, and the representative function is divided between them, so, however, that in any undertaking which comprises more than one plant with 50 employees, a separate plant committee (*comité d'établissement*) is set up which takes over the representative functions of the works council.⁴¹⁷ None of these representative functions amount to a right of co-determination, except with regard to the discharge of members of the representative organs themselves (which requires the consent of the works council or, alternatively, of a factory inspector)⁴¹⁸ and with regard to the administration of welfare arrangements.⁴¹⁹ Except where collective agreements provide for more extensive powers, the functions of the French representative and consultative organs are otherwise purely advisory. The employer himself is a member of the works council (which is not the case in Germany). In undertakings which have the form of stock companies (*sociétés anonymes*) the works council is entitled to obtain the balance sheet, the profit and loss account, and the auditor's report, and to employ, at the expense of the undertaking, the services of an independent accountant. The works council also sends two delegates to the administrative board of the stock company, but they have no right to vote. These provisions do not apply to foreign corporations.⁴²⁰

The situation in Belgium resembles that in France inasmuch as in Belgium, too, works councils (*conseils d'entreprise*) and em-

⁴¹⁶ See Boldt, *Rapport de Synthèse*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, ch. II, sec. V, at 20-22.

⁴¹⁷ Durand, *La Représentation des Travailleurs sur le plan de l'entreprise en droit français*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, esp. at 211.

⁴¹⁸ *Id.* at 218.

⁴¹⁹ *Id.* at 236.

⁴²⁰ *Id.* at 212.

ployees' representatives (*délégations syndicales du personnel*) exist side by side. There is an important distinction, however, in that the basis of the latter is an agreement and is not statutory, and that, to a larger extent than in France, the functions even of the statutory works councils are determined by collective agreements (notably by the decisions of the bilateral committees) as well as by the statute itself.⁴²¹

The collective agreements (decisions of the bilateral committees) which created employees' representatives do not belong to those which have been given legal force by royal decree.⁴²² The Belgian "employees' representatives" thus resemble British shop stewards in that they exist *praeter legem*. The consultative function is reserved to the works councils which so far have been established only in undertakings with more than 150 employees,⁴²³ a figure which was substituted for the previous figure of 200 by a royal decree of October, 1958.⁴²⁴ The employer is a member of the works councils. Detailed information about the development of the undertaking must be furnished at regular intervals, and in undertakings carried on in corporate form this includes furnishing balance sheets, profit and loss accounts, auditors' reports and the like.⁴²⁵ There is no provision for employee representation in the organs of the stock company, as there is in Germany and in France. Clearly the consultative functions can be usefully exercised only at the enterprise level, and the name of the works councils (*conseils d'entreprise*) appears to indicate that they are intended to operate at that level. Nevertheless, there is in Belgium a certain amount of doubt on this point,⁴²⁶ which is understandable since the works councils combine with their consultative functions purely social tasks appropriate to the plant rather than to the undertaking, for example, those dealing with the fixing of annual vacations, the management of welfare institutions, agreement on works rules, and above all, the task of ensuring that safety and other protective social legislation is observed.⁴²⁷ On the other hand, it is the employees' representatives and not the employee members of the works councils who

⁴²¹ Law of Sept. 20, 1948, art. 15, [1948] *Pasinomie Belge* 663. See Horion, *La Représentation des Travailleurs sur le plan de l'entreprise en droit Belge*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 155.

⁴²² Horion, *supra* note 421, at 174.

⁴²³ *Id.* at 149.

⁴²⁴ See Second EXPOSÉ para. 129.

⁴²⁵ Horion, *supra* note 421, at 158 *et seq.*

⁴²⁶ *Id.* at 150.

⁴²⁷ Law of Sept. 20, 1948, art. 15(d), [1948] *Pasinomie Belge* 663. See Horion, *supra* note 421, at 157.

are the spokesmen of the employees in the event of grievances, but they must take care not to usurp the functions of the works councils.⁴²⁸

One would expect the employees' representatives to be elected at plant level, but the General Agreement of 1947 speaks in terms of undertakings. It should be emphasized, however, that this Agreement does not operate automatically, but by virtue of its incorporation in decisions of bilateral committees for particular industries.⁴²⁹ Incorporation on a large scale has, in fact, been effected and much detailed regulation is to be found in these individual decisions pursuant to which sub-committees can be formed for individual plants (as has happened, for example, in the coal mining industry).⁴³⁰

In Luxembourg the situation is very much simpler than in Belgium. Existing legislation does not provide for any consultation between management and labor representatives on purely economic or commercial matters. There are no "works councils" but only separate "workmen's delegations" (*délégations ouvrières*) and "salaried employees' delegations" (*délégations d'employés*), of which the employer is not, of course, a member. Their tasks⁴³¹ are generally to defend the rights of the workers, to advise on works rules to be adopted by the employer and to see that they are applied, to transmit grievances to the employer, to try to settle difficulties, to participate in the management of welfare institutions, to promote the employment of disabled persons, to cooperate in the organization of apprenticeships for manual workers, and to assist in the prevention of accidents and occupational diseases. Although it is expressly said only with regard to salaried employees, it is clearly also a function of these delegations to transmit communications of employer to the workers. Unlike their German counterparts, the delegations have no right to intervene in the case of dismissals, but if an employer wishes to dismiss a manual worker without notice he must inform the delegation of his reasons, and notice must be given to them of any intended discharge of large numbers of workers, for example, by reason of contraction of business.⁴³² All these are obviously functions which can be fully exercised only at plant level.

⁴²⁸ Horion, *supra* note 421, at 155, 183.

⁴²⁹ *Id.* at 174.

⁴³⁰ *Id.* at 177.

⁴³¹ Law of June 7, 1937, art. 25, [1937] *Pasin. Lux.* 119; Decree of Oct. 30, 1958, art. 3, [1958] *Pasin. Lux.* 564; Kayser, *La Représentation des Travailleurs sur le plan de l'entreprise en droit Luxembourgeois*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 307.

⁴³² Decree of Oct. 30, 1958, art. 20, [1958] *Pasin. Lux.* 564.

The law provides⁴³³ that where an undertaking consists of several plants, there will be a separate manual workers' and a separate salaried employees' delegation for each plant, but that (in forms which differ for manual workers and for salaried employees) there can be central committees for the entire undertaking as well. Manual workers can have separate representation for each workshop inside a plant provided it contains at least 50 workers, but this appears to be rarely applied.⁴³⁴ The entire legislation does not apply to undertakings with less than fifteen employees.⁴³⁵

The Netherlands legislation on employee representation is of comparatively recent origin, and is still being gradually introduced.⁴³⁶ It is far less elaborate than that now in force in France and Belgium, to say nothing of Germany. According to the relevant law of 1950 each employer who employs at least 25 employees entitled to vote (that is, who are over 21 years old and have been employed in the undertaking for more than one year) must set up a council (*onderneemings-raad*). By the beginning of 1959 councils had, however, been established in only about one-fifth of the 5,000 undertakings to which the statute is applicable. It was expected that within the foreseeable future this would increase to one-fourth.⁴³⁷ In some industries (for example, textiles and banking) the figure is much higher, and in the metallurgical industries, although only 25 percent of the undertakings had councils by the middle of 1958, these employed 74 percent of all metallurgical workers.⁴³⁸ These councils are designed to further understanding between labor and management; their tasks are purely deliberative and advisory; and they have no power of co-determination (not even in purely social questions). Their functions⁴³⁹ are to transmit grievances to the employer, to consider matters such as vacation rosters, shift work schemes, and intervals (in so far as they have not been fixed by collective agreement), to see that the agreed conditions of employment are observed as well as the protective provisions of statutes, and to

⁴³³ Law of June 7, 1937, art. 24, [1937] *Pasin. Lux.* 119; Decree of Oct. 30, 1958, art. 85, [1958] *Pasin. Lux.* 564. Kayser, *supra* note 431, at 302 states that the workers' representation is concentrated in the plant, that of the salaried employees in the enterprise.

⁴³⁴ Decree of Oct. 30, 1958, art. 4, [1958] *Pasin. Lux.* 564.

⁴³⁵ Law of June 7, 1937, art. 24, [1937] *Pasin. Lux.* 119; Decree of Oct. 30, 1958, art. 1, [1958] *Pasin. Lux.* 564.

⁴³⁶ Molenaar, *La Représentation des Travailleurs sur le plan de l'entreprise en droit Néerlandais*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 331.

⁴³⁷ FORTANIER & VERAART, *ARBEITSRECHT* 142 (1959).

⁴³⁸ Molenaar, *supra* note 436.

⁴³⁹ Law of May 4, 1950, art. 6, para. 2, [1950] *Stb. K174* (Neth.); Molenaar, *supra* note 436, at 329.

inspect safety installations, canteens and the like, and also to suggest technical and other improvements. Like the French works councils (*comités d'entreprises*) they have one function which is more than deliberative—to participate in the management of welfare arrangements. Moreover, the employer, who is a member and chairman of the council, is under a duty to furnish the necessary information, to keep the council informed about the commercial situation of the undertaking, and to consult it before issuing works rules. Although the relevant legislation is not explicit on the point, these councils are apparently on principle designed to operate at the level of the undertaking, but one provision seems to make it possible to create a special council for each plant.⁴⁴⁰ The councils are part of the general organization of the Dutch economy provided for by the legislation of 1950, under which undertakings are grouped both vertically and horizontally, and organized by law to further their mutual interests. Each "horizontal" group has a committee, consisting of equal numbers of employer and employee representatives, which supervises the establishment and operation of the works councils, the idea being that an employer should be induced to create these councils by persuasion and not by penal sanctions.⁴⁴¹

The structure and functions of the existing Italian system of employee representation, like those of the corresponding institutions in Germany, can only be understood against the background of the complex political and social history of the country. Although Article 46 of the Constitution of 1947 provides for legislation dealing with the cooperation of employer and employees in the management of enterprises, no such law has been enacted. Of the far-reaching attempts to achieve participation of workers in management which have from time to time played a dominant role in the political history of Italy in this century, only a few vestiges remain—such as the councils of management of the Olivetti works at Ivrea and elsewhere,⁴⁴² and certain experimental agreements between the Confederation of Christian Trade Unions and a number of employers establishing mixed committees to consider the raising of productivity.⁴⁴³ Such general arrangements as exist serve mainly social and not economic purposes, that is, the enforcement of collective agreements and protective legislation, the ventilation and settlement of

⁴⁴⁰ Molenaar, *supra* note 436, at 326.

⁴⁴¹ *Id.* at 322.

⁴⁴² Mengoni, *La Représentation des Travailleurs sur le plan de l'entreprise en droit Italien*, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 268.

⁴⁴³ *Id.* at 270.

grievances, the formulation of works rules in cooperation with the employer, the regulation of vacation rosters, methods of wage payments, working hours and shift work, the management of welfare schemes, and, in certain very narrowly defined limits, the settlement of conflicts arising from dismissals and lay-offs.⁴⁴⁴ These are the matters with which the works committees (*commissioni interne*) are principally concerned. They are clearly subjects to be dealt with at the plant level, and so are technical or organizational improvements suggested by workers and their transmission to the employer.⁴⁴⁵ The relevant provision in the Collective Agreement of 1953 has to be interpreted as envisaging a committee for each plant, branch, or office which is "autonomous," that is, which has some independence as a technical and organizational unit. This Agreement (and its amendments) apply to industry only, and only to those undertakings which are members of the General Confederation of Industry—to which most larger and medium-sized enterprises in fact belong. Those which do not belong nevertheless observe the Agreement.⁴⁴⁶ A separate Agreement of October 23, 1950, applies to purely commercial undertakings.⁴⁴⁷ In industry, committees are provided for plants with more than 40 employees; for those with fewer than 40 and more than five there is an individual "delegate."⁴⁴⁸

It must be clear to an American observer that the great importance of these representative institutions in the Six results partly from the fact that collective bargaining takes place at industry and not at plant level. This makes it necessary to have "on-the-spot" representative organs which can fit the provisions of the general collective agreement to the needs of the individual plants.

This relationship between collective bargaining and representation at plant level has important practical consequences. These committees and councils are legally not organs of the unions (with the possible exception of the Belgian employees' delegates). This legal independence from the unions exists even where, as in France, the unions have a limited power to demand their "recall."⁴⁴⁹ Whatever their legal position, however, workers' representatives are bound in fact often to be very closely connected with the unions.

The German statute⁴⁵⁰ expresses a principle which is inherent in

⁴⁴⁴ *Id.* at 284.

⁴⁴⁵ *Id.* at 280.

⁴⁴⁶ *Id.* at 272.

⁴⁴⁷ *Id.* at 271.

⁴⁴⁸ *Id.* at 274.

⁴⁴⁹ Durand, *supra* note 417, at 215.

⁴⁵⁰ Law of Oct. 11, 1952, para. 49, [1952] BGBl. I, 681 (Ger. Fed. Rep.).

the legislation of all the six countries where it states that the employer and the works council are to collaborate "within the framework of the existing collective agreements and in cooperation with the trade unions and employers' associations represented in the plant." Collective agreements have priority over any agreements the works council may make with the employer. The law of "plant agreements" (*Betriebsvereinbarungen*) is particularly developed in Germany and very complicated. On some topics such agreements must, on others they may, be made, and an elaborate arbitration mechanism is provided in case of failure of agreement.⁴⁵¹ But plant agreements must always be subordinate to collective agreements to which unions are a party, and in this connection it is useful to emphasize the difference between, on the one hand, an agreement between a works council (or other representative organ at plant level) and the employer, and on the other hand a collective agreement for a single plant (*accord d'établissement*). In Germany the distinction is relevant among other reasons because, in the event of disagreement between management and works council about the compulsory plant agreement (concerning the beginning and end of the working day, intervals, vacation rosters, apprenticeship, administration of welfare schemes confined to plant or enterprise, discipline, piece rates, time and place of wage payments, principles and new methods of wage payments) arbitration is compulsory,⁴⁵² whereas arbitration between trade unions and employers and their associations is entirely voluntary. In Germany, as well as in Belgium, Italy, and the Netherlands, the representatives at enterprise or plant level have expressly been given the task of watching over the enforcement of collective agreements and of the provisions of protective legislation.⁴⁵³ Moreover, the works rules or *règlement intérieur* must either, as in Germany and in Belgium,⁴⁵⁴ be agreed to by the employer and the works council or other representation, or, as in France, Italy, Luxembourg, and the Netherlands, be issued after consultation between these parties.⁴⁵⁵

All the representative bodies here referred to—with the excep-

⁴⁵¹ *Id.* paras. 50, 56, 57.

⁴⁵² *Id.* para. 56.

⁴⁵³ E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 109, 182, 281, 329.

⁴⁵⁴ Germany: Law on Constitution of the Plant, Oct. 11, 1952, para. 56, [1952] BGBl. I, 681; Belgium: Law of Sept. 20, 1948, art. 15(d), [1948] *Pasinomie Belge* 663.

⁴⁵⁵ E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 230, 283, 307; Molenaar, *Rapport Récapitulatif sur les sources du droit du travail*, in E.C.S.C. HIGH AUTHORITY, *ÉTUDE COMPARATIVE DES SOURCES DU DROIT DU TRAVAIL DANS LES PAYS DE LA C.E.C.A.* 42 (1957).

tion of the Belgian employees' representatives—are elected by the employees in the plant or enterprise, and in Germany and Italy, as also in Belgium in the larger undertakings, manual workers and salaried employees vote for separate lists.⁴⁵⁶ In France there is a separate list for certain supervisory and higher technical personnel.⁴⁵⁷ Clearly, whether the law says so or not, the competing lists of candidates are frequently those put up by rival trade unions, but the desire, for example, of the French trade unions, to exercise a right of "direct appointment" has not been realized.

Members of the representative bodies will frequently be the most active trade unionists in the enterprise. Hence the great importance of the provisions which, in order to protect them from being victimized by the employer, restrict his right to dismiss any of them except for misconduct or with the consent of the works council or of the workers' delegation itself, or of some outside body. In Germany⁴⁵⁸ the employer cannot dismiss any member of a works council except if he is entitled to dismiss the member without notice by reason of his misconduct or on any other ground which, according to the provisions of the Industrial Code, the Commercial Code, or the Civil Code enables the employer to discharge a worker without giving notice.⁴⁵⁹ Moreover, a member of a works council can be dismissed in the event of closure of a plant or of a division of a plant if it is impossible to transfer the works council member to another division. The employer may not take action in any form which hinders the members of the works council in the exercise of their functions or affects them to their advantage or to their detriment.⁴⁶⁰

To some extent the purpose and effect of these provisions and of similar provisions in others of the Six are comparable to those of American statutes directed at certain kinds of unfair labor practices. In France⁴⁶¹ the contract of employment of a works council member cannot be terminated by the employer without the consent of the council or, in the alternative, that of the labor inspector, and similarly no employees' representative can be discharged except under

⁴⁵⁶ E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 405, at 104, 153, 274. Luxembourg is the only member of the Community to have not only separate lists but also separate "workmen's" and "salaried employees" delegations.

⁴⁵⁷ Durand, *supra* note 417, at 216.

⁴⁵⁸ Law on Protection in the Event of Dismissals (*Kuendigungs-Schutzgesetz*), Aug. 10, 1951, para. 13, [1951] BGBl. I, 499 (Ger. Fed. Rep.).

⁴⁵⁹ See PART II, *Section E infra*.

⁴⁶⁰ Law of Oct. 11, 1952, para. 53, [1952] BGBl. I, 681 (Ger. Fed. Rep.).

⁴⁶¹ Ordonnance of Feb. 22, 1945, art. 22, [1945] J.O. 954 (Fr.). For details, see Durand, in E.C.S.C. HIGH AUTHORITY, *LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES MEMBRES PAYS DE LA C.E.C.A.* 214 (1958).

those conditions. The protection in France against discrimination by the employer of members of councils, of employees' representatives, of candidates for one of these offices and of former office holders was strengthened by a recent Decree of January 7, 1959.⁴⁶²

Belgian law⁴⁶³ is similar to German law, except that the employer cannot dismiss a member of, or candidate for office in, a works council in cases other than those justifying instantaneous dismissal, unless there are "economic or technical" grounds for the termination of the contract, recognized in advance as such by the bilateral committee. The employees' representatives are, in fact, also protected by the collective agreements.

In Luxembourg⁴⁶⁴ no member of a workmen's delegation can be dismissed except for reasons justifying instantaneous dismissal or with the consent of the delegation itself. In Italy⁴⁶⁵ the members of the "internal committees" are protected against discharge by a series of complicated provisions in the Collective Agreement of 1953. Normally the employer requires the consent of the relevant trade union, and if this is withheld, as frequently happens, the matter is settled by an arbitration tribunal which declares the discharge to be void if it is found to be due to the representative activities of the employee. In the Netherlands⁴⁶⁶ such protection as exists would appear to depend on the autonomous rules which the works councils themselves have power to adopt.

In all the six countries countervailing obligations are imposed on the members of works councils and on employees' representatives. These duties are mainly of two kinds: they must not interfere with the powers of management to any larger extent than the law provides, and they are under strict duties of secrecy with regard to such technical or commercial information as they obtain in their official capacity.

This is only a bird's-eye view of workers' representation in the six countries, since the details of the law are complicated and could not be discussed. In order to understand fully the social significance

⁴⁶² See Second EXPOSÉ, para. 53. The protection was, on the Belgian pattern, extended to candidates and former members.

⁴⁶³ Law of Sept. 20, 1948, art. 21, [1948] *Pasinomie Belge* 663; Horion, in E.C.S.C. HIGH AUTHORITY, *LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES MEMBRES PAYS DE LA C.E.C.A.* 167 (1958).

⁴⁶⁴ Decree of Oct. 30, 1958, art. 22, para. 4, [1958] *Pasin. Lux* 564.

⁴⁶⁵ Collective Agreement of May 8, 1953, art. 14, in *I CONTRATTI CONFEDERALI DI LAVORO NELL'INDUSTRIA ITALIANA* (1955); Mengoni, in E.C.S.C. HIGH AUTHORITY, *LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES MEMBRES PAYS DE LA C.E.C.A.* 277-78 (1958).

⁴⁶⁶ Molenaar, in E.C.S.C. HIGH AUTHORITY, *LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES MEMBRES PAYS DE LA C.E.C.A.* 307 (1958).

of these institutions and also of collective bargaining it is necessary to glance at the settlement of conflicts in the six countries.

D. SETTLEMENT OF CONFLICTS ⁴⁰⁷

One of the outstanding legal characteristics of labor relations on the Continent when compared with those in the United States is, as has been suggested, the importance of the role of legislation in creating rights and obligations of employers and employees. A similar observation can be made about the judicial function of the state and about litigation. Litigation in the courts between individual employers and employees on matters such as wages and the legality of dismissals is a common occurrence, and in many cases the courts determine the meaning of terms of collective agreements where such terms have been incorporated in individual contracts of employment. Litigation in the courts takes the place which, in broad areas of American industry, is occupied by grievance arbitration. Arbitration itself is very important in at least some Continental countries but, generally speaking, it is arbitration between unions and employers' associations concerning collective terms to be adopted for the future.

To appreciate the significance of litigation one should bear in mind a number of facts which are not obvious. In the first place, it is customary on the Continent to draw a sharp distinction between "collective conflicts" and "individual conflicts," a distinction which also exists, of course, in America and in Britain but is not nearly as important there as, say, in Germany or in France. The distinction is very clearly defined in a recent article by Professor Paul Durand of the University of Paris:

Fundamentally, the collective industrial dispute differs from the individual dispute in two respects. It presupposes in the first place the intervention of a group, which may be either a legally recognized group (such as a trade union) or simply a *de facto* group consisting of an unorganized majority of employees. But this first feature does not suffice of itself, for in that case the distinction between individual disputes and collective disputes would depend exclusively on the initiative of the group. A second condition is required: the existence of a collective interest. The dispute will be a collective one if it involves a question of

⁴⁰⁷ In addition to the books listed in note 303 *supra*, see GRUNEBaum-BALLIN & PETIT, *Les Conflits Collectifs du travail et leur règlement dans le monde contemporain*, 9 TRAVAUX ET RECHERCHES DE L'INSTITUT DE DROIT COMPARÉ DE L'UNIVERSITÉ DE PARIS (1954).

principle, the settlement of which affects the legal status of the different members of the group. It will also have this character if a common interest is at stake, e.g., freedom of opinion, trade union freedom, representation of the staff in the enterprise, or recourse to strike action, even though the settlement of the dispute may affect the legal status of only one employee. The dismissal of an employee on the ground of his membership of a trade union can give rise to a collective dispute, because the attack on the "right to organize" endangers a prerogative of workers as a whole.⁴⁶⁸

The mere fact that in a case of allegedly unlawful or abusive dismissal, for example, the trade union takes up the cudgels on behalf of one of its members and that a union official negotiates with the employer and, if necessary, acts for the member in court, does not make the dispute a "collective conflict." The distinction is especially important in countries such as France, Belgium, and Luxembourg, where special courts deal with individual disputes, whereas collective disputes, in so far as they can go before any courts at all, are dealt with by the ordinary courts. Many of those cases which in the United States concern, for example, seniority issues in grievance arbitration proceedings would, by French or German lawyers, be characterized as individual disputes, although the employee may be represented by his union. The distinction is vital in view of the procedural differences which are involved.

The second point which one should bear in mind when considering the significance of litigation is that, by and large, it is very much simpler and cheaper than in America, and that people resort to the courts with little hesitation. This is true quite generally, but especially in labor matters in those countries among the Six—France, Germany, Belgium, and Luxembourg—in which special labor courts exist. These labor courts are tribunals provided by the state for the adjudication of conflicts between employers and employees in proceedings which are speedy and inexpensive and in which the tribunal makes special efforts to induce the parties to arrive at an amicable settlement. Such tribunals have existed on the Continent for over 150 years, having been first introduced by Napoleon. No attempt will be made to describe in any detail the composition and functioning of these labor courts. In France, Belgium, and Luxembourg they are called *conseils des prud'hommes* and they are organized in France

⁴⁶⁸ Durand, *Conciliation and Mediation in Collective Industrial Disputes*, 10 INTERNATIONAL SOCIAL SCIENCE BULLETIN (UNESCO) 545-46 (1958).

pursuant to Book IV of the Labor Code,⁴⁶⁹ in Belgium pursuant to a law of 1926,⁴⁷⁰ and in Luxembourg to a Decree of 1938.⁴⁷¹ In Western Germany they are called *Arbeitsgerichte* and governed by a law of 1953⁴⁷² which, like the legislation in France and Belgium, has taken the place of older statutes.

There are important differences between the various types of labor courts. Thus in Germany, but not in France or in Belgium, the whole country is covered by a network of these courts. In Germany each court when sitting consists of a chairman who is a lawyer and normally a judge⁴⁷³ and one employer and one employee representative taken from panels nominated by the organizations on both sides.⁴⁷⁴ In France and in Belgium the court consists of an equal number of employees and employers,⁴⁷⁵ and the chair is taken alternately by a member of the employer and by a member of the employee group.⁴⁷⁶ They are elected—one of the few examples of elected judges in Europe.⁴⁷⁷ In Germany and in France they have jurisdiction over both manual workers and salaried employees, but, whereas in Germany jurisdiction extends to all contracts of employment irrespective of the amount of the salary, excluding completely that of the ordinary courts the *conseils des prud'hommes* in France have exclusive jurisdiction only over contracts of employment of the less highly paid employees. In the case of employees at the higher levels, their jurisdiction is concurrent with that of ordinary courts.⁴⁷⁸ The right of appeal is restricted in both countries to cases involving more than a minimum amount.⁴⁷⁹ In France the appeal is heard by

⁴⁶⁹ For discussions of the law, see: 2 DURAND paras. 502-30; BRUN & GALLAND, DROIT DU TRAVAIL pt. I, paras. 96-112, at 126-46 (1958).

⁴⁷⁰ *Loi organique des conseils de prud'hommes*, July 9, 1926, [1926] 1 Recueil des Lois et Arrêtés Royaux de Belgique 1414; amended by Law of Mar. 18, 1950, [1950] 1 Recueil des Lois et Arrêtés Royaux de Belgique 634.

⁴⁷¹ Decree of Dec. 31, 1938, [1938] Pasin. Lux. 571.

⁴⁷² Law on Labor Courts, Sept. 3, 1953, [1953] BGBl. I, 1267 (Ger. Fed. Rep.); for a detailed commentary: DIETZ & NIKISCH, ARBEITSGERICHTSGESETZ (1954).

⁴⁷³ Law on Labor Courts, Sept. 3, 1953, para. 18(3), [1953] BGBl. I, 1267 (Ger. Fed. Rep.). The labor courts are organized by the Ministries of Labor of the *Länder* which cooperate with the Ministries of Justice. Law on Labor Courts, Sept. 3, 1953, para. 14, *id.*

⁴⁷⁴ *Id.* paras. 20-23.

⁴⁷⁵ See notes 469 and 470 *supra*. France: CODE DU TRAVAIL, bk. IV, Art. 6. In Belgium there is also an "assesseur juridique" who votes in certain cases: Art. 26 of the law quoted in Note 470.

⁴⁷⁶ CODE DU TRAVAIL, bk. IV, art. 10.

⁴⁷⁷ CODE DU TRAVAIL, bk. IV, arts. 7, 22-35. This applies also to Belgium.

⁴⁷⁸ Contrast Law on Labor Courts, Sept. 3, 1953, para. 2, [1953] BGBl. I, 1267 (Ger. Fed. Rep.) with CODE DU TRAVAIL bk. IV, art. 80, (Fr.).

⁴⁷⁹ France: CODE DU TRAVAIL bk. IV, arts. 80 *et seq.* (for details: BRUN. & GALLAND, *op. cit. supra* note 469, at 144 *et seq.*). Germany: Law on Labor Courts, Sept. 3, 1953,

the ordinary courts,⁴⁸⁰ but in Germany there is a Labor Court of Appeal and, in the last resort, a Federal Labor Court.⁴⁸¹ The jurisdiction of the German labor courts is in some respects wider than that of the *conseils des prud'hommes*.⁴⁸²

No such tribunals exist at the moment in Italy, although there are some special provisions to be applied by the ordinary courts when dealing with labor matters.⁴⁸³ Nor do they exist in the Netherlands, although a similar function is exercised by a Dutch administrative tribunal, the *ontslagcommissie* or "discharge committee" consisting of one employer, one employee, and two officials, which must decide whether the official consent required in the case of each discharge of an employee, otherwise than for urgent reasons or by agreement, should be given or withheld.⁴⁸⁴

The frequency of litigation in most of the six countries is partly explained by the existence and accessibility in most of them of inexpensive and expert tribunals. The parallel between their social function and that of grievance arbitration in America is also suggested by the fact that in many cases the employee, who is normally the plaintiff, will be assisted or represented by an official of his union, while the employer's case will often be presented by an official of his employers' association. But the courts are, of course, open to the unorganized on both sides as well as to organization members.

One would expect the interpretation of collective agreements to be a principal activity of these labor courts, and this is true, especially in Germany. The terms of collective agreements become terms of the relevant contracts of employment and a dispute con-

para. 64, [1953] BGBl. I, at 1267 (for details: DIETZ & NIKISCH, *op. cit. supra* note 472, at 458 *et seq.*).

⁴⁸⁰ Contrast Law on Labor Courts, Sept. 3, 1953, para. 64, [1953] BGBl. I, at 1267 (Ger. Fed. Rep.) with CODE DU TRAVAIL bk. IV, art. 83 (Fr.). In Belgium there is a labor appeal court (*conseil des prud'hommes d'appel*).

⁴⁸¹ Appeal from the Labor Courts of Appeal (in exceptional cases from the Labor Courts directly) to the Federal Labor Court in Kassel only on points of law. Law on Labor Courts, Sept. 3, 1953, paras. 72, 76, [1953] BGBl. I, 1267. For the special procedure concerning matters arising from the creation, operation, etc. of works' councils, see paras. 80-100 of the Law on Labor Courts, Sept. 3, 1953, *id.*

⁴⁸² Especially because it comprises disputes arising between parties to collective agreements as such, and also certain disputes between employees and certain delictual claims: Law on Labor Courts, Sept. 3, 1953, para. 2(1) Nos. 1 and 3, [1953] BGBl. I, 1267 (Ger. Fed. Rep.).

⁴⁸³ Aranguren, *La Disciplina Collettiva delle Controversie di Lavoro*, in I RAPPORTI COLLETTIVI DI LAVORO 175 (1959).

⁴⁸⁴ This arises under the Extraordinary Decree of 1945 under which the contract of employment cannot be terminated either by the employer or by the employee without the consent of the Labor Office. See FORTANIER & VERAART, *op. cit. supra* note 437, at 58.

cerning the meaning of any of these terms may arise between the individual employer and employee and thus come before the court. Disputes may, however, also arise between the parties to a collective agreement, that is, between a union and an employer or employers' association, or—in France—between an organization on either side and an organization member on the other. Such disputes are heard by ordinary courts in all Member States except Germany where the jurisdiction of the Labor Courts, sitting with two representative members of each side, extends to collective disputes on existing rights.⁴⁸⁵

All that has been said so far refers exclusively to disputes about existing rights, including collective disputes concerning the interpretation of collective agreements or concerning, for example, such matters as an alleged breach of a collective agreement by a trade union in calling a strike or by an employers' association in failing to use all available means to induce its members to observe the terms of the agreement. As in the United States, but perhaps with even greater emphasis, a distinction is made everywhere on the Continent between disputes over existing rights (*conflits d'ordre juridique, Rechts-Streitigkeiten*) and disputes over future rights, that is, "conflicts of interest" (*conflits d'ordre économique, Interessenstreitigkeiten*). Examples of disputes over future rights are disputes about demands for wage increases or other matters concerned with the making of new, or the modification of existing, collective agreements. The need for keeping this distinction clearly in mind in attempting to understand the conciliation, fact-finding, and arbitration in the various European countries is especially great in view of the ambiguity of the word "arbitration." "Arbitration" covers both types of conflict, and, indeed is used indiscriminately in the United States to designate totally different proceedings—grievance "arbitration" on the one hand, and "voluntary arbitration and compulsory arbitration as procedures for the settlement of labor controversies arising in the course of collective negotiation"⁴⁸⁶ on the other.

Although the distinction is made in all the six countries, it has a different practical significance in Germany, where labor courts deal with all conflicts of right even if they are of a collective character,⁴⁸⁷ than it does elsewhere. In France, Belgium, and Luxem-

⁴⁸⁵ Law on Labor Courts, Sept. 3, 1953, paras. 2(1) No. 1, 16(2), [1953] BGBl. I, 1267 (Ger. Fed. Rep.).

⁴⁸⁶ HANDLER & HAYS, CASES AND MATERIALS ON LABOR LAW 323 (3rd ed. 1959).

⁴⁸⁷ See note 485 *supra*.

bourg⁴⁸⁸ purely interpretive conflicts, that is, disputes about the meaning of collective terms and their application which arise between the parties to the agreement, do not go to the courts at all, but in France suits for injunctions or claims for damages by reason of breaches of a collective contract (for example, in the event of a strike) go to the ordinary courts.⁴⁸⁹ In the Netherlands⁴⁹⁰ and also in Italy⁴⁹¹—although this is not absolutely clear in view of the uncertain state of the law—collective disputes as well as individual disputes of a legal character belong to the jurisdiction of the ordinary courts, there being neither a statutory system of arbitration nor a system of special labor courts.

The three methods of dispute settlement which have been developed in the United States and in Britain—conciliation, fact-finding (inquiry) and arbitration—are represented in the Six. Although they differ very much from country to country, certain tendencies are clearly discernible everywhere.

One is the preference for settlement machinery created by collective bargaining to that created by statute. In Italy there were at the time this was written no statutory conciliation or arbitration schemes, but, partly by ordinary collective agreements and partly by agreements between top organizations (*accordi interconfederali*), schemes for conciliation and arbitration of disputes have been developed by the two sides of industry themselves.⁴⁹² In Germany there are provisions for arbitration, and to an extent also for conciliation, in the Control Council Law of 1946⁴⁹³ which is still in force, and in a number of statutes of the individual states (*Länder*).⁴⁹⁴ More significant, however, is the Model Arbitration Agreement adopted by the top organizations in 1954,⁴⁹⁵ which has been incorporated in collective agreements in a number of industries. In

⁴⁸⁸ France & Belgium: Durand, *supra* note 468, at 547; Luxembourg: Decree of Oct. 6, 1945, art. 27, [1945] *Pasin. Lux.* 540. As regards France, see however: 3 DURAND para. 215, at 607.

⁴⁸⁹ France: 3 DURAND para. 216, at 608-10. In Belgium the question does not seem to have arisen (Horion, *supra* note 259, at 14) but if it arose, the ordinary courts would presumably have jurisdiction. This would also appear to be the case in Luxembourg. For Belgium, see 2 GEYSEN, *DROIT SOCIAL* no. 1069, at 258 (1953).

⁴⁹⁰ STEINMANN-GOLDSCHMIDT, *GEWERKSCHAFTEN UND FRAGEN DES KOLLEKTIVEN ARBEITSRECHTS* 123 (1957); Levenbach, *supra* note 360, at 11-12.

⁴⁹¹ See Aranguren, *supra* note 483.

⁴⁹² Aranguren, *supra* note 483, at 245.

⁴⁹³ Control Council Law No. 35 of Aug. 20, 1946, [1946] No. 10 Official Gazette of the Control Council for Germany 174.

⁴⁹⁴ See NIPPERDEY, *ARBEITSRECHT* 5th ed. nos. 521, 524. (Baden, Rhineland-Palatinate) (1958).

⁴⁹⁵ Printed in 7 *RECHT DER ARBEIT* 383 (1954).

the metal industry, which is the most important of all, it has now, however, been terminated by the union as a result of a decision of the Federal Labor Court of October 1958 in which the Court interpreted the Agreement in a manner to which the unions took exception.

In the Netherlands the functions exercised elsewhere by conciliation and arbitration arrangements are to a large extent fulfilled by the Council of Mediators. The Council is, as already pointed out, a statutory institution, but it cooperates so closely with the organizations on both sides as they are combined in the Foundation of Labor that it is hard to say whether its social function (as distinguished from its legal structure) more nearly resembles that of an autonomous or a statutory institution. The Council has completely pushed the conciliation machinery established by a law of 1923 into the background, but arbitration based on collective agreements continues to be important.⁴⁹⁶

In Belgium the effective machinery for the settlement of disputes is that of the bilateral committees. A law of 1948 has even entrusted to them the implementation of certain emergency measures. Older legislation on conciliation by government officials, passed in 1926 and amended in 1929 and 1932, has lost its importance, but the conciliation powers of labor inspectors and other similar officials, based on legislation of 1945, are still exercised.⁴⁹⁷ In Luxembourg the existing compulsory conciliation and voluntary arbitration scheme is based on the Decree of 1945⁴⁹⁸ and is given effect by the National Conciliation Office. Inside the Office, however, settlement is handled by a bilateral committee so that despite the statutory framework, settlement is not by governmental organs but by cooperation of labor and management. Preference for autonomous as compared with governmental action in conflict settlement has, in sum, become a developing principle of "European" scope.

Nor is this statement invalidated by the structure of the French system, despite first appearances. The law of 1950⁴⁹⁹ provides for compulsory conciliation and voluntary arbitration, but this has been largely a failure. On the other hand it is generally agreed that con-

⁴⁹⁶ Law of May 4, 1923, [1923] Stb. No. 182 (Neth.); Law of Apr. 7, 1933, [1933] Stb. No. 160 (Neth.) (see Fournier, *Pays-Bas*, in GRUNEBaum-BALLIN & PETIT, *op. cit. supra* note 467, at 237); STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 490, at 124; Levenbach, *supra* note 360, at 11.

⁴⁹⁷ Seeuws & Fournier, *Belgique*, in GRUNEBaum-BALLIN & PETIT, *op. cit. supra* note 467, at 48-50; STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 490, at 103-05.

⁴⁹⁸ Decree of Oct. 6, 1945, [1945] *Pasin. Lux* 540.

⁴⁹⁹ Law of Feb. 11, 1950, arts. 5, 9, 10, [1950] *J.O.* 1688 (Fr.).

ciliation procedures based on collective bargaining were much more successful. This may, it is true, be partly due to the fact that the courts stigmatized strikes in violation of an agreed conciliation procedure as illegal but did not enforce statutory provisions concerning compulsory conciliation in the same way. Nonetheless it appears also to indicate the greater vitality of agreed procedures.⁵⁰⁰ Moreover, the great reform of French settlement procedure inaugurated in 1957⁵⁰¹ with the introduction of proceedings modelled on American "fact-finding" machinery was the result of previous experience with similar arrangements under collective agreements.⁵⁰²

Another important aspect of settlement procedures which seems to have developed in the countries of the Community is a general aversion to compulsory proceedings. Even where conciliation, fact-finding (inquiry) or arbitration is carried out by statutory organs, it is generally voluntary. With the minor exception of compulsory arbitration of certain disputes concerning "plant agreements" between employers and works councils in Germany and, much more conspicuously, of the powers of the Councils of Mediators in the Netherlands, the recommendations of conciliators, reports of investigators, and awards of industrial arbitrators in the Six have no compulsory effect except where they have been accepted by both sides either in advance or after the fact. In at least two of the Member Countries, in France and in Germany, compulsory arbitration was a decisive feature of labor law for several years between the Wars (to say nothing of Fascist Italy and its *Magistratura di Lavoro*). It has been abandoned because of its adverse effect on collective bargaining.

On the other hand, in some countries, and especially France, proceedings are "compulsory"—at least according to the letter of the law—in the sense that the authority seeking a settlement may intervene on the application of either side without the consent of the other and the latter is under a legal duty to participate in the proceedings. In this sense conciliation has been compulsory in France since the decisive statute of 1950, as it is in Luxembourg. Because they lacked sanctions, these provisions of the French statute proved quite ineffective, and they have now been replaced by the very much more elaborate and effective provisions of the Law of July 1957. This law is of great practical importance and of special interest to

⁵⁰⁰ BRUN & GALLAND, *op. cit. supra* note 469, at 936-40.

⁵⁰¹ Law of July 26, 1957, [1957] J.O. 7459 (Fr.), discussed in detail by Durand, *supra* note 468.

⁵⁰² BRUN & GALLAND, *op. cit. supra* note 469, at 943.

Americans because its model was the "fact-finding" provisions of American federal legislation.⁵⁰³ In its social function, if not its legal structure, it is perhaps the nearest European equivalent of the obligation to bargain in good faith with which American lawyers are familiar. Under the Law of July 1957 conciliation has remained compulsory, but this fact has quite a different significance under this new statute. All collective agreements must provide for the conciliation of disputes arising between the parties, whereas hitherto this was only required in those agreements which were to be "extended."⁵⁰⁴ Furthermore, within one month after a dispute has arisen, the matter must be taken before either an agreed conciliation committee, or in the absence of agreement before the competent regional, or before the national conciliation committee, consisting of an equal number (a maximum of three) of delegates from the "most representative" organizations on either side and up to three representatives of the public authorities under the chairmanship of the Minister of Labor or a Divisional Labor Inspector.⁵⁰⁵ The proceedings can be initiated *ex officio* by the Minister of Labor, the prefect, or the directors of the Labor Inspection Service,⁵⁰⁶ but the authorities are somewhat reluctant to make use of this power. Normally, therefore, the proceedings will be set in motion by either side to the dispute, but regardless of how they originate, a party who has been summoned to appear before an agreed or statutory conciliation committee and fails to do so can be fined. This means that the party must appear in person and, if a corporate body, must be represented by someone in a managerial position who is empowered to negotiate and conclude an agreement.

This is a large measure of "compulsion," but under the new law of 1957, as under the old one of 1950, a strike or lockout in defiance of the compulsory conciliation provisions is not for that reason alone illegal. On the other hand, it is illegal if it violated a conciliation agreement, which may mean *inter alia* that participation in the strike constitutes "serious misconduct" (*faute lourde*) which under the relevant provision of the statute of 1950,⁵⁰⁷ enables the employer to terminate the contracts of employment with the strikers.

⁵⁰³ Durand, *supra* note 468.

⁵⁰⁴ *Id.* at 552.

⁵⁰⁵ *Id.* at 562.

⁵⁰⁶ *Id.* at 579-81.

⁵⁰⁷ Law of Feb. 11, 1950, art. 4, [1950] J.O. 1688 (Fr.): "La grève ne rompt pas le contrat de travail, sauf faute lourde imputable au salarié. ("A strike does not terminate the contract of employment, in the absence of serious misconduct on the part of the employee.")

If the conciliation procedure is successful, the resulting "conciliation agreement" is the equivalent of a collective agreement.⁵⁰⁸ If it fails, "mediation," that is, "fact-finding" proceedings, can be set in motion either by the chairman of the conciliation committee before which the proceedings have taken place or by the Minister of Labor. They are not, however, available where the dispute is about existing rights.⁵⁰⁹ These fact-finding proceedings on the American model constitute the great innovation of 1957 in French law and may provide a pattern for similar legislation elsewhere in Europe. The difference between the powers of the mediator, who is appointed from a panel of names maintained by the Ministry of Labor, and those of a conciliator is that the mediator, in addition to making a further attempt at conciliation, formulates a recommendation based on a systematic analysis of the facts.⁵¹⁰ This recommendation is not only submitted to the parties but published, the idea being to mobilize public opinion in favor of a settlement of the dispute. According to the most competent French authors,⁵¹¹ the British experience in dispute settlement has been repeated in France—the sanction of public opinion proving far more effective in settling conflicts than compulsory arbitration and the threat of legal penalties or damages. In fact, one gains the impression that arbitration plays a very minor role in France. The French law of 1957 is much the most interesting recent development within the countries of the Community in the general field of the law governing dispute settlement.

The German statutory arbitration schemes of the Control Council Law of 1946 and of the still surviving *Länder* legislation, are, as has been pointed out, less important than those based on the Top-Organization Agreement of 1954 and its Model Arbitration Code. The significance of what was said above about the "contractual" function of collective agreements and the so-called "peace obligation" here becomes apparent. Once an obligation to refrain, until the termination of the agreed arbitration proceedings, from "hostile action" (*Kampfmassnahmen*) has been written into a collective agreement, both sides are under stringent and legally enforceable obligations. Judgments awarding possibly heavy damages and the

⁵⁰⁸ *Id.* art. 16.

⁵⁰⁹ Durand, *supra* note 468, at 578, emphasizes the contrast in this respect between art. 15 of the French Law of 1957 and the American attitude which does not exclude from "fact-finding" proceedings questions "turning on the interpretation or violation of a legal provision."

⁵¹⁰ Durand, *supra* note 468, at 584-86.

⁵¹¹ *Id.* at 594; BRUN & GALLAND, *op. cit.* *supra* note 469, at 947-48.

equivalent of injunctions threaten an employers' organization, an individual employer, or a union refusing to participate in arbitration proceedings, or one who initiates or (as the Federal Labor Court has now held) ⁵¹² even prepares a lockout or strike. How long this very serious restriction of the freedom to strike will be tolerated by the German trade unions is difficult to guess. The contrast between the strength of the legal sanctions in Germany and the French tendency under the new law of 1957 to rely chiefly on the influence of public opinion is clear, but it should not be overlooked that the German sanctions operate only where arbitration is based on a collective agreement. Another feature which distinguishes the German from the French (and also from the Luxembourg) ⁵¹³ system of promoting industrial peace is the absence in Germany of a clear distinction between the functions of conciliation and arbitration—arbitration agencies are expected to perform the function of conciliators as well.⁵¹⁴

This merger of conciliation and arbitration functions is also characteristic of Belgium, the bilateral committees exercising both functions. Labor inspectors, on the other hand, act only as conciliators and, if their efforts fail, they submit the case to the competent bilateral committee,⁵¹⁵ which may and often does act in such cases through a conciliation sub-committee. Like the French "mediation" of conflicts this Belgian procedure cannot be used to settle disputes concerning existing rights. The parties may, of course, agree to accept the recommendation of the sub-committee. If they do not, the settlement recommendation may be incorporated in minutes which are deposited at the Ministry of Labor. The Belgian procedure is singularly free from elements of compulsion and, unlike that in France, does not even compel the parties to participate in the proceedings. Belgian industry is, however, strongly organized on both sides and the autonomous forces of industry presumably exercise a strong pressure in favor of settlements. In a decree of March 1946 ⁵¹⁶ the Belgian legislator made a highly original and interesting contribution to these efforts. This decree provides that, if an employer does not avail himself of the existing arrangements for

⁵¹² Judgment of Oct. 31, 1958, 6 BArbG 321 (Ger. Fed. Rep.).

⁵¹³ Decree of Oct. 6, 1945, arts. 9, 18, [1945] Pasin. Lux 540.

⁵¹⁴ See, e.g., the Baden Arbitration Law, Oct. 19, 1949, Para. 5 [1950] Gesetz-und Verordnungsblatt 60 (Ger. Fed. Rep.).

⁵¹⁵ See STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 490, at 104.

⁵¹⁶ Seeuws & Fournier, *supra* note 497, at 49; STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 490, at 105.

a settlement, the strikers can be treated as involuntarily unemployed for the purposes of unemployment insurance which in effect means that a recalcitrant employer is threatened with a government-financed strike. By the same token workers can be deprived of unemployment benefit for six months if settlement fails through their fault or through that of the union of which they are members.

In the Netherlands the functions of conciliation and, in so far as this term can be used at all, of arbitration are mainly concentrated in the Council of Mediators to which frequent reference has already been made.

In Italy, in addition to conciliation effected pursuant to collective agreements and to agreements between top organizations, conciliation functions are exercised informally—but apparently on a large scale—by the Ministry of Labor and its offices in the provinces, the labor administration having been re-constituted after the war by a decree of 1948. Like so much else which has been said about Italy, this situation may sooner or later be changed by legislation.⁵¹⁷

E. PROTECTION OF EMPLOYEES IN THE EVENT OF DISMISSAL

No American lawyer familiar with seniority arrangements in the United States needs any special reminder of the profound importance of security of tenure in contemporary industry. This idea has taken deep roots all over Europe. The job is the basis of the worker's livelihood, and the law cannot allow him to be deprived of it unfairly and without just compensation any more than it can tolerate the arbitrary expropriation of the property of a farmer or of a businessman. The least that can be done for the worker is to ensure that he is given due notice, just as it should be incumbent on him to give due notice to the employer before quitting his job.

Generally speaking the idea of the arbitrary right to "hire and fire" has, all over Europe, given way to what the French call the principle of "stability of employment" or job security. The subject has recently been analyzed, and the legislations of the Six have been compared, in a volume published by the High Authority of the Coal-Steel Community⁵¹⁸ to which the present writer is much indebted and to which reference is made for further details.

⁵¹⁷ STEINMANN-GOLDSCHMIDT, *op. cit. supra* note 490, at 141.

⁵¹⁸ LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES PAYS MEMBRES DE LA C.E.C.A. (1958), being volume two of the publications on labor law under the auspices of the High Authority of the E.C.S.C.

I. PERIODS OF NOTICE

In Belgium, Germany, and the Netherlands, and, with regard to salaried employees, in Italy and in Luxembourg, periods of notice are fixed by statute. In France (one recently introduced exception apart), and, with regard to manual workers, in Italy and Luxembourg, they are fixed by collective agreement, and failing this, by usage. There is no general doctrine as there is in English law to the effect that "reasonable" notice must be given, nor have the courts a power to fix the time of notice, except in Belgium with regard to the most highly paid salaried employees and in the absence of a contract.⁵¹⁹

According to German law⁵²⁰ the period of notice is two weeks for industrial manual workers, but this may be extended or shortened by agreement, including a collective agreement, provided that the periods to be observed by the employer and by the worker are identical. For clerical⁵²¹ as well as technical⁵²² salaried employees the period of notice is six weeks, and notice can only be given so as to terminate the contract at the end of a quarter, that is, on March 31, June 30, and so forth. This, too, can be altered by contract, provided that the period of notice is not less than one month and that the contract can by its terms only be terminated at the end of a month, for example, on January 31, February 28, or March 31. Special provisions relate to apprentices,⁵²³ and particular industries⁵²⁴ and where neither the provisions of the Industrial Code nor those of the Commercial Code apply (for example, in the professions), the general provisions of the Civil Code supply a subsidiary rule.⁵²⁵ Special provisions also apply to the most highly paid employees.⁵²⁶ Salaried employees are in all undertakings employing more than two people (not including apprentices) entitled to at least three months' notice terminating the contract at the end of a quarter, if they have been employed in the enterprise for at least five years⁵²⁷ (but only years after the employee's 25th birthday are taken into account). After eight years' employment the period of

⁵¹⁹ See Horion, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 127.

⁵²⁰ GEWERBEORDNUNG [hereinafter cited as GEWO] para. 122 (Ger.).

⁵²¹ HANDELSGESETZBUCH [hereinafter cited as HGB] para. 67 (Ger.).

⁵²² GEWO para. 133a.

⁵²³ *E.g.*, GEWO para. 127b.

⁵²⁴ Boldt, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 73-74.

⁵²⁵ BGB paras. 620-25.

⁵²⁶ *E.g.*, GEWO para. 133ab; HGB para. 68.

⁵²⁷ Law on the Period of Notice for Salaried Employees, July 9, 1926, [1926] Reichsgesetzblatt I, 399 (Ger.).

notice is four months; after 10 years, five; and after 12 years, six months. These seniority provisions do not, however, affect the period of notice to which the employer is entitled.

In Belgium as in Germany the periods of notice for salaried employees differ from those for manual workers. Manual workers⁵²⁸ are entitled to two weeks' and must give one week's notice, the period to begin running on the Monday after the day the notice is given, but these periods are doubled for those who have been employed in the enterprise without interruption for 10 years, and quadrupled for those who have been employed for 20 years. Individual contracts can only reduce the period to be observed by the worker or extend that to be observed by the employer, except in the case of workers employed for less than six months, in which case special provisions apply. Special provisions also apply in the building industry. If orders for his product are lacking the employer may introduce a shortened working week after giving seven days' notice, but there are special rules for certain branches of the textile industry. Salaried employees⁵²⁹ who earn less than 120,000 francs a year must be given three months' notice which begins to run from the beginning of the month following that in which the notice is given. The period increases by three months for each five-year period commenced, but not necessarily completed, by the employee after the first five years in the same enterprise. These periods cannot be reduced by contract, but the notice to be given to employees earning more than 120,000 francs a year is fixed by contract, and in default of a contract, by the court. The court cannot, however, fix a shorter period of notice than that to be given to the less highly paid employees. Contracts of employment for a fixed period of less than three months concluded with the intent of evading the statutes concerning notice are by the courts considered as contracts for an indefinite period. In Belgium, as elsewhere in Europe, "chain contracts" for fixed periods designed to evade periods of notice are frowned upon by the courts. The employee's required period of notice to the employer is half that of the employer, but this can, within limits, be changed by contract. Special provisions protect the employee under notice who has found another job.

⁵²⁸ See arts. 19-19 ter and 28 quater of the Law of Mar. 10, 1900, [1900] *Recueil des Lois et Arrêtés Royaux de Belgique* 76, as amended by the Law of Mar. 4, 1954, [1954] *Moniteur Belge* 1770, and Decrees issued thereunder. Also see Horion, *supra* note 519, at 113-15.

⁵²⁹ Law of Aug. 7, 1922, arts. 14-16, [1922] *Recueil des Lois et Arrêtés Royaux de Belgique* 864, as amended by the Law of Mar. 11, 1954, [1954] *Moniteur Belge* 2078; See Horion, *supra* note 519, at 125-28.

In the Netherlands⁵³⁰ the period of notice is in principle identical with the pay period, for example, one week for workers paid weekly, one month for employees paid by the month. This rule applies both to notices given by the employer and by the employee, subject to a contractual agreement derogating from it. Such an agreement must be in writing, may not enable the employer to discharge the employee on shorter notice than that required of the employee, and may not be longer than six months. These periods of notice are extended in the case of all employees who, after having reached full age, have served the same enterprise for a full year. For them the period of notice to be given by the employer is at least one week for each year of service up to a maximum of 13 weeks, and that to be given by the worker at least one week for each two years of service up to a maximum of six weeks. This can only be abrogated by collective agreement and within certain defined limits.

In Luxembourg⁵³¹ salaried employees can only be dismissed by notice in writing, the period of notice beginning to run at the middle or the end of a calendar month. The period may not be less than two months for employees who have been in the employer's service less than five years, four months for those in service for five or more but less than ten years, and six months for those who have been in the service of the same employer for ten or more years. Periods of notice required of the employee are one half of these. There are no statutory provisions for manual workers, notice depending on usage and in practice mainly on collective agreements which normally provide for up to two weeks' notice irrespective of duration of service.

Until very recently no periods of notice were fixed by statute in France. The Labor Code⁵³² merely says that these periods have to be in accordance with usage or collective agreements, by which usage can be abrogated, and that any term of a contract of employment or works rule (*règlement intérieur*) purporting to reduce the period of notice as established by usage or collective agreement is void. Under a statute of 1958⁵³³ any manual, clerical or other employee who has served the same employer for at least six months without

⁵³⁰ Law on Contracts of Employment, July 13, 1907, [1907] Stb. No. 193, amended by the Law on Discharges, Dec. 17, 1953, [1953] Stb. No. 619 (Neth.); Molenaar, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 306; FORTANIER & VERAART, *op. cit. supra* note 437, at 41-55.

⁵³¹ See Kayser, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 287.

⁵³² CODE DU TRAVAIL bk. I, tit. II, art. 23.

⁵³³ Law of Feb. 19, 1958, [1958] J.O. 1858 (Fr.); Durand, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 227.

interruption is entitled to at least one month's notice, but the notice he has to give is not affected by the statute. In practice notice periods are invariably extended and not curtailed by collective agreements, which may take into account the place of the employee in the hierarchy of the undertaking and his seniority. This is true even in industries such as the building industry where workers were entitled to no notice at all according to usage. Contractual agreements purporting to fix periods of notice which are too long may be void as an infringement of freedom of work.⁵³⁴ Under the statute of 1958 the employer must give notice by registered letter and must obtain a receipt.⁵³⁵

The Italian Civil Code refers to usage and collective agreements with regard to the notice to be given to manual workers,⁵³⁶ but salaried employees are entitled to statutory periods of notice which apply in the absence of usage or collective agreements more favorable to the employee. These statutory periods range from 15 days to four months in accordance with seniority.

In the event of a violation by the employer of statutory provisions concerning notice some laws provide that the contract continues and wages are due to the end of the period of notice; others that the contract is terminated by the notice but that the employer is liable to pay damages for breach of contract.⁵³⁷

2. GROUNDS FOR INSTANTANEOUS DISMISSAL

In all the six countries the employer has a right of instantaneous dismissal, irrespective of any provisions or rules on notice, or special protective provisions normally safeguarding the employee, if a situation has arisen in which he cannot be expected to keep the employee in his employment. Similarly, a right to quit instantaneously is given to the employee where he cannot be expected to remain longer. This basic idea is shared by the six legal systems, but there are great variations in detail.

In France⁵³⁸ there are no general statutory provisions, but the courts permit the employer to dismiss the employee on the spot if

⁵³⁴ Durand, *supra* note 533, at 210-11.

⁵³⁶ *Id.* at 227.

⁵³⁸ CODICE CIVILE art. 2118 (Italy); Mengoni, in E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 242.

⁵³⁷ This matter is highly complex and cannot be discussed here. Reference is made to *Boldt*, *supra* note 524, at 43 *et seq.* and to the discussions of the various legal systems in that volume.

⁵³⁸ Law of Feb. 11, 1950, art. 4, [1950] J.O. 1688 (Fr.); Durand, *supra* note 533, at 203, 211-12.

he has been guilty of a *faute grave*, that is, a breach of duty such as breach of discipline, absenteeism, unauthorized work for another firm, and the like, the seriousness of the offense always being weighed against other factors such as seniority. Participation in a strike as such is no cause for dismissal and leaves the contract suspended but intact. In the case of some employees, for example, war pensioners, the employer must according to statute be able to prove very serious misconduct (*une faute très grave*). Special principles apply to contracts on approval.

In Germany⁵³⁹ instantaneous dismissal is regulated by statute. Manual workers who have a right to a term of notice of two weeks or less—the normal case—can be dismissed on the spot only for certain specific reasons enumerated in the statute such as theft, attacking or insulting the employer or his representative, or “persistent refusal to fulfil their obligations” (*beharrliche Arbeits-Verweigerung*). Persistent refusal to fulfil obligations may include participation in a strike. The worker may quit without notice for certain specific reasons, such as assaults and insults, non-payment of wages, and the like. Other employees, including commercial and salaried technical employees, can be discharged and can quit “for important reasons,” a phrase which recurs in German legislation. It is interpreted as envisaging facts, whether or not caused by the fault of either side, so grave as to make it impossible to expect either side to continue the relationship. This does not include every breach of contract, but only serious breaches, and it certainly does not include a lack of orders for the product or a need for reducing personnel. The courts are very exacting in their interpretation of this phrase.

In Belgium manual workers can be dismissed and can quit instantaneously for serious reasons⁵⁴⁰ (*juste motif*), which in practice are much the same as the “important reasons” of German law. Belgian statutes list certain situations to exemplify what such serious reasons are. Much the same applies to salaried employees, except that in the case of an instantaneous dismissal the employer must, within three days, let the employee know by registered letter the precise facts on which the dismissal is based. The law is similar in

⁵³⁹ GEWO paras. 123, 124, 124a, 133b-133d; HGB paras. 70-72; BGB para. 626; Boldt, *supra* note 524, at 75-77.

⁵⁴⁰ Law of Mar. 10, 1900, arts. 16, 20, 21, [1900] Recueil des Lois et Arrêtés Royaux de Belgique 76, as amended by the Law of Mar. 4, 1954, [1954] Moniteur Belge 1770; Law of Aug. 7, 1922, arts. 18, 20, 21, [1922] Recueil des Lois et Arrêtés Royaux de Belgique 864, as amended by the Law of Mar. 11, 1954, [1954] Moniteur Belge 2078; Horion, *supra* note 519, at 120-22, 135-36.

Luxembourg, except that the dismissal or the termination of the contract by a manual or clerical worker must be based on a grave default by the other party to the employment contract.⁵⁴¹ In the Netherlands⁵⁴² either side can terminate the contract for "urgent reasons" and can obtain a judgment for the termination of the contract for "important reasons." "Urgent reasons" in the Netherlands means much the same as *faute grave* in France, or "important reasons" in Germany. A strike does not automatically terminate the contract, but is generally an "urgent reason" for the employer to discharge the strikers.⁵⁴³ In Italy⁵⁴⁴ either side can terminate a contract made for an indefinite time, if the other side has committed a grave breach of contract.

3. SOCIALLY UNJUSTIFIED DISMISSALS

The principle of "job security" requires that an employee should be either indemnified or reinstated if the employer abused his right of discharge and acted in a way which is socially unjustified. This principle has been given effect, especially in French, German, and Dutch legislation, and it is not completely absent, though much attenuated, in the laws of Italy, Belgium, and Luxembourg. In all these situations it is assumed that the employer has given the requisite notice. If he has not, he will in France,⁵⁴⁵ and may in Germany,⁵⁴⁶ be liable to pay a double indemnity: for the period of notice and for abuse of right. Except in the Netherlands,⁵⁴⁷ the principles here under discussion do not apply where the employee terminates the contract.

In France⁵⁴⁸ the employer must compensate but need not reinstate, the employee if the discharge constitutes an abusive dismissal (*rupture abusive*). In the course of the many years since this principle was first introduced, the courts have gradually enlarged its scope until it now means that the employer must compensate the employee if he has dismissed him in circumstances in which a reasonable employer would not have done so. According to the case law, however, the employee bears the burden of proof.

⁵⁴¹ Kayser, *supra* note 531, at 289, 294.

⁵⁴² FORTANIER & VERAART, *op. cit. supra* note 437, at 56-57.

⁵⁴³ Molenaar, *supra* note 530, at 302.

⁵⁴⁴ CODICE CIVILE art. 2119 (Italy); Mengoni, *supra* note 536, at 243-44.

⁵⁴⁵ Durand, *supra* note 533, at 224.

⁵⁴⁶ Law on Protection in the event of Dismissals, Aug. 10, 1951, para. 11, [1951] BGBI. I, 499 (Ger. Fed. Rep.). Normally there will be only one indemnity.

⁵⁴⁷ Molenaar, *supra* note 530, at 308.

⁵⁴⁸ CODE DU TRAVAIL, bk. I, tit. II, art. 23; Durand, *supra* note 533, at 220-24.

French law has adopted this means of attempting to do what the United States tries to achieve by counteracting "unfair labor practices" on the one hand, and by giving effect to seniority principles on the other. Some of the cases in which the employer has had to pay indemnity were, for example, plainly cases of discrimination; others were cases of personal hardship of the employee. Apart from the protection by statute of more senior employees against abusive dismissal, there are also special arrangements under collective agreements to protect older employees.

The German principle⁵⁴⁹ of *Kündigungsschutz* or protection against "socially unjustified dismissals" goes much further. It enables all except managerial employees, who are more than 20 years old and have had more than six months' uninterrupted employment in a plant normally employing more than five employees, to ask the labor court within three weeks of their discharge to declare the discharge socially unjustified and therefore invalid. It is socially unjustified if it is not required by reasons connected with the person or conduct of the employee or by urgent needs of the enterprise. All this the employer has to prove, but even if he establishes the urgent needs of the enterprise, it is open to the employee to prove that, in selecting the employees to be discharged, the employer took insufficient account of social factors, for example, of seniority. The employer may then show that the discharge of a particular employee was technically or economically necessary. If the labor court finds that the complaint is justified, it declares that the contract was not terminated by the discharge. Except in certain cases, it must at the same time at the request of either side (which is frequently made) terminate the contract of employment as of a date it considers appropriate and fix the compensation (up to one year's wages) which the employer must pay to the employee.

Before invoking the jurisdiction of the labor court, the employee may put the matter before the works council. If the council thinks the complaint is justified, it should attempt a settlement with the employer. Moreover, the works council must be consulted before each discharge⁵⁵⁰ and, although a violation of this obligation does not render the discharge void, it will probably make it socially unjustifiable in the eyes of the labor court. Whether the powers of the

⁵⁴⁹ Law on Protection in the Event of Dismissals, Aug. 10, 1951, paras. 1-3, 7-8, 12, 21, [1951] BGBI. I, 499 (Ger. Fed. Rep.).

⁵⁵⁰ Law on Constitution of the Plant, Oct. 11, 1952, para. 66(1), [1952] BGBI. I, 681 (Ger. Fed. Rep.). This applies only in plants with more than 20 employees.

works council can be enlarged by collective agreement is a moot point much debated by German lawyers.⁵⁵¹

In the Netherlands protection against manifestly unreasonable termination of the contract by either employer or employee was introduced in 1954.⁵⁵² A discharge is manifestly unreasonable if no reason is given, the stated reason for it is a pretext, or the reasons for it are false, or if, in view of the difficulties of finding another job, the hardship inflicted upon the employee by the termination of the contract outweighs the employer's interest in terminating it, or if the employee is discharged for complying with his military obligations, or if, except for serious reasons, the employer in discharging the employee has contravened a regulation or usage concerning seniority. The termination of the contract by the employee is manifestly unreasonable if he has no reasons or his reasons are a pretext or false, or if the consequences of the employee's quitting the job are so serious from the employer's point of view as to outweigh the employee's interest in giving up his job. The judge fixes the compensation payable by the party whose action is manifestly unreasonable, but he may also order him to resume the employment relationship. The Netherlands is one of the few countries where what corresponds to the penalties for contempt of court by reason of non-compliance with a decree of specific performance can be used to enforce a contract of employment. The importance of this legislation of 1954 is, however, overshadowed by the need for obtaining the consent of the Regional Employment Exchange prior to the termination of a contract of employment.

No legislation corresponding to that concerning abusive dismissal in France, or socially unjustified dismissal in Germany, or manifestly unreasonable termination of the contract in the Netherlands exists in the three other countries of the Community. In Belgium⁵⁵³ an employer who gives the proper notice is liable to indemnify the employee only if there is a real "abuse of right," for example, if he has been dismissed for demanding payments due to him or if an innocent employee has been accused of theft. The works councils have nothing to do with individual dismissals but must cooperate in

⁵⁵¹ See DIETZ, *BETRIEBSVERFASSUNGSGESETZ, MIT WAHLORDNUNG* n. 12 to para. 66, at 511 (2nd ed. 1955); Boldt, *supra* note 524, at 78.

⁵⁵² This was introduced by the Law on Discharge, Dec. 17, 1953, [1953] Stb. No. 619, which amended the Law on Contracts of Employment, July 13, 1907, [1907] Stb. No. 193 (Neth.). See Molenaar, *supra* note 530, at 308-10; FORTANIER & VERAART, *op. cit. supra* note 437, at 60-61.

⁵⁵³ Horion, *supra* note 519, at 118, 166.

defining general rules to govern engagements and dismissals in the plant. In Luxembourg⁵⁵⁴ collective agreements prohibit dismissals by reason of union membership or activities, and special indemnities are payable under statute to salaried employees dismissed after long service. They amount to two months' salary after 15 years, four months after 20 years, and six months after 25 years. In the event of a discharge without notice the works councils must be informed of the grounds of dismissal.

In Italy⁵⁵⁵ there are some rare cases in which, according to the general principles of the law of contract, the dismissal may be void by reason of illegality or immorality, but this is of little practical importance. Apart from some special statutory provisions for certain branches of the economy, what is of interest is the restriction which the law imposes on the power of the employer to dismiss an employee during sickness, or a female employee during pregnancy and during the first few weeks after confinement. During a lawful strike the strikers, whose contracts of employment are suspended, may not be discharged.⁵⁵⁶ More important even than this are a number of statutory provisions imposing upon the employer an obligation to pay "seniority compensation," except in the event of a serious breach of contract by the employee or in cases in which he voluntarily quits his job.⁵⁵⁷ Of principal interest and importance, however, are the three "inter-industrial" collective agreements of October 1950 and May 1953 of which the one in force since October 18, 1950, is here relevant.⁵⁵⁸ According to this agreement any employee who has been discharged can lodge a protest with his union, and if the union does not arrive at a settlement with the employer, the matter is sent to arbitration. If the arbitration board judges the employee's complaint to be justified, it can impose on the employer an obligation either to re-engage the worker or to pay an indemnity. This applies only in undertakings with more than 35 workers. The "works committees" which used to play an important role in discharge procedures under previous collective agreements are no longer concerned with them.

⁵⁵⁴ Kayser, *supra* note 531, at 292-93; Decree on Workers' Delegations, Oct. 30, 1958, art. 20(1), [1958] *Pasin. Lux.* 564. See also Law of June 7, 1937, art. 22(4), [1937] *Pasin. Lux.* 119.

⁵⁵⁵ Mengoni, *supra* note 536, at 236-38.

⁵⁵⁶ *Id.* at 245-51.

⁵⁵⁷ *Id.* at 253-55.

⁵⁵⁸ Aranguren, *supra* note 483, at 245-72; Mengoni, *supra* note 536, at 274-76.

4. DISMISSALS SUBJECT TO CONSENT

In a number of important situations the employer must have the consent or authorization of some authority, whatever his motive for discharging the employee. He is often spared the necessity of obtaining such consent or authorization, however, if the employee was guilty of a serious breach of discipline or the employer for some other reason would have been entitled to dismiss the employee on the spot.

In the Netherlands ⁵⁵⁹ neither the employer nor the employee can terminate the contract of employment without the authorization of the Director of the Regional Employment Office. This does not apply where the contract of employment is terminated not by unilateral notice but by mutual consent or where either side has an "urgent reason" for putting an immediate end to the contract. The need for authorization by the Director of the Regional Employment Office arises from one of the provisions of the Extraordinary Decree on Labor Relations of 1945 ⁵⁶⁰ designed to counteract inflationary tendencies by regulating the labor market. If either side purports to terminate the contract by notice without having obtained this authorization, he commits an offense and is liable to imprisonment up to six months or to a fine up to 10,000 florins. Moreover, the contract continues, the employer is liable to pay wages and the employee to work, and these obligations can be enforced by court order. Here, then, the validity of the termination of the contract depends on the decision of an administrative authority. In fact, however, the procedure is more "judicial" than at first appears. The Regional Employment Office consults the organizations on both sides and the Labor Inspector. In the more important cases the matter is submitted to a "discharge committee" which hears the parties and tries to bring about an understanding—successfully, it is said, in about 40 percent of the cases. If unsuccessful, the discharge committee sends a recommendation to the Employment Office on which the latter acts. This recommendation is, so we are told, usually made unanimously.

The authorities, including the "discharge committees," apply published directives issued by the Labor Department. The policies it pursues are intended to ensure a distribution of labor designed to

⁵⁵⁹ Molenaar, *supra* note 530, at 300; FORTANIER & VERAART, *op. cit. supra* note 437, at 58-59.

⁵⁶⁰ Extraordinary Decree on Labor Relations, Oct. 5, 1945, art. 6, [1945] Stb. No. F 214 (Neth.).

guarantee the maximum of production and to promote peaceful labor relations. Moreover, the "discharge committees," which deal with some 50,000 cases a year, consider the interests of both sides, including matters such as seniority, the employee's age, and whether it is more or less hopeful to attempt to restore the relationship between the parties. Hence the matters taken into account in this procedure coincide to some extent with those to be taken into account by a court when asked to decide whether the termination of the contract is "manifestly unreasonable." This parallelism of judicial and administrative procedures is criticized by Dutch writers.⁵⁶¹

A French Order of 1945, also requires the employer to obtain the consent of the employment office⁵⁶² to hiring and discharges in industrial and commercial undertakings. Except in industry and commerce no consent is required, but in some cases the employment office must be notified. In industry and commerce such consent is required even where the discharge, or termination of the contract by the employee, is based on *faute grave* of the other party. In such cases, however, the office must make its decision in three days, whereas normally it has a week to do so. If no answer is given within the required period, consent is deemed to have been given. If consent is refused, reasons must be given, and against the decision there lies an appeal to a higher administrative authority (*Directeur Départemental du Travail*) who hears a consultative committee in which both sides of industry are represented. An infringement of the provisions of this legislation is a criminal offense, but in radical contrast to the Netherlands, infringement in France has no effect on the validity of the contract or of its termination by notice. Another difference from the Dutch law consists in the exclusively economic (labor market) nature of the policies to be taken into account by the authorities who are not concerned with the social situation at all. Nevertheless, the employer commits an offense if he discharges an employee without the necessary authorization, whether he does so for economic reasons, for example, because he must reduce his personnel—or for other reasons, for example, because of a breach of discipline on the part of the employee. These rules have been developed by the somewhat complicated case law of the highest French courts.

No legislation of this kind exists in the other four countries, except in the case of lay-offs of large numbers of employees. In all

⁵⁶¹ Molenaar, *supra* note 530, at 311.

⁵⁶² 2 DURAND 187-98; E.C.S.C. HIGH AUTHORITY, *op. cit. supra* note 518, at 212-14; BRUN & GALLAND, *op. cit. supra* note 469, at 595-600.

countries⁵⁶³ the employer must notify the employment office of each case of a discharge or other vacancy, and in Belgium this includes a notification of the grounds on which the employee was dismissed. The office may make inquiries, and by negotiating with the employer sometimes produces a settlement where discharge was unjustified.

In Germany, Italy, France, and Luxembourg special provisions regulate "mass dismissals"; these provisions are partly contained in statutes and partly in collective agreements. No such legislation exists in Belgium or in the Netherlands.⁵⁶⁴ In the Dutch Extraordinary Decree of 1945 there is, however, a provision which prohibits the employer from reducing working hours to less than 48 per week, except in certain situations defined in the Decree. If he reduces the hours below 48, he nevertheless remains liable to pay the wages due for 48 hours of work.

The most elaborate provisions protecting the labor market against the consequences of sudden mass dismissals have been enacted in Germany.⁵⁶⁵ With exceptions they apply to each plant employing more than 20 employees and are directed at discharges of five or more in plants with less than 50 employees, of 10 percent or more than 25 employees in plants with at least 50 but fewer than 500 employees, and of at least 50 employees in larger plants, not counting managerial staff and not counting instantaneous dismissals which are not affected by this legislation. The employer must first notify the works council and consult with it on ways of avoiding hardship. Next, he must notify the labor exchange in writing, and submit a statement of the views expressed by the works council. The contracts of employment terminate no earlier than one month after this notification, unless the Regional Labor Office decides otherwise. On the other hand, the Regional Labor Office may extend the period as much as another month, and may also permit the employer to shorten working hours during the period. The decisions of the Regional Labor Office are made by a committee on which both sides of industry are represented and which is presided over by the president of the Regional Labor Office or his deputy. The purpose of these provisions is to "stagger" mass dismissals; the purpose of other provisions seeking to ensure that the works' council is consulted and that no measures of this kind are taken without its con-

⁵⁶³ Boldt, *supra* note 524, at 39-40.

⁵⁶⁴ Horion, *supra* note 519, at 166; Molenaar, *supra* note 530, at 306.

⁵⁶⁵ Law of Aug. 10, 1951, paras. 15-18, 20, [1951] BGBI. I, 499 (Ger. Fed. Rep.); Law on Constitution of the Plant, Oct. 11, 1952, paras. 66(2), 72-75, [1952] BGBI. I, 681 (Ger. Fed. Rep.).

sent is social rather than economic—that is, to protect the individual and not the labor market. The ultimate sanction for violation of the latter provisions may be the imposition on the employer of a duty to compensate employees who lose their jobs.

In Italy corresponding measures have been introduced by collective bargaining rather than legislation.⁵⁶⁶ A statutory provision was, however, enacted in 1949⁵⁶⁷ which provides that the employer may engage labor only through the employment exchange and that a discharged employee has, for a year after his discharge, a prior right to be considered for re-engagement by his former employer. The inter-industrial collective agreement of April 21, 1950 (in force since October of that year) provides that an employer who wishes to reduce the number of his employees because of a contraction of business or because of a change in production methods must notify the regional organizations (union and employers' associations) and the discharges are suspended for the two weeks following this notification. Within these two weeks negotiations take place to regulate the order of discharges, taking into account the economic interests of the enterprise on the one hand and such matters as seniority and family status of the employees on the other. If no settlement is arrived at, the employer may nevertheless, in accordance with the provisions of the agreement mentioned above, be liable to pay indemnities to the individual employees if he ignores the social considerations which it is incumbent upon him to observe. The essential features of the procedure applicable to mass dismissals are the need for notification and the postponement of their effectiveness. Special rules apply to small undertakings. If an employer starts to re-engage labor after a mass dismissal, he is bound by the rule: "last out—first in."

In France the order of discharges in the event of mass dismissals is determined by collective agreement (and an agreement capable of "extension" must contain such provisions)⁵⁶⁸ or by a works rule (*règlement intérieur*) which, in the absence of a relevant collective agreement, must be issued by the employer,⁵⁶⁹ and must take account of seniority and family status. In practice much has been done to regulate these matters by collective bargaining, including agreements which provide for compensation.⁵⁷⁰

⁵⁶⁶ Mengoni, *supra* note 536, at 278-79.

⁵⁶⁷ *Id.* at 251-52.

⁵⁶⁸ CODE DU TRAVAIL bk. I, tit. II, art. 31(g) (3).

⁵⁶⁹ Ordinance of May 24, 1945, art. 10, [1945] J.O. 2970 (Fr.).

⁵⁷⁰ Durand, *supra* note 533, at 217.

In Luxembourg⁵⁷¹ the employer must notify the National Labor Office if he wishes to discharge more than 10 employees at a time and the discharges do not take effect until the end of the fourth week after this notification, a period which can be reduced, or extended up to six weeks by the Minister of Labor. Those discharged have a prior right to be re-hired—that is, a right to damages if they are not re-hired in preference to hiring others. The employer must, under statute,⁵⁷² notify the workmen's delegations, and, under collective agreements, the organizations on both sides, in the event of intended mass dismissals.

Certain categories of employees enjoy special protection in all the six countries. Most important among these are the members, and candidates for membership, of works councils and similar bodies, as has been indicated. Other provisions protect disabled persons, women during pregnancy or during the first few weeks after a confinement, sick employees and the like.⁵⁷³

APPENDIX

SOCIAL SECURITY BENEFITS: A SKELETON SURVEY⁵⁷⁴

A. BELGIUM

I. UNEMPLOYMENT INSURANCE

Comprises all employees. Contribution conditions (minima of contribution periods) must be fulfilled. Duration (exceptions apart) unlimited. Rate varies with age, sex, family status, the occupation of the wife, and the classification of the place of residence from the point of view of the cost of living. Special payments in case of short time work and of short time interruption of work. Financing: Contribution of 2 percent of wages and (up to 60,000 francs per year)

⁵⁷¹ Kayser, *supra* note 531, at 287, 294-95; Law on National Labor Office, June 30, 1945, art. 12(2), [1945] *Pasin. Lux.* 310.

⁵⁷² Decree on Worker's Delegations, Oct. 30, 1958, art. 20(2), [1958] *Pasin. Lux.* 564.

⁵⁷³ For details of these measures, see Coal-Steel Community publication cited in note 518 *supra*.

⁵⁷⁴ This skeleton survey is largely based on the two volumes of monographs on the systems of social security applicable to the employees in the Coal and Steel Industries in the Community and in Great Britain, published by the High Authority of the E.C.S.C. From the very large literature on the subject the two short works by Rouast & Durand, *SÉCURITÉ SOCIALE* (1958), and by Caesar, *SOZIALVERSICHERUNG* in Schaeffer's *GRUNDRISSE* No. 40 (1958) may be useful to readers of this book in view of their succinctness. They are also up to date.

of salaries, half paid by employer, half by employee. State supplement. Organization: National Institute for Labor Exchanges and Unemployment Benefit (*Office National du Placement et du Chômage.*)

2. SICKNESS, DISABILITY, AND MATERNITY BENEFITS

Covering all manual workers and salaried employees and members of family. Contribution conditions to be fulfilled. For insured and family: medical (including hospital, pharmaceutical, dental, maternity) service. For insured only: cash benefit, 60 percent of wages up to six months, then disability benefit of varying amounts without time limit. Maternity grant of 200 francs, and for insured women 60 percent of lost wages six weeks before and six weeks after confinement. Contributions: For manual workers 7 percent of wages, 3.5 percent paid by employer, 3.5 percent by worker; for salaried employees 6 percent, 2.75 percent paid by employee, 3.25 percent by employer, but not beyond 60,000 francs per year. National Unions of recognized Local and Regional Insurance Funds, and Auxiliary Insurance Fund coordinated by National Insurance Fund (Sickness, Disability).

3. FAMILY ALLOWANCES

Covering all employees. Payment either 12.50 francs per day for the first and second child, 17.20 for third, 21 for fourth and 27.80 francs for fifth and further children, or in monthly total amounts of 315 for first and for second, 430 for third, 525 for fourth child, 695 for fifth and further children, with special rates if father sick, or victim of accident, or if child an orphan. Payments continue until child at end of school age or he reaches age 21 in case of further education. Maternity grant: 1800 francs for first birth, 900 for second and each subsequent birth. Special payment of four francs per day for first and two francs for each subsequent child (or 100 and 50 francs respectively per month) if mother not gainfully employed. Local and mutual funds coordinated in National Fund for Family Allowances. Contribution: Employer pays 7.5 percent of wages. Considerable state supplement.

4. OLD AGE AND SURVIVORS' PENSIONS

Completely reformed in 1955. Separately organized for manual workers (National Fund for Retirement and Survivors' Pensions—*Caisse Nationale des Pensions de Retraite et de Survie*) and for sala-

ried employees (Various Funds). Contribution for manual workers 8.5 percent of which 4.25 percent paid by employer and 4.25 percent by employee; for salaried employees 10.25 percent of which 6 percent paid by employer, 4.25 by employee. Considerable state supplement. All employees covered. Old age pension for men from age 65, women age 60, provided they have retired from work. Under system inaugurated in 1955, which is being gradually introduced, amount of pension equal to 75 percent (in certain cases 60 percent) of $\frac{1}{45}$ (in case of women $\frac{1}{40}$) of the aggregate of the remuneration received by the beneficiary during the years taken into account. This adapted to purchasing power (retail price index). Also widow's benefit.

5. ACCIDENTS

No system of social insurance, but absolute liability imposed on employers, as in U.S. workmen's compensation law, for accidents in course of employment including way to and from work and for prescribed industrial diseases, excluding civil liability. Covers all employees. Insurance against accident liability optional, but only possible with licensed insurance companies (of which there are 75) or one of the 16 licensed mutual insurance societies. In fact 99 percent of employers insured (state guarantee fund in case of insolvency of non-insured employers). Insurance against liability for occupational diseases in fact compulsory with *Fonds de Prévoyance* to which contributions payable. Insured employer exonerated, insurer directly liable to victim. Benefits: medical services including hospital, pharmaceuticals, and orthopedic care. Pension amounting in some cases to 100 percent, in others to 90 or 80 percent of last annual wage, maximum 120,000 francs. In case of fatal accidents or disease, funeral grant and pensions for widows, orphans and other relatives. Premiums payable by employers according to risk, *e.g.*, in iron and steel industry, average 4.5 percent of wages, plus payment to cover occupational diseases fixed by decree, varying between 15 and about 20 francs per worker per year.

B. FRANCE

I. GENERAL OBSERVATIONS

a. *Organization*

(a) Local, Regional, and National Social Security Funds linked in National Federation of Social Security Organizations, dealing

with all branches of insurance except old age and survivors' pensions. (b) Regional Old Age Pensions Funds. (c) Local Family Allowances Funds, linked in National Union of Family Allowances Funds.

b. *Financing*

For all branches of social security except industrial accidents and diseases and family allowances, global contribution of 16 percent of wages (up to 660,000 francs per year) of which 10 percent paid by the employer, 6 percent by the employee; for family allowances, 16.75 percent of wages, paid by employer; for accidents and diseases, variable rates in accordance with degree of industrial risk.

c. *Coverage*

All employees without ceiling, provided they have fulfilled contribution conditions.

2. UNEMPLOYMENT

No statutory unemployment insurance, but unemployment assistance paid by municipal authorities, and, since January, 1959, a scheme of unemployment insurance agreed between unions and employers' associations which may be declared binding on all employers and employees. Contribution: 1 percent of wages, 0.8 percent paid by employer, 0.2 percent by employee. Payment up to nine (in certain cases 12) months of 35 percent of last relevant wages, a maximum of 80-90 percent which is constituted of payments out of agreed insurance plus public unemployment assistance.

3. SICKNESS, MATERNITY, AND DISABILITY INSURANCE

Medical services including hospital, maternity, pharmaceutical, dental. For insured, wife, children and certain other family members in the household. No time limit as long as insured remains in insurance. Expenses other than most maternity expenses not completely covered; maximum of 80 percent of doctor's and other charges covered, and in the majority of cases a lower percentage. Sickness benefit in cash up to three (in certain cases up to four) years; on principle one half of "basic wage," in case of three children, two thirds, reduced in case of hospitalization. Payable to women six weeks before, eight after confinement. In case of disability, *i.e.*, reduction of working capacity by at least two thirds, full medical expenses and pension of (depending on nature of case) 30,

40 or up to 80 percent of average of last 10 years wages to age 60 when old age pension begins.

4. FAMILY ALLOWANCES

Covers entire working population and those who for acknowledged reasons refrain from working. Basic allowance for each family with at least two children under 16 (if apprenticed, 17, or if studying or incapacitated, 20) 22 percent of basic wage plus 33 percent for each further child, plus certain additional payments to make up for former tax advantages. Basic salary fixed regionally in accordance with cost of living. Paid monthly. Where only one member of family gainfully employed (*e.g.*, husband) further payment ranging in accordance with number and age of child or children, from 5 to 50 percent of basic wage. (This payable also where only one child, in some cases where no child in the family.) Prenatal allowances for pregnant women, and maternity grants (twice basic salary for second, and four-thirds basic salary for each additional, birth). Also other benefits such as rent subsidies and removal subsidies.

5. OLD AGE AND SURVIVORS' PENSIONS

Present system inaugurated in 1945, but transitional systems continue for older pensioners. Under definitive system entitlement from age 60 for all those having insurance record of at least 15 years and from age 65 for those having record of more than five and less than 15 years. Percentage of basic wage (meaning here average of last 10 years) up to 660,000 francs per year, with allowances for devaluation of the franc. The percentage varies according to contribution record from 20 to 40, plus increments for spouse, children etc. If contribution record less than 15 years but more than 5 years, calculation in terms of percentage of contributions paid (*rente* as distinguished from *pension*). Special and supplementary allowances have to be paid on large scale by government. Also death (funeral) grant, and widows' and widowers', but no other survivors' pensions.

6. INDUSTRIAL ACCIDENTS AND DISEASES

Financed from employers' contributions varying according to size and nature of enterprise. Covering all employees with regard to accidents arising either out, or in the course, of employment (*par le fait ou à l'occasion du travail*) or with regard to one of the

diseases "recognized," *i.e.*, prescribed as occupational diseases for the occupation of the particular employee. Benefits in kind: medical (as in case of health insurance) and rehabilitation services. In case of temporary incapacity, payment of 50 percent of basic wage for first 28 days, subsequently two thirds. Basic wage calculated on basis of last monthly earnings. In case of permanent incapacity permanent pension varying with degree of disablement, age, etc. In case of fatal accident or disease: costs of funeral, widows', orphans' and other special survivors' pensions. The civil liability of the employer is excluded, but not that of third parties.

C. GERMANY

1. UNEMPLOYMENT INSURANCE

Comprises generally speaking all employees except the most highly paid salaried employees. Amount: regressive percentage of wages during last 13 weeks before loss of job (90 percent for lowest, 55 percent for highest point of wage scale). Duration varies in accordance with contribution record. Minimum: 78 days, maximum 468 days. Besides: payment of wage supplement in case of short work week (up to 52 weeks). Where no insurance, unemployment assistance with means test. Organization: Federal Institute for Labor Exchanges and Unemployment Insurance. Contributions: two percent of wages up to a maximum of 175 DM a week (750 DM a month), borne 50 percent by the two parties to the contract of employment.

2. SICKNESS BENEFIT (INCLUDING MATERNITY BENEFIT AND DEATH GRANT)

Borne by local, regional and other sickness funds, comprising manual workers and salaried employees up to income 7,920 DM per year, granting insured and family medical and maternity services (including hospital) and cash benefit, in principle 50 percent of basic wage plus increments. Contributions vary among sickness funds; average 6.1 percent. Borne 50 percent each by employer and employee, except lowest wage earners, where employer pays all.

3. FAMILY ALLOWANCES

40 DM for the third and each further child per month up to the age of 18 or, in case of full-time education, 25. Organization: Family Compensation Funds attached to Employers' Mutual Insurance

Institutes (*Berufsgenossenschaften*). Paid for employees by employer. Contributions vary between Mutual Institutes (estimated in 1957 at average 1.1 percent of wages).

4. PENSIONS (RENTENVERSICHERUNG)

Completely reformed in 1957. Covering old age pension (from age 65), survivors' pension (widows', orphans'), disability (*i.e.*, employability reduced by half or more) and unemployability. Covering all employees (and others). Organization: For manual workers (exceptions apart): State (*Land*) Insurance Institutes; for salaried employees: Federal Insurance Institute. Principal benefits: (a) rehabilitation, re-training, etc., (b) pensions varying with the average wages or salaries received during the 3 years preceding the first payment of pension, and with the number of years of contribution payments, plus certain increments. Percentages of various types of pensions different. Contribution 14 percent of wages of which employer and employee pay one half each (only of wages and salaries up to 9,600 DM).

5. ACCIDENT INSURANCE

That is, insurance against accidents in the course of employment and occupational diseases covering, among others, all employees. Includes accidents on way to and from work. Only such diseases as prescribed by order recognized as occupational. Organization: Employers Mutual Insurance Institutes (*Berufsgenossenschaften*): compulsory and statutory. Benefits: medical treatment (all stages, hospital, etc.), rehabilitation, occupational therapy, assistance in finding employment, pension up to two thirds of last annual wages, varying with degree of disablement, death grant, widows' and orphans' benefit in case of fatal accident or diseases. Mutual Insurance Institutes supervise safety measures in industry. Employer and his agents civilly liable for damages only if convicted by criminal court for intentionally causing accident (broader liability in case of road accidents), but liable to Mutual Insurance Institute (also to sickness fund, etc.) to refund moneys disbursed on proof of intention or negligence. Contributions paid to Mutual Insurance Institutes by employers alone, varying for each employer in accordance with rate of wages paid, number of employees and the "risk category" to which the plant belongs, *i.e.*, the magnitude of the accident risk and risk of diseases. There may be incremental payments in case of bad accident record, and reductions in case of good accident

record. The average was, in 1955, calculated at 1 percent of wages or salaries.

D. ITALY

I. GENERAL OBSERVATIONS

a. *Organization*

Three principal organizations (at national, provincial, local levels): National Institute for Social Security (*Istituto Nazionale della Previdenza Sociale: I.N.P.S.*): unemployment insurance, family allowances, old age, disability and survivors' insurance, tuberculosis insurance. National Institute of Health Insurance (*Istituto Nazionale Assicurazione Malattie: I.N.A.M.*): sickness and maternity benefit. National Institute for Insurance against Industrial Accidents (*Istituto Nazionale Assicurazione Infortuni sul Lavoro: I.N.A.I.L.*): industrial accidents and occupational diseases. Some minor organizations, e.g., National Unit for Insurance of, and Assistance to, Orphans of Italian Workers (*Ente Nazionale per la Previdenza e l'Assistenza agli Orfani dei Lavoratori Italiani, E.N.A.O.L.I.*). Also the Social Housing Programme: *I.N.A.-C.A.S.A.*

b. *Financing*

Two kinds of contributions: absolute and percentage. Unemployment, old age, disability, survivors' and tuberculosis insurance: absolute contributions (*contributi base*) paid by employer from 8 lire in case of wages up to 2,500 per week to 53 lire in case of wages of more than 27,700 per week, and percentage contributions (*contributi integrativi*) 14.70 percent of wages, of which 3.05 percent borne by employee, rest by employer. Health, maternity, orphans' insurance: no absolute contributions, 6.93 percent of wages paid by employer, 0.15 percent (for health insurance) by employee. Accident insurance: contribution approximately 3.70 percent paid by employer. Social Housing program: 1.15 percent paid by employer, 0.57 percent paid by employee. Family allowances and supplement for workers working shortened week: 33.9 percent of wages up to ceiling of 900 lire per day for men, 750 for women, paid by employer. (The percentage is only seemingly high, in view of the very low ceiling.) State subsidies to various branches of insurance.

c. *Coverage*

All employees.

2. UNEMPLOYMENT INSURANCE

Total unemployment: If contribution conditions fulfilled, basic benefit proportionate to contributions paid during last year, plus supplement of 200 lire per day and certain family increments, *e.g.*, children, spouse, etc. Maximum 180 days per year. If contribution conditions not fulfilled—only for localities and occupations prescribed by Minister of Labor, and subject to willingness to undergo re-training etc.—220 lire per day plus increments for 90 (in exceptional cases 180) days per year. **Partial unemployment:** for certain industries in case of reduction of hours below 40 per week two thirds of the wages which would have been payable for the 25th to 40th hour per week (no time limit), and, in case of temporary lay-off, normally up to one month (extension up to 13 weeks) two-thirds of 16 hours' wages per week. In addition: unemployment assistance in case of need. Re-training of unemployed under Ministry of Labor.

3. SICKNESS, MATERNITY, AND FUNERAL BENEFITS

Contribution conditions must be fulfilled. Comprises services of general practitioner, hospital, pharmaceutical and (within a financial limit) dental services for insured and family, subject to a time limit of (exceptions apart) 180 days per calendar year. Sickness benefits for up to 150 days amounting to 50 percent of average wage of last month or quarter, reduced if insured hospitalized. Special rule for tuberculosis: no time limit, cash benefit payable only during sanatorium treatment and for up to one year after, and fixed in absolute figures (with family increments), irrespective of wages earned. **Maternity:** medical, etc. services plus 80 percent of wages for three months prior to expected confinement and eight weeks after confinement. Funeral benefit in certain cases.

4. FAMILY ALLOWANCES

Payable to all employees while employed, or if sick up to 180 days (in some cases three months) amounting (in industry and trade) to 4,342 lire per month with respect to each child up to 14 (or 18 and in some cases 21, if living in the house and not gainfully employed) (in some cases this covers brothers, sisters, grandchild-

dren), 3,016 lire per month with respect to wife, unless in receipt of certain minimum income, or to husband, if incapable of self support, and 1,430 lire per month for each parent or other ascendant relative above a certain age and dependent on recipient of family allowance.

5. DISABILITY, OLD AGE, AND SURVIVORS' BENEFITS

Disability benefits, provided contribution conditions fulfilled, for persons whose earning capacity reduced by at least one third, of unlimited duration: full medical service and cash benefit depending on contributions paid in the past, plus increment for children, minimum 60,000 lire per year if beneficiary over, and 42,000 lire per year if under, 65. Reduced if beneficiary employed, in receipt of sanatorium treatment, or in receipt of industrial accident etc. benefits. Old age pension for men from age 60, women age 55, provided contribution conditions fulfilled, amount depending on contributions, with increments for children under 18 and subject to same minima as disability pension. Reduction of pension in case of gainful employment or treatment in sanatorium. Survivors' pension for benefit of widow or widower amounting to 50 percent of pension of deceased, for benefit of full orphan (in certain cases 20 in others 30 percent of pension of deceased), and (exceptionally) for benefit of parent. In certain cases no survivors pension payable, payment of lump sum to survivors on death of insured. Orphans' benefit consisting in educational and medical services for orphans administered by National Unit for Insurance of and Assistance to Orphans of Italian Workers, financed by employers' contributions and subsidies from various public funds.

6. INDUSTRIAL ACCIDENTS AND DISEASES

Contributions payable by employers in accordance with risk of industry, varying from 2 to 7.6 percent of wages, average 3.7 percent but payment of contribution not condition of benefit. Only undertakings covered which use certain kinds of machinery (including those driven by steam, electricity, internal combustion) or belong to defined branches of activity (*e.g.*, building, transport, and many others), in fact comprising major part of industry. Diseases only covered insofar as prescribed as occupational for particular occupations. Industrial accident defined as violent event in the course of employment leading to physical or mental injury, fatal or otherwise.

Way to and from work not generally included. Medical services including orthopedic and rehabilitation. In case of temporary disability compensation of five-ninths of average daily wage during two weeks preceding accident or onset of disease until cure, or commencement of pension as below. In case of permanent incapacity, total or partial (*i.e.*, at least 10 percent disablement in case of accidents, 20 percent in case of disease), pension amounting to percentage (55–100 percent) of the last annual wage of beneficiary within a minimum of 135,000 and a maximum of 300,000 lire, plus family increments and attendance supplement. Survivors' benefits for widow or widower, or, in certain cases, orphan children, or parents. Funeral benefits of varying amounts.

E. LUXEMBOURG

1. GENERAL

One of the principal characteristics of the social security system: coexistence of two separate schemes of insurance, one for manual workers and one for salaried employees. These two schemes exist side by side in (1) health, maternity and funeral insurance, and (2) disability, old age and survivors' pensions. The schemes of family allowances, industrial accident insurance and unemployment benefits are common for both categories.

2. ORGANIZATION

a. *Health, Maternity, Funeral Insurance*

For manual workers: three regional sickness funds (*Caisses Régionales de Maladie*) acting through 15 local offices and (in the iron and steel industry) seven plant-level private sickness funds (*Caisse de Maladie d'Entreprises*), linked in Union of Sickness Funds. For salaried employees: One statutory Sickness Fund for Employees, and three employer-owned sickness funds (in the iron and steel industry).

b. *Old Age, Disability, Survivors' Pensions*

For manual workers: Old Age and Disability Insurance Board (*Etablissement d'Assurance contre la Vieillesse et l'Invalidité*), part of the Social Insurance Office (*Office des Assurances Sociales*) which, for some purposes, acts through the Regional Sickness Funds (above). For salaried employees: Pensions Fund for Private Employees (*Caisse de Pension des Employés Privés*).

c. *Industrial Accidents and Occupational Diseases*

Accident Insurance Society (*Association d'Assurance contre les Accidents*), part of the Social Insurance Office (above).

d. *Family Allowances*

Family Allowances Fund (*Caisse de Compensation pour Allocations Familiales*) managed by the Old Age and Disability Insurance Board (above), and partly acting through the Regional Sickness Funds.

e. *Unemployment Compensation*

(There is no system of unemployment insurance proper): National Employment Office (*Office National du Travail*), acting for some purposes through its three local agencies, through the Regional Sickness Funds, and through the municipalities.

3. UNEMPLOYMENT COMPENSATION

No insurance. Financed 75 percent by state, 25 percent by municipalities. Covers all employees (manual and salaried), certain categories (*e.g.*, seasonal workers, commercial travelers, agricultural workers) excepted, from age 16 to 65, provided unemployment involuntary, unemployed ready to accept work and employed for 200 days during last 12 months. No means test. For 26 weeks (in 12 months)—less in cases of foreign nationals—60 percent of normal wage or salary which is the basis for calculation of health insurance contributions, ceiling: 220 francs per day. Income from occasional work deducted, also other income above 25 percent of compensation. In certain cases also compensation for shortened working week. In addition re-training and other similar services.

4. HEALTH, MATERNITY, FUNERAL INSURANCE

Covers all manual workers and salaried employees, irrespective of wage or salary (and certain others). Financed out of contributions fixed by individual sickness funds, maximum (in case of manual workers) 6.75 percent, in fact 6 percent in case of Regional Funds, 5.4 percent in case of Plant Funds. Ceiling in case of manual workers 220 francs per day. Two thirds of contributions borne by employee, one third by employer. State supplement to administrative expenses. Contribution conditions must be fulfilled. Medical services for insured and certain members of his family (wife, chil-

dren in the house up to 18 and in certain cases beyond, and other persons), including hospital, dental services, maternity care, and pharmaceuticals, with participation of insured in cost (in case of manual worker not beyond 25 percent). Time limit for hospital service. Funeral paid. Sickness benefits payable to insured or if in hospital, etc., to members of his family, normally 26 weeks, sometimes extended. Minimum 50 percent of wage or salary, can be increased by individual sickness fund up to 75 percent. Average 66 $\frac{2}{3}$ percent. Payment to family in case of hospitalization at lower rates. At end of sickness benefit period disability pension may begin. Maternity benefit: cash payments six weeks before and six weeks after confinement, up to 12 weeks for nursing mothers.

5. FAMILY ALLOWANCES

Covering all employees, financed by employers at varying rates of contribution, amounting in industry to 4.5 percent of wages (no ceiling). State supplement. Maternity grant 5,000 francs for first birth, 3,000 francs for subsequent confinements. For each child up to 18 (beyond in case of incapacity) 444 francs per month and more for fifth and further children. Adapted to cost of living index.

6. OLD AGE, DISABILITY, SURVIVORS' PENSIONS

Covering all manual workers and, under separate legislation, generally speaking all salaried employees, irrespective of wage or salary. Financed by contributions of 5 percent of wages from employers and 5 percent of wages from employees plus state supplement and supplement from municipalities. No ceiling for manual workers but ceiling of 159,600 francs per year for salaried employees. If contribution conditions fulfilled, on reduction of earning power through sickness etc. by two thirds in case of manual workers, and on permanent inability to exercise usual or equivalent occupation in case of salaried employees (*invalidité*) or, in case of manual workers on reaching age 65 (in certain cases 62, 60 or 58) and in cases of male salaried employees on reaching age 65 (in certain cases 60) and female salaried employees age 55, pension between minimum and maximum depending on contribution record, plus family increments. Treatment for certain diseases and support of family during treatment. Survivors' pension for widow, orphans, in certain cases other relatives. Payment of funeral.

7. INDUSTRIAL ACCIDENTS AND DISEASES

Covering all manual workers and salaried employees earning up to 90,000 francs per year. Financed by contributions (percentage of aggregate of wages and salaries in enterprise or plant in accordance with category of risk to which it belongs, and fixed periodically, subject, in case of salaried employees, to salary ceiling of 90,000 francs per year) paid by employers, plus state supplement. Industrial accident defined (as in France) as accident arising *either* out of, *or* in the course of, employment. List of recognized occupational diseases. Industrial accident includes way to and from work. Benefits: full medical treatment, payment of three-fourths of wages or salary for first 13 weeks as long as victim is incapable of work, beyond this a pension of 80 percent of wage or salary in case of 100 percent disablement, and correspondingly lower in case of partial disablement, plus family increments, funeral cost, survivors' pensions. Other services in kind including rehabilitation. Civil action for damages excluded (as in Germany) except where employer convicted for causing accident intentionally.

F. NETHERLANDS

I. GENERAL: ORGANIZATION

a. *Health and Maternity Insurance: Medical Benefits*

The local (or regional) General Sickness Funds (*Algemene Ziekenfondsen*) organized on a mutual basis, or by employers or by insurance companies, etc., linked in a (national) Council of Sickness Funds which has a number of regulatory and other powers. Sickness funds must be licensed by Minister of Social Affairs and Public Health.

b. *Health and Maternity Insurance: Cash Benefits, Family Allowances, Unemployment Insurance*

Twenty-six "joint industrial associations" (*Bedrijfsverenigingen*) combining employer and employee representative and licensed by the Minister. Employers compelled to be members. Fifteen of them operate through a "Joint Office of Management." Central financial organ for family allowances: Family Allowances Compensation Fund. For unemployment insurance: General Unemployment Fund

c. *Disability, Old Age, Survivors' Pensions, Industrial Accidents, and Occupational Diseases*

(Cash benefit) Social Insurance Bank (a public institution: *Sociale Verzekeringsbank*) acting through the 22 regional Labor Councils (*Raden van Arbeid*) each of which consists of three employer and three worker representatives and a full time chairman appointed by the Minister.

d. *Coordinating and Supervising Organ: Council of Social Insurance*

Responsible to Minister. (Note: calculation ceiling for all contributions and all benefits: 19 florins per day.)

2. UNEMPLOYMENT INSURANCE

Covers all employees below age 65 not earning more than 6,900 florins per year. Two kinds of benefit: Short unemployment ("suspension") benefit for a minimum of 48 days (or more if rules of particular Joint Industrial Association so provide), and unemployment benefits proper for at least 78 days following upon the short unemployment benefit. Contribution conditions must be fulfilled. Amount: 60 percent to 80 percent of last wage (depending on age, sex, family status) up to 19 florins per day. Financing: Short unemployment benefit: equal contributions of employers and employees varying from industry to industry in accordance with risk (between 2 percent and 5.8 percent of wages payable by either side). Unemployment benefit proper: 1.2 percent of wages of which 0.4 percent paid by employer, 0.4 percent by employee, 0.4 percent by state. Calculation ceiling 19 florins per day. In addition unemployment assistance financed by state, paid by municipalities.

3. HEALTH AND MATERNITY INSURANCE

Sharp distinction between medical services and cash benefits. Covers, generally speaking, all employees earning up to 6,900 florins per year. Medical services also cover unemployed, pensioners etc., and cover the spouse, children up to 16 (in certain cases 27), and (if living in the same household) certain other relatives of the insured. Financing: Medical Services: 4.2 percent of wages (up to 19 florins per day) of which half paid by employer, half by employee. Cash benefit: contribution varying from industry to industry

between 2 percent and 4 percent of wages up to 19 florins per day, of which one half but no more than 1 percent paid by employee, rest by employer. Medical services comprise those of general practitioner and specialist, and dental, hospital, sanatorium, midwifery services, and pharmaceuticals, etc. Sickness fund enters into standard contract with medical and other practitioners (generally speaking no full time employment by sickness fund), who are entitled to enter into such contract. Claimant must be registered with a sickness fund. No further contribution conditions. Hospital up to 70 days, but 90 percent of those insured have full coverage for small payment to sickness fund. Cash benefit: 80 percent of wage (up to 19 florins per day) and one-third of this (payable to family) if insured in hospital, for up to 52 weeks (in case of tuberculosis in some cases for three years). Maternity grant of 55 florins and maternity allowance of 100 percent of wage or salary (up to 19 florins per day) for six weeks before and six weeks after confinement.

4. FAMILY ALLOWANCES

Covering all employed persons and others, with respect to each child under 16 (in cases of incapacity or full time education up to 27) on ascending scale, 58 cents per day for first, 65 cents per day for second and third, 91 cents per day for fourth and fifth and 102 cents per day for sixth and further children. Financed by employer contribution of 5 percent of wage or salary up to 19 florins per day. Special supplement of 10 cents per child per day for employees earning less than 16 florins per day.

5. OLD AGE, DISABILITY, SURVIVORS' PENSIONS

Distinguish between the general old age insurance for the entire population (employed or not) in force since 1957, and the special old age, disability, and survivors' insurance for employees.

General insurance covering all persons resident or employed in the Netherlands between ages 15 and 64, irrespective of income or nationality. Financing: Contribution of (until 1962) 6.75 percent of total income, up to 7,450 florins annually, payable by insured and in case of employees deducted from wage or salary by employer and paid over by him. Right to pension from age 65: 972 florins annually for single person, 1,584 florins for married couple. Condition: Payment of contribution for 50 years, but, generally speaking, all those over 15 on January 1, 1957, deemed, subject to certain conditions, to have paid 50 years' contributions. Under final system 2

percent deducted for each year of non-payment. Amount of pension variable (adapted to wage index).

Special (additional) insurance of all employees over 14 earning up to 5,600 florins per year, or having previously earned less, reaching 5,600 florins but no more than 6,900 florins (persons earning more can join voluntarily and pay their own contribution), no one over 35 can enter insurance for the first time. Financing: weekly contribution from 25 to 60 cents, payable by employer, amount depending on age and sex of employee, 60 cents for man, 50 cents for woman over 21. Contribution condition: payment of 150 contributions for disability pension. Benefits: old age pension from age 65, pension in case of disability (*i.e.*, reduction of normal earning capacity by two-thirds or more whether permanent or, if exceeding six months, temporary) amounts varying with number of contributions paid plus certain family increments. In case of disability also special medical services. Widows' and orphans' pensions depending on amount of contributions paid.

6. INDUSTRIAL ACCIDENTS AND DISEASES

(Special legislation applicable to seamen, agriculture, etc. not considered.) Normally (see above) through Social Insurance Bank, but employer may be authorized to insure through private insurance company or as self-insurer. Financing: contribution paid by employer in accordance with the "risk category" (there are 93) to which his plant belongs, percentage of wages up to 19 florins per day. Covers all employees against risk arising from (fatal or non-fatal) industrial accident, *i.e.*, sudden event caused by external force and resulting in impairment of physical or mental integrity, in the course of employment, including during way to or from work, or from one of the prescribed industrial diseases. Benefits: medical, surgical, etc., treatment and re-training. In case of reduction of working capacity by at least 50 percent up to 42 days 80 percent of wages (up to 19 florins per day) (or one third of this if in hospital and without family). In case of total incapacity to work (after 42 days) for 12 months 80 percent of wages (up to 19 florins per day) and after that 70 percent. In case of partial incapacity proportionate reduction, further reduction in certain cases of hospitalization, but up to 100 percent in case a permanent attendant is needed. Fatal cases: funeral benefit and survivors' pensions for widow (30 percent), orphans up to age 16 (15 or 20 percent), in certain cases widower and certain relatives, aggregate to be no more than 60 percent of wage (up to 19 florins per day).

Chapter VII

New Legal Remedies of Enterprises: A Survey

*Eric Stein and Peter Hay**

The Community system is conceived of as "a government of laws" rather than "a government of men." The Community Court of Justice is directed "to ensure observance of law and justice . . . in the interpretation and application" of the Treaty. Any other system would run counter to the basic principles underlying the democratic institutions of the six Member States and would be incompatible with their constitutions. A necessary component of this system is an adequate armory of legal remedies available to persons whose rights are unlawfully abridged by authorities administering the system.

Economic rights and interests of persons—individuals and enterprises—engaged in economic activities in the Community may be affected in varying degrees by the acts of the Community institutions as well as by the acts of national authorities acting pursuant to the Treaty or to a Community act. This applies to economic rights and interests of natural persons whether or not they are nationals of a Member State, as well as to legal persons whether or not they are organized under the laws of a Member State or of a non-member country if such persons are partly or wholly engaged in economic activities within the Community. Thus, for example, an American citizen doing business in the Community, a branch of an American company or a subsidiary of an American parent may be affected by these acts.¹ The principal purpose of this chapter is

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¹ Art. 196 of the Euratom Treaty defines the term "person" as used in that Treaty as "any natural person wholly or partly engaged in the territories of Member States in activities" falling within the scope of the Treaty and the term "enterprise" as "any enterprise or institution wholly or partly engaged in activities under the same conditions, whatever may be its public or private legal status." Art. 80 of the Coal-Steel Treaty provides that the term "enterprise" as used in that Treaty "refers to any enterprise engaged in production in the field of coal and steel" within the Community territory; "and in addition, with regard to Articles 65 and 66 as well as information required for their application and appeals based upon them, to any enterprise or

to outline the legal remedies available to enterprises against these acts in the Community Court of Justice. Only brief reference is made to remedies available in national courts. A study of national remedies would entail an analysis of the procedural systems in the six Member States, a task which is entirely beyond the scope of this volume. Brief attention is given to legal remedies in suits based on contracts to which the Community is a party and on tortious acts imputed to the Community, as well as to the related conflict of laws problems. Finally, the salient features of the procedure before the Community Court and the Court's sources of law will be considered.²

I. ADMINISTRATIVE ACTS OF THE COMMUNITY

A. FORM OF ADMINISTRATIVE ACTS

In the areas of their responsibility, the Council of Ministers and the Commission adopt measures³ which will be referred to here, for want of a better term, as administrative acts. This term must not obscure the fact that in form, content, and effect some of these acts may resemble national legislation more than national administrative measures. The effect of the administrative acts depends on whether they take the form of regulations, directives, decisions, recommendations, or opinions. Of these, regulations resemble American federal statutes in that they establish general rules applicable directly and without national implementing legislation in the Member States. Directives, on the other hand, are binding orders which may be addressed only to Member States; they bind the Member States as to the prescribed result but leave to each Member State the choice of the means and legal form of implementation of the order.⁴ Decisions are individual rather than general acts and differ from directives in that they may be addressed to an enterprise, as well as to a Member State, and are binding in all respects.⁵ Recom-

organization regularly engaged in distribution other than sale to domestic consumers or to craft industries." The E.E.C. Treaty contains no similar definitions. It would appear logical that the E.E.C. Treaty, like the two other Treaties, should be interpreted as applicable on the basis of the principle of territoriality. For the status of aliens in the Community countries generally see 57^e CONGRÈS DES NOTAIRES DE FRANCE, *LE STATUT DE L'ÉTRANGER ET LE MARCHÉ COMMUN* (1959).

²The composition and jurisdiction of the Court was outlined in "The New Institutions," Chapter II *supra*.

³Art. 189.

⁴*E.g.*, art. 69 provides for the implementation, by directives issued by the Council, of the provisions of art. 67 concerning the abolition of restrictions on the free movement of capital.

⁵*E.g.*, art. 79(4) empowers the Commission to issue decisions to remove discrimination practiced by carriers.

mendations and opinions, finally, do not bind their addressees but constitute advice to Member States or enterprises in those instances in which the institutions have no power or do not choose to act with a binding effect.⁶ Recommendations and opinions are, nevertheless, of importance because of the expertise of the Community institutions⁷ and of the possible measures which may be taken if a recommendation or an opinion is disregarded.⁸

B. ENFORCEMENT OF ADMINISTRATIVE ACTS AGAINST ENTERPRISES

I. IMPOSITION OF PENALTIES

Failure to abide by a binding administrative act (regulation or decision) subjects an enterprise to the enforcement procedure. Normally, such an administrative act will be enforced by fining the delinquent enterprise.⁹ The E.E.C. Treaty does not expressly authorize enforcement by other means.¹⁰

The Coal-Steel Community Treaty under which a number of fines have been imposed specifically authorizes the High Authority to impose penalties upon enterprises in a considerable number of instances; it envisages either a single fine¹¹ or a series of daily fines for each day of continuing violation.¹² The E.E.C. Treaty expressly requires penalties in one instance only: the Council must institute fines to ensure observance of the antitrust provisions.¹³ In addition,

⁶ Art. 189 last para. The characterization of recommendations as "advice" points up an interesting difference between them and the recommendations issued by political international organizations where recommendations are issued in lieu of decisions and carry undeniable political weight. Nagel, *Einige rechtsvergleichende Bemerkungen zu den Empfehlungen der Vereinten Nationen, des Europarates und des Nordischen Rates*, 1958 *INTERNATIONALES RECHT UND DIPLOMATIE* 223 at 234-235 (No. 3).

⁷ Examples are the recommendations concerning liberalization of capital beyond the degree provided for by the Treaty (art. 71) and such technical problems as special transport charges for frontier traffic (art. 81).

⁸ *E.g.*, art. 91(1) under which the Commission may authorize a Member State injured by dumping to take "protective measures" against "the originator" of dumping who had disregarded the Commission's earlier recommendation to end the dumping.

⁹ For the special enforcement procedures of the antitrust provisions pending regulation by the Council see Chapter X *infra*.

¹⁰ The E.C.S.C. Treaty did provide for one such instance in art. 66(5) under which illegal concentrations could be dissolved by forced sales and other measures.

¹¹ *Ordnungsstrafe*; compare E.C.S.C. Treaty art. 66(6).

¹² This latter fine parallels the German concept of *Zwangsgeld*. E.C.S.C. Treaty art. 65(5).

¹³ "Geldbussen und Zwangsgelder," "amendes et . . . astreintes," art. 87(2a). The Treaty does, however, provide for other "measures" to assure compliance with Community policy apart from fines. Thus, art. 91(1) provides that the Commission may authorize Member States to take "protective measures" when parties guilty of dumping practices do not heed the Commission's recommendations.

however, the Treaty contains a general provision to the effect that the regulations adopted by the Council "may confer" on the Community Court "full jurisdiction in respect of penalties¹⁴ provided for in such regulations."¹⁵ Consequently, it would seem that the Council in any regulation may provide for penalties against enterprises and determine the respective roles of the Commission and of the Community Court in the imposition of penalties. Three patterns seem possible.

1) The Treaty requires the Commission to "exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter."¹⁶ Thus the Council may authorize the Commission to impose penalties on enterprises violating a Council regulation. In accordance with the general procedure discussed below, the enterprise concerned may appeal the Commission decision to the Community Court which may either sustain or annul the penalty.¹⁷

2) The Council may provide in its regulation that in hearing an appeal from a Commission decision imposing a penalty the Court exercises "full jurisdiction."¹⁸ In that case the power of the Court will be substantially broader than its general power of review on appeal against administrative acts: the Court will act as a trial court and consider such factors as the seriousness of the violation, recidivism, and the economic circumstances of the defendant. Moreover the Court will not be limited to confirming or annulling the penalty but will also be able to modify it.¹⁹

¹⁴ "Zwangsmassnahmen," "sanctions." It should be noted that these terms are *not* limited to fines.

¹⁵ Art. 172. Whether the Council may establish penalties and give the Court "full jurisdiction" with regard to them for violation of the antitrust provisions only (*cf.* art. 87, 2a) or whether it may establish penalties for all its regulations and give the Court "full jurisdiction" with respect thereto, depends on how art. 172 is interpreted. The language of art. 172 admits of an extensive interpretation which appears preferable in order to render the Council's regulations effective. The meaning of "full jurisdiction" will be discussed later.

¹⁶ Art. 155.

¹⁷ Art. 173. See Part II, Section A, Subsections 3-4, *infra*.

¹⁸ Art. 172.

¹⁹ Daig, *Die Gerichtsbarkeit in der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft*, 44 ARCHIV DES ÖFFENTLICHEN RECHTS 132, at 184-186 (1958) (hereinafter cited as Daig, ARCH. D. Ö. R.). *Cf.* E.C.S.C. Court competence of review under art. 36 and 66(4) of the E.C.S.C. Treaty. See also case 8-56 [1958] Journal Officiel de la Communauté Européenne du Charbon et de l'Acier 5, at 9. According to Daig, *Die Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaft für Kohle und Stahl in den Jahren 1956 und 1957*, 13 JURISTENZEITUNG 204, at 207 (1958), this conceptual difference in the scope of review by the Court was modeled after French administrative law, which distinguishes between *recours pour excès de pouvoir* (appeal against administrative acts with ordinary scope of review) and *recours de pleine juridiction* ("full jurisdiction").

3) The Council may determine that the penalties for infraction of its regulation should be imposed by the Court itself exercising "full jurisdiction" within the meaning described above. If this alternative is adopted, the Commission presumably would act as prosecutor before the Court.²⁰

A further question arises, whether the Commission has an independent power to institute penalties for the violation of its own regulations or of Council regulations, without being authorized to do so by the Council.²¹ The Treaty contains no express provision granting the Commission such power; it does accord the Commission a power "to ensure the application of the provisions of the Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof" as well as "a power of decision of its own" but only "under the conditions laid down in this Treaty."²² The Commission, composed of appointed and independent administrators, is conceived of predominantly as an "executive" and not a "law-making" institution. It is, therefore, doubtful whether the Treaty could and should be interpreted so extensively as to accord the "executive" an implied independent power to prescribe penalties.

The Council and, in case of disagreement, the Community Court will provide authoritative answers to these problems of Treaty interpretation. But it may be safely concluded that the Council has the power to prescribe penalties for violation of *any* of its regulations and to authorize either the Commission or the Court to impose such penalties.

It has been suggested that in the antitrust field at any rate the Community Court exercising "full jurisdiction," rather than the Commission, should have the original authority to impose penalties because the Court's procedures more effectively safeguard rights of the affected enterprises.²³ Under certain circumstances an enterprise

²⁰ Daig, ARCH. D. Ö. R. 185.

²¹ The conferral of such broad discretionary law-making powers, which are ordinarily within the competence of the legislator, on the executive may also create difficulties with regard to the constitutionality of such acts under the constitutions of the Member States. This question has already been raised with regard to a regulation issued by the Commission of the European Atomic Energy Community. See Everling, *Die ersten Rechtsetzungsakte der Organe der Europäischen Gemeinschaften*, 14 BETRIEBS-BERATER 52 (1959) No. 2, and Meibom, *Die Rechtsetzung durch die Organe der Europäischen Gemeinschaften*, 14 BETRIEBS-BERATER 127 (1959) No. 4.

The E.E.C. Council Regulations Nos. 3 and 4 concerning the social security of migrant workers, [1958] Journal Officiel 561, 597, have been said to raise questions of constitutionality in France.

²² Art. 155 para. 3.

²³ Nebolsine et al., *The "Right of Defense" in the Control of Restrictive Practices under the European Community Treaties*, 8 AM. J. COMP. L. 433 at 461 (1959).

may prefer, however, to "accept" a penalty imposed by the Commission rather than to face the publicity of a public proceeding before the Court, particularly since the Commission may be more indulgent than the Court.

2. COLLECTION OF MONETARY OBLIGATIONS

Only those administrative acts which create monetary obligations are enforceable against an enterprise in the territories of the Member States under an express provision of the E.E.C. Treaty. These acts include Council or Commission decisions creating monetary obligations or imposing fines for the violation of administrative acts.²⁴ These decisions as well as money judgments of the Community Court are enforceable in the Member States.²⁵ Domestic authorities in the Member State where execution takes place are authorized by the Treaty only to require verification of the authenticity of the document containing the decision or judgment. Once the document is verified they *must* grant execution in accordance with their own rules of civil procedure.²⁶ Thus, the enforcement of judgments of the Community Court is quite different and substantially easier than the enforcement of foreign judgments. National courts cannot examine whether the Community Court had jurisdiction, whether, on the merits, the Community law was correctly applied, or whether the enforcement would be contrary to the "public policy" of the forum.²⁷ A collateral attack on Community acts or judgments therefore is not possible in the course of the enforcement procedure. Only the Community Court may suspend execution.

²⁴ Under the E.C.S.C. Treaty pecuniary obligations other than fines were imposed upon enterprises for instance by decisions setting forth the contributions to be made by enterprises to the compensation scheme for scrap. See E.C.S.C., SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 88-94 (1959).

²⁵ Arts. 192 and 187.

²⁶ For a discussion of the applicable national law, see OSTERHELD, *DIE VOLLSTRECKUNG VON ENTSCHEIDUNGEN DER E.G.K.S. IN DER BUNDESREPUBLIK DEUTSCHLAND* 70-84 (1954).

²⁷ This procedure can be explained by the fact that the Community Court is not regarded as a "foreign court" in the Member States. See MATHIJSEN, *LE DROIT DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 97 (1958). The requirement of verification of the authenticity can thus not even be assimilated to an exequatur proceeding. See Dumon and Rigaux, *La Cour de Justice des Communautés Européennes et les juridictions des Etats membres*, 19 ANNALES DE DROIT ET DE SCIENCES POLITIQUES 7, at 21 (1959). For the competence of German courts to go behind an ordinary foreign judgment, see Zivilprozessordnung (ZPO) § 328; it might also be said that German courts would not be able to go behind a Community judgment even absent the express provision of art. 192 of the Treaty, on the ground that the Community Court is not a "foreign" court but a supranational court for purposes of ZPO § 328. Cf. in a different context, OSTERHELD, *op. cit. supra* note 26, at 73, n. 258.

II. LEGAL REDRESS OF ENTERPRISES AGAINST ADMINISTRATIVE ACTS

A. SUIT FOR ANNULMENT IN THE COMMUNITY COURT OF JUSTICE

The composition of the Court and its diversified jurisdiction have been described in general terms in the chapter dealing with the institutions of the Community. The experience with the Coal-Steel Community Treaty has shown that from the viewpoint of an enterprise the most important aspect of the jurisdiction of the Court is its power to review and annul administrative acts rendered by the institutions. This will no doubt also be the case under the E.E.C. Treaty; one must keep in mind, however, that since the E.E.C. Treaty contains fewer rules directly applicable to enterprises, there will be fewer occasions for enterprises to appeal to the Court in the earlier stages of the Community at any rate and pending the issuance of regulations by the Community institutions.

I. THE ENTERPRISE AS PARTY BEFORE THE COMMUNITY COURT

The question of who may bring an appeal before the Court has been of importance in the Coal-Steel Community, since there the right to appeal is limited to coal and steel producers, while certain distributors and buyers of coal and steel are able to sue in special circumstances only.²⁸ A much disputed question was the extent to which "outsiders," such as industrial users of coal and steel or labor groups, would have access to the Court. In one case the Court refused to consider an appeal from an association of coal consumers.²⁹

This problem does not exist under the E.E.C. Treaty. The right to appeal under the E.E.C. Treaty is granted under specified cir-

²⁸ E.C.S.C. Treaty arts. 33 and 65-66 in connection with art. 80 and art. 63(2)(b). See joint cases 7-54 and 9-54, *Sammlung der Rechtsprechung des Gerichtshofes* [hereinafter cited as *Sammlung*], Vol. II, 53 and case 2-56, *Sammlung*, Vol. III, 9, at 36.

²⁹ Joint cases 8-54 and 10-54, *Sammlung*, Vol. II, 155 at 184. STEINDORFF, *DIE NICHTIGKEITSKLAGE IM RECHT DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL* 50-52, 127-129 (1952), who pleads for an application by analogy of the exceptions of arts. 65 and 63 of the E.C.S.C. Treaty to all "outsiders" who are affected; MUCH, *DIE AMTSHAFTUNG IM RECHT DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL* 93 (1952), however, believes that outsiders have no enforceable claim for damages against the Community arising out of the latter's administrative acts. See Schüle, *Grenzen der Klagebefugnis vor dem Gerichtshof der Montanunion*, 16 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 227 (1955-56). Steindorff, *Montanfremde Unternehmen in der Europäischen Gemeinschaft für Kohle und Stahl*, 8 *JURISTENZEITUNG* 718 (1953).

cumstances to "any natural or legal person,"³⁰ obviously because the Community may affect almost any person or any type of enterprise within its jurisdiction.³¹ This right does not depend on any specific legal status, nationality, or type of activity of the plaintiff enterprise. Thus the Court will be open to American citizens or companies organized in the United States or to foreign companies controlled by American capital if the rights or interests of such citizens or companies are affected in a manner specified in the Treaty.

There is reason to assume that the Court will interpret liberally the provisions governing access to the Court. This expectation is supported by the clause of the Treaty, referred to above in the introduction to this chapter, which is called the "Magna Carta" of the Court; it charges the Court with the duty of ensuring "observance of law and justice in the interpretation and application of" the Treaty.³² This expectation is also encouraged by the constitutional requirement of broad access to legal remedies inherent in any democratic system of government under law.³³

2. ADMINISTRATIVE ACTS SUBJECT TO APPEAL

Since the object of legal redress is the protection of rights, an enterprise may appeal against regulations and decisions but not against recommendations or opinions which are not binding and therefore in law cannot affect rights.³⁴

3. GROUNDS OF APPEAL AGAINST ADMINISTRATIVE ACTS

If, for example, an enterprise applies for exemption from the antitrust provisions and the application is denied, on what grounds can an appeal be taken to Court?³⁵ The Treaty provides four grounds of appeal.³⁶

1) The first ground is "incompetence" which consists of an ac-

³⁰ Art. 173.

³¹ Cf. Pinay, *La Cour de Justice des Communautés Européennes*, 1959 REVUE DU MARCHÉ COMMUN 138, at 143 (No. 12).

³² Art. 164; Daig, ARCH. D. Ö. R. *supra* note 19, at 150-154.

³³ The concept of "Rechtsstaatlichkeit." E.g., German Grundgesetz art. 19; cf. also in a different context Everling, *supra* note 21, at 55, 58 and Meibom, *id.* at 131.

³⁴ See note 68 *infra* concerning appeals against non-binding acts which are, in fact "disguised decisions." Daig, *Die Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaft für Kohle und Stahl in den Jahren 1956-1957*, 13 JURISTENZEITUNG 204-205 (1958).

³⁵ It is assumed here that in regulations to be issued under art. 87 the Council will charge the Commission with the task to pass upon such application in the first instance.

³⁶ Art. 173.

tion by a Community institution "outside the defined limits of [its] legal power"³⁷ and may perhaps be analogized to the concept of *ultra vires*.³⁸

2) The second ground for appeal is the violation of a substantial procedural requirement, such as the failure to adopt the administrative act by the requisite number of votes, the failure to comply with requirements of publication or consultation with other bodies (such as the Economic and Social Committee), or the failure to give sufficient reasons for the act.³⁹ These requirements are based on express provisions of the Treaty. However, this ground of appeal may possibly be available not only in case of a violation of a procedural requirement set forth in the Treaty (*i.e.*, "statutory requirement"), but also in case of a violation of a procedural requirement to which the administrative act is "inherently [subject] from its nature,"⁴⁰ a concept which has its American analogy in the notions of "due process" and "fair play."⁴¹ It may well be that should the competent institution refuse an application for exemption from the antitrust provisions without according an opportunity to the applicant enterprise to present evidence, the decision will be subject to annulment because of a defect in form even though the Treaty and all applicable regulations are silent on the point.⁴²

3) The third ground, violation of the Treaty, serves to contest the administrative act because of an incorrect interpretation of the Treaty or "of any legal provision relating to its application," such

³⁷ VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY*, 71 (1954).

³⁸ For instance the plaintiff argued the High Authority's incompetence in the E.C.S.C. case 8-55, *Sammlung*, Vol. II, 197, at 228, 307-314, but the Court rejected this alleged ground.

³⁹ In E.C.S.C. case 6-54 plaintiff charged that the High Authority's decision was not based on sufficient reasons as required by arts. 5 and 15 of the E.C.S.C. Treaty. The Court held that the reasons given were sufficient. *Sammlung*, Vol. I, 213, at 232-233; a similar allegation in E.C.S.C. case 2-56 was rejected by the Court on the ground that the High Authority was not bound to meet all possible arguments in its reasons, but needed only state the factual and legal considerations on which it bases its decision. *Sammlung*, Vol. III, 9, at 37-38. Finally, in the more recent E.C.S.C. case 9-56 the Court held that the recital of reasons in two short paragraphs did not constitute compliance with the requirement to give reasons; having found, *inter alia*, that the lack of sufficient reasons constituted a major violation of procedure, the Court annulled the High Authority's decision. *Sammlung*, Vol. IV, 9, at 28-31. The requirement to give reasons for regulations, directives and decisions is contained in E.E.C. Treaty art. 190.

⁴⁰ VALENTINE, *op. cit. supra* note 37, at 72.

⁴¹ *Cf.* Administrative Procedure Act 4(b), 5 U.S.C. § 1004 (1958); *F.C.C. v. Potsville Broadcasting Co.*, 309 U.S. 134, at 143 (1939).

⁴² *Cf.* *Nebolsine*, 8 AM. J. COMP. L. *supra* note 23, at 462.

as a regulation, or because of a complete absence of facts to support the act.⁴³ Violation of the Treaty has been argued extensively in many cases involving the Coal-Steel Treaty and the Court has developed a sizable body of law.⁴⁴

4) Finally an administrative act may be attacked for *détournement de pouvoir*, best translated as "misapplication of power," which results whenever an organ has exercised its power to achieve an end not envisioned in the grant of power. Although alleged in several Coal-Steel cases,⁴⁵ thus far the Court has not relied on it as a basis for annulment.⁴⁶

These grounds for appeal are modeled on those of French administrative law in which they are known collectively as appeals for *excès de pouvoir*,⁴⁷ that is, appeals to prevent governmental agencies from exceeding their powers. They show considerable similarity to the administrative law of the other Member States⁴⁸ and even of England and the United States. Belgian and Luxembourgian administrative laws in this area are almost exactly like the French.⁴⁹ The

⁴³ Cf. the excellent analysis by Steindorff, *op. cit. supra* note 29, at 130-131, with regard to the E.C.S.C. as well as his comparative analysis of French law, *id.* at 55-76. See also case 6-54, Sammlung, Vol. I, 213, at 235-236.

⁴⁴ In case 2-56, Sammlung, Vol. III, 9, at 38 the Court had to decide whether the High Authority's reference to the general principles of E.C.S.C. Treaty art. 4 in applying and interpreting the anti-cartel provisions of the Treaty constituted a violation of the Treaty. The Court held that the High Authority did not violate the Treaty by interpreting the specific prohibition against discrimination of art. 65 in conformity with the general principles of art. 4. *Id.* at 44, 45. Any other interpretation would have led the Court to the untenable proposition that some parts of the Treaty are contrary to other parts of the Treaty. Daig, *Die Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaft für Kohle und Stahl in den Jahren 1956 und 1957*, 13 JURISTENZEITUNG 238 at 239. On the other hand, the Court annulled the High Authority's decision concerning price publication because it was based on an incorrect interpretation of E.C.S.C. Treaty art. 60 (case 1-54, Sammlung, Vol. I, at 23-33); the Court also annulled the decision involved in case 9-56, Sammlung, Vol. IV, 9, at 32-33, *inter alia*, because the High Authority had violated arts. 5 and 47 of the E.C.S.C. Treaty by not publishing certain information and data as it was required to publish. For a discussion of cases 1-54 and 2-56 see Stein, *The Court of Justice of the European Coal and Steel Community: 1954-1957*, 51 AM. J. INT'L. L. 821, at 821-824 and 828-829 (1957) and Stein, *The European Coal and Steel Community: The Beginning of its Judicial Process*, 55 COL. L. REV. 985 (1955).

⁴⁵ E.g., cases 1-54, 6-54, 8-55, 9-55. See Stein, articles cited in note 44 *supra*.

⁴⁶ See text at notes 54-56 *infra* for discussion of case 9-56 and 10-56, Sammlung, Vol. IV, 9, at 34-47 and 51, at 73-85 where plaintiff charging *détournement de pouvoir* prevailed.

⁴⁷ STEINDORFF, *op. cit. supra* note 29, at 53-83 and literature cited there.

⁴⁸ With regard to the E.E.C. Treaty see *Erläuterungen der Bundesregierung zum Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft*, HANDBUCH FÜR EUROPÄISCHE WIRTSCHAFT I/Teil A/30 at 77, where it is said that the grounds of appeal of art. 173 are the same as in German constitutional and administrative law. Cf. Daig, ARCH. D.Ö.R. *supra* note 19, at 173-174.

⁴⁹ WIGNY, DROIT ADMINISTRATIF 371-375 (1953). Lievens, *The Conseil d'Etat in Belgium*, 7 AM. J. COMP. L. 572, at 586, 587 (1958).

Italian law provides for similar grounds of appeal with the difference that *détournement* or *sviamento di potere*, is not an independent ground for appeal but may be asserted only in support of one of the other grounds of appeal—for example, violation of law—which are collectively known as *eccèsso di potere*.⁵⁰ *Détournement* is an independent ground for appeal under Dutch law together with the other three grounds included in the E.E.C. Treaty.⁵¹ German law, finally, recognizes as grounds for appeal the administrator's incompetence to act, the violation of statutory procedural requirements, and violation of law,⁵² as well as misapplication of power which is understood in very much the same way as the French *détournement de pouvoir*.⁵³ In those cases under the Coal-Steel Treaty where the ground of *détournement* was pressed the Court tended to employ the French definition of the term. In one case the plaintiff attacked a decision of the High Authority establishing a subsidiary organ on the ground of *détournement de pouvoir*. The Court upheld the plaintiff and annulled the decision primarily because of an unlawful delegation of power.⁵⁴ The Court intimated that the Treaty had been violated since "the guarantee of the balance of power" among the institutions had been upset by the unlawful delegation of power by the Authority to the new organ.⁵⁵ The Court did not inquire whether or not there was a *détournement* but having found an irregularity proceeded to decree the annulment.⁵⁶

Détournement de pouvoir has also served the Court as a basis for broadening the right of appeal of enterprises under the Coal-Steel Community Treaty.

Grounds for appeal similar to those of the E.E.C. Treaty are found in common law countries. Although review of administrative

⁵⁰ MATHIJSEN, LE DROIT DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 119 (1958).

⁵¹ *Id.* at 120.

⁵² I FORSTHOFF, LEHRBUCH DES VERWALTUNGSRECHTS 211-215, 218, 225 (7. Auflage 1958).

⁵³ Lagrange in the conclusions in case 3-54, Sammlung, Vol. I, 131, at 177, 178; but see LAUN, *Bemerkungen zum freien Ermessen und zum détournement de pouvoir im staatlichen und im Völkerrecht*, in: MENSCH UND STAAT IN RECHT UND GESCHICHTE, FESTSCHRIFT FÜR HERBERT KRAUS 128, at 147, 148 (1954).

⁵⁴ Case 9-56 and 10-56, Sammlung, Vol. IV, 9, at 34-47.

⁵⁵ Case 9-56, *id.*, at 44. As Prof. Reuter, COURS DE DROIT INTERNATIONAL PUBLIC 142 (1958-1959), points out, this case is especially interesting since the issue of a subsidiary organ brings to mind the famous case of Montpeurt of French administrative law (C.E. 31 July 1942, [1942] Sirey, Jur. III, 37) and the Advisory Opinion of the I.C.J. on the *Effect of awards of compensation made by the U.N. Administrative Tribunal*, *Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954, p. 47.*

⁵⁶ Cf. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice de la C.E.C.A.*, (1958) ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 295, at 304-305.

acts in England is now usually provided for in the statutes establishing administrative agencies—and in terms which often differ substantially from one statute to the next—some general observations can perhaps be made. English law of judicial review revolves around the question of whether the administrative agency has “exceeded its jurisdiction.”⁵⁷ Exceeding jurisdiction includes exceeding its powers (*ultra vires*), procedural defects, that is, failure to observe mandatory procedural requirements or rules of “natural justice” (due process), and “error of law on the face of the record,” that is, violation of law.⁵⁸ “Abuse of discretion,” finally, includes the increasingly important element of “improper purpose” which seems to be similar to *détournement de pouvoir* in Community law. As is true of Community administrative law, English law grants no right of appeal when the agency can show that it pursued in good faith a proper as well as an improper purpose.⁵⁹ In the United States where judicial review of federal administrative acts is treated as are appeals from lower courts,⁶⁰ judicial review of administrative acts may be obtained on the grounds of *ultra vires*, violation of law, disregard of the requirements of procedural due process, and abuse of discretion.⁶¹ “Improper purpose” does not seem to offer a ground for review. However, because of the relatively broad scope of review asserted by American courts, adoption of an act for an “improper purpose” perhaps might be challenged as an abuse of discretion.⁶²

4. SCOPE OF THE RIGHT OF APPEAL OF ENTERPRISES

a. *Direct Appeal Against Binding Acts*

An enterprise may appeal against a decision *addressed to it*. In addition, it may appeal against a decision which, although in the form of a general regulation or a decision addressed “*to another person*,” is “of direct and specific concern” *to it*.⁶³ Thus if an in-

⁵⁷ GRIFFITH AND STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 212-229 (2d ed. 1957).

⁵⁸ *Id.* at 212, 215, 218.

⁵⁹ Cases 1-54 and 2-54, *Sammlung*, Vol. I, 7, at 34 and 79, at 111; case 8-55, *Sammlung*, Vol. II, 197, at 314-319; *cf.* *Westminster Corp. v. L.N.W. Ry.*, [1905] A.C. 426; *Municipal Council of Sydney v. Campbell*, [1925] A.C. 338.

⁶⁰ SCHWARTZ, *AMERICAN ADMINISTRATIVE LAW* 109 (1950).

⁶¹ *Id.* at 113; *cf.* also STEINDORFF, *op. cit. supra* note 29, at 90 and 95-96. *Administrative Procedure Act* § 9(e), 5 U.S.C. § 1009 (1958).

⁶² The “Hoover Commission” recommended that the scope of review should be broadened to permit the courts to reverse for “unwarranted exercise” of discretion. This was intended to permit review where it was alleged that agency action was taken for an improper purpose. *Report on Legal Services and Procedures of U.S. Commission on Organization of the Executive Branch of the Government* (1953-1955) 215-217.

⁶³ Art. 173, para. 2. *Cf.* the French text: “. . . les décisions qui, bien que prises sous l'apparence d'un règlement ou d'une décision adressée à une autre personne,

stitution issues what purports to be a regulation, but which in fact affects a single enterprise only, an appeal would lie. Again, an enterprise should be able to appeal a decision addressed to its competitors authorizing a cartel agreement among them if a similar authorization has previously been denied to it, but there may be some question whether the language of the Treaty permits such appeal. If such appeal does not lie, the only recourse remaining to the enterprise would be to re-submit its application for an authorization to the Commission with a view to appealing a second denial to the Court. Thus defined the right of appeal is narrower than that granted under the Coal-Steel Community Treaty.⁶⁴

The language of the E.E.C. Treaty seems to exclude an appeal against regulations except where they affect a single enterprise. Nor does it allow an appeal against a decision or a directive *addressed to a Member State* which will cause the latter to take administrative or legislative action against an enterprise. If an enterprise has no way in national courts to restrain its national government from complying with an illegal Community directive and if it is barred from an appeal to the Community Court, it will be without any remedy. As is true of American courts which refuse to review administrative action where the plaintiff is "anyone who asserts no more than his interest as a member of the public"⁶⁵ (absent a "case or controversy"), the Treaty understandably seeks to exclude appeals based on insubstantial and remote interests. A problem might arise, however, of reconciling the requirement contained, for instance, in the German constitution that legal redress must be available against every administrative act⁶⁶ with the necessity of avoiding abuse of the judicial process. The Court may in due course define "direct and specific concern" of enterprises claiming the right of appeal. It is difficult to foresee whether the Court will be able to elevate the concept of "direct and specific concern" to a general test by which it would measure the right of appeal in those cases where

la concernant directement et individuellement." The German text: ". . . Entscheidungen. . . , die, obwohl sie als *Verordnung oder als eine an eine andere Person gerichtete Entscheidung ergangen sind*, sie unmittelbar und individuell betreffen." [Emphasis added.]

⁶⁴ E.C.S.C. Treaty art. 33 grants enterprises a right of appeal not only against decisions addressed to them and against "general decisions" (*i.e.*, decisions purporting to contain general rules roughly comparable to regulations under the E.E.C. Treaty) which are "concealed decisions" but also against "recommendations" (comparable to directives under the E.E.C. Treaty) and "general decisions" in which a *détournement de pouvoir* was committed against the enterprise.

⁶⁵ SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 191 (1954); cf. GELLHORN AND BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 204-242 (1954).

⁶⁶ German Grundgesetz art. 19(4).

such right is claimed by an enterprise but is not expressly accorded in the Treaty. From the viewpoint of an enterprise it would certainly be more desirable to permit it to appeal whenever its interests were directly affected than to limit arbitrarily the right of appeal to appeals against specified administrative acts.⁶⁷

b. *Collateral Attack Against Regulations*

An appeal must be brought within two months from the date of the publication of the regulation in the official journal of the Communities or from communication of the directive or decision to the addressee or, absent such communication, from the day the addressee obtained knowledge of the act. Since regulations are in the nature of general laws, it may be impossible to determine within two months whether an enterprise is "affected" in the sense that permits it to appeal. For this reason the Treaty provides that whenever a *regulation* becomes the subject of a dispute in any legal proceeding, any party may question its validity on any ground on which the regulation could have been attacked directly, regardless of the lapse of time since its publication.⁶⁸ It may well be that this broad right of "indirect appeal" will be used as a substitute for direct appeals against regulations which enterprises may not be permitted to bring. Despite the specific Treaty language an effort might also be made to make "indirect appeals" available not only against regulations but against other acts as well in order to create legal protection against acts which cannot be attacked directly.⁶⁹

The Court is not given the power to *annul* an indirectly contested

⁶⁷ An attempt to arrive at a general test of "interest" was made under the E.C.S.C. Treaty for the purpose of resolving the difficult question of whether a given administrative act was "individual" or "general" in character and thus did or did not entitle enterprises to appeal. Such a test has been urged repeatedly by writers, (Rivero, *supra* note 56, No. 14 at 302; Steindorff, *Die Europäischen Gemeinschaften in der Rechtsprechung*, 8 ARCHIV DES VÖLKERRECHTS 50, at 66 (1959); Court Advocate Römer in cases 7-54 and 9-54, *Sammlung*, Vol. II, 105, at 111 and 120-127. Court Advocate Lagrange in case 8-55, *id.*, 231, at 248 and in case 15-57, *id.*, Vol. IV, 205, at 211), and in at least one case the E.C.S.C. Court seemed to have accepted this test (case 7-54 and 9-54, *Sammlung*, Vol. II, 53, at 84). *Cf.* also Belgium, Conseil d'Etat, 8 juin 1951, 5-6 Recueil de Jurisprudence du Droit Administratif 281; Lievens, AM. J. COMP. L. *supra* note 49, at 585; LAUBADÈRE, TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF Nos. 635-643, 623, 626 and 629; FORSTHOFF, *op. cit. supra* note 52, at 501.

⁶⁸ Art. 184. The E.C.S.C. Treaty recognizes such an indirect appeal against general decisions in appeals against fines only. E.C.S.C. Treaty art. 36 par. 3. *Cf.* case 9-56, *Sammlung*, Vol. IV, 9, at 25-28.

⁶⁹ Daig (ARCH. D. Ö. R. *supra* note 19, at 177) seems to favor extending availability of the indirect appeal beyond the language of art. 184, which limits it to regulations, to all other acts of the Community organs, where the time limitation for the bringing of a direct appeal has run. He argues that the indirect appeal is designed to broaden the available legal protection rather than merely provide for special situations.

regulation. It is merely authorized to hold it "inapplicable." It has been argued, however, that the result will be essentially the same because Community institutions as well as national courts are bound to comply with the legal interpretations rendered by the Court.⁷⁰

*c. Appeal Against Decisions "Disguised" as
Recommendations or Opinions*

A recommendation or opinion, although not binding and not appealable, may in effect reflect a policy which the Community institution has adopted and will enforce by means of binding administrative acts, for example, if the recommendation or opinion is not heeded. For purposes of legal certainty and commercial security, an enterprise may therefore desire a determination of the legality of the position taken by the institution in the recommendation or opinion.

Several situations of this kind seem possible. For example, the Commission might address a recommendation to an enterprise to desist from what it considers dumping practices. The enterprise knows that if it disobeys the Commission may authorize "the Member State injured" to take "protective measures" defined by the Commission.⁷¹ Or, the Community institution for reasons of its own might choose to recommend action in the antitrust field which it has the authority to make obligatory by a binding appealable decision.

In several cases arising under the Coal-Steel Community Treaty it was argued that the Court could not consider an appeal because the contested act of the Community institution was not binding. The Court has held, however, that acts will be considered binding and thus appealable ("disguised decisions") if they contain provisions which can be applied. In other words, where the High Authority had made abundantly clear in administrative acts what position it would take, should stated conditions later obtain, those acts were considered appealable. In several cases the Court, following this reasoning, has found acts appealable. On the other hand it refused to entertain an appeal against an "opinion" in which the High Authority took a negative view of certain investment plans of a steel

⁷⁰ It is argued further that the Court may also adjudicate which *parts* of the regulation are to remain in force, a competence which the Treaty confers on the Court expressly only in the case of annulment of regulations on direct appeal. *Ibid.*

⁷¹ Art. 91(1). It could possibly be argued on the basis of the general Treaty framework that the Commission may address a recommendation to a Member State only rather than to an enterprise.

producer. The Court did so despite the fact that the "opinion" had grave economic consequences for the enterprise concerned and was thought by some to contain a clearly implied threat of sanctions. In this case the Court stressed the fact that the "opinion" did not impose any legal obligations on the enterprise.⁷² It is interesting to compare this latter approach with the recent judgment of a U.S. District Court. It held a "report" by the Interstate Commerce Commission reviewable because of its "immediate and practical impact" on the enterprise concerned.⁷³

The E.E.C. Treaty provides expressly that only "acts other than recommendations or opinions" are subject to judicial review.⁷⁴ However, this provision was hardly intended to exclude appeals against such recommendations and opinions which are in fact "disguised decisions," since decisions remain decisions regardless of the form in which they are issued.⁷⁵

A different situation may arise where the Commission renders an unfavorable opinion with regard to a project which forms the basis for an application by an enterprise for a loan from the European Investment Bank. In such event the Board of Directors may grant a loan by a *unanimous vote only* which means that the opinion may prejudice the applicant in a very real sense.⁷⁶ This case may be distinguished on the ground that a grant of a loan is a privilege rather than a right or legally protected interest. Thus an enterprise would not have a legal remedy against an unfavorable opinion of the Commission even if in fact the opinion was the cause of the denial of the application by the Board of Directors of the Bank. Nor would the enterprise have recourse to the Court against the negative decision of the Board of Directors.⁷⁷

⁷² Case 8-55, Sammlung, Vol. II, 197, at 224 and conclusions of Advocate General Lagrange *id.* 231, at 245; case 9-55, *id.* 331, at 363; joint cases 7-56 and 3-57 to 7-57, Sammlung, Vol. III, 83, at 115-116; joint cases 1-57 and 14-57, *id.*, 213, at 234-235. See a comment by Jerusalem, *Die Rechtslage der Unternehmen in der Montanunion*, 11 NEUE JURISTISCHE WOCHENSCHRIFT 410 (1958); MATHIJSEN, *op. cit. supra* note 50, at 60-62. Cf. Bebr, *The Development of a Community Law by the Court of the European Coal and Steel Community*, 42 MINN. L. REV. 845, at 869 (1958) on extensive interpretation of what is an appealable "individual decision" under the E.C.S.C. Treaty.

⁷³ *Garden City Floral v. United States*, (D. C. Mont.) 143 F. Supp. 609, at 611 (1956) relying on *Frozen Food Express v. United States*, 351 U.S. 40, at 43-44 (1956), involving a determination of "agricultural commodities" within the meaning of § 203(b) (6) of the Interstate Commerce Act.

⁷⁴ E.E.C. art. 173. Cf. E.C.S.C. art. 33. For a definition of "recommendations" in the E.C.S.C. Treaty see art. 14.

⁷⁵ See note 72 *supra*, particularly cases 8-55 and 9-55.

⁷⁶ Protocol on the Statute of the European Investment Bank art. 21 (6).

⁷⁷ The conclusions of the Board of Directors may only be contested by Member States or the Commission and only on the ground of infringement of specified procedural requirements. Art. 180(c).

d. "Unclassified" Acts

Closely connected with the last problem is the question of the appealability of Community acts "other than recommendations or opinions" which do not fit the categories of "regulation," "directive," or "decision." Although in many cases it may be possible to draw analogies to these categories, it may be difficult to do so in some. In numerous cases the Treaty provides that the Council or Commission is to "authorize," "approve," "decide," "provide," "lay down rules" or "adopt measures" without specifying the form of the administrative act.⁷⁸ Again, the Treaty authorizes the Council to conclude international agreements on behalf of the Community without specifying the form of the act by which the Council gives final approval to such agreements.⁷⁹

The problem is twofold: Is the Community free to choose *any* form where the Treaty does not specify the type of act and, secondly, how does this affect an enterprise's right of appeal? The choice of the form of an act was discussed earlier in the chapter on "The New Institutions." With respect to the enterprise's right to appeal against such "unclassified acts," it will be recalled that the right is given in general terms with regard to "acts other than recommendations or opinions." The use of such a broad term without a defined meaning should be a sufficient basis to allow appeals against those acts of the Council or the Commission which do not fit the above categories but require judicial control because of their legal impact on the enterprise.

5. THE SUIT FOR INACTION

Since the Treaty *requires* the Community to exercise certain powers, a provision had to be included whereby the Council and the Commission may be compelled to act when they fail to exercise their powers. This type of suit is familiar to the common lawyer in the form of a mandamus proceeding whereby an official may be compelled to perform a statutory duty or to exercise a discretionary

⁷⁸ Everling, *BETRIEBS-BERATER supra* note 21, at 52, footnotes 18, 19. Art. 51 provides that the Council shall "adopt . . . measures" in the field of social security for migrant workers. The Council enacted two regulations on the basis of this article: Regulations Nos. 3 and 4, [1958] *Journal Officiel* 561, 597.

⁷⁹ Art. 228 and art. 238. Daig, *ARCH. D. Ö. R. supra* note 19, at 167, recognizes the possibility of an appeal against such acts of approval under art. 173 but doubts whether this was intended. It seems that appealability of such acts of approval merely depends on whether they can be assimilated to other binding Community acts and appealed on the same conditions.

power but not to exercise such power in any particular manner.⁸⁰ In the E.E.C. the legal means for compelling such action is the suit for inaction. Its scope is wider than that of a similar suit under the Coal-Steel Community Treaty.⁸¹

In order to institute such an action the enterprise must allege that the Community institution has failed *to address a decision to it* ("an act other than a recommendation or an opinion") and that the inaction is *in violation of the Treaty*. Thus after the Council has issued the regulations implementing the antitrust provisions as envisaged in the Treaty, an enterprise, relying on the regulations, would be able to sue if the Commission should fail to act on its application for exemption from the antitrust provisions.⁸² Two observations must be made in this context. First, the language of the Treaty is specific enough to exclude a suit by the enterprise for a failure of the institution to address a decision *to another* enterprise or to a Member State, or to issue a directive or a regulation. Such a suit is reserved to the Member States only. Secondly, of the four grounds enumerated above on which appeal can be taken against an administrative act, "violation of the Treaty" seems to be the only ground on which a suit for inaction may be instituted.

Yet there are cases where choice by the Commission of a recommendation (or opinion) rather than a decision would not of itself constitute a violation of the Treaty. In making this choice, the Commission may nevertheless be guided by improper motives. Thus, while an enterprise may not be able to sue for annulment of the opinion (since it is a non-binding act), it is arguable that it should be able to bring what would amount to a suit for inaction (for fail-

⁸⁰ GRIFFITH AND STREET, *op. cit. supra* note 57, at 233-236; *cf.* Wade, *The Courts and the Administrative Process*, 63 LAW Q. REV. 164 at 170 (1947); *Reg. v. Belfast Corp.*, 1954 N.I. Rep. 122 at 125-126. American cases are collected in GELLHORN AND BYSE, *op. cit. supra* note 65, at 379-424. Two recent New York cases are fairly representative of the American position. In *Berger v. Dumper*, 160 N.Y.S. 2d. 530 (1957), and in *Corrigan v. Jansen*, 173 N.Y.S. 2d. 894 (1958), the applications for mandamus were dismissed because the defendants had neither failed to act in violation of a duty imposed by law nor had made an "arbitrary, unreasonable or capricious" use of their discretionary power. *Corrigan* case at 897.

⁸¹ Art. 175. The E.C.S.C. Treaty regards the suit for inaction merely as a particular aspect of the suit for annulment. It is likened to an appeal for the annulment of an "implied negative decision." E.C.S.C. Treaty art. 35. Daig, *JURISTENZEITUNG supra* note 34, 204 at 206-207. The E.E.C. Treaty provides for two separate actions. As a result, the scope of the suit for inaction under that Treaty cannot be determined by analogies to the suit for annulment. Daig, *ARCH. D. Ö. R. supra* note 19, at 178. See also the appeal lodged recently by the *Chambre Syndicale de la Sidérurgie Française* in [1959] *Journal Officiel* 683.

⁸² It is assumed for the purpose of this illustration that in the regulations which the Council is required to issue under art. 87 the Commission will be charged with the task of passing upon such applications.

ure to issue a decision) by urging that the choice of the opinion constituted a *détournement de pouvoir*. Such a right could be justified on the ground that only incomplete legal protection would be afforded if the Community institutions could refuse to issue appealable acts for demonstrably improper motives with immunity from judicial control.⁸³

No remedy is available to an enterprise in the Community Court against a Member State which has failed to act in violation of its Treaty obligation. Only other Member States and the Commission are given the right to sue before the Community Court for a determination that a Member State has failed to fulfill its obligation under the Treaty; the enterprise concerned would therefore have to induce a government or the Commission to institute action on its behalf.⁸⁴ Nor, as shown above, can the enterprise bring suit for inaction in the Community Court against the Commission for failing to sue the Member State. To the extent that a remedy exists at all, it would have to be sought through national procedures.

6. RELIEF IN A SUIT FOR INACTION AND APPEAL FOR ANNULMENT

The purpose of the suit for inaction is to establish the duty of the institution to act. The Court therefore may determine the existence and timing of the duty to act but the contents of the required act must be left to the institution itself. Thus, in the example used earlier, the Court may find that the institutions must act on the application for authorization of a cartel agreement; the institution is left free, however, to grant or deny the application.

The same principle applies in appeals for annulment. The Court may only annul the contested Community act, but it may not substitute its own judgment as to the kind of act required; the institution concerned has the duty to substitute an appropriate act for the annulled one.

In practice, of course, the judgment of the Court in a suit for inaction or on appeal will frequently indicate at least by implication the elements of the act which the defendant institution will be required to issue "for the implementation of the judgment."⁸⁵

⁸³ See Daig, ARCH. D. Ö. R. *supra* note 19, at 179. The Court will have to rule on the scope of the suit for inaction in joint cases 24-58 and 34-58 now pending before it.

⁸⁴ Arts. 170 and 169. Judgments rendered against Member States are not enforceable. These types of suits are known as *Feststellungsklagen* in German law since they do not carry any sanction.

⁸⁵ Arts. 176 para. 1, 174, 175 para. 1.

Claims for damages against the Community arising from the act annulled by the Court are not affected by the judgment of annulment but may be pressed against the Community in a separate action.⁸⁶

7. THE SCOPE OF REVIEW BY THE COURT

The Coal-Steel Community Treaty provides that the Court may not review "the High Authority's evaluation of the situation, based on economic facts and circumstances," which led to the administrative act, unless *détournement de pouvoir* or clear misinterpretation of the Treaty law is alleged. Only in such circumstances was the Court authorized to examine, for instance, whether the decision of the High Authority to fix maximum coal prices was warranted economically.⁸⁷ An express limitation of this type was not included in the E.E.C. Treaty which is, indeed, wholly silent on the point.

The question thus arises whether the Court—for instance in reviewing a decision denying an application for exemption from the cartel provisions—is free to inquire whether the institution has evaluated correctly the economic circumstances and conditions, or whether it must accept the economic conclusions of the institution and is limited to a review of the legality of the decision. The lack of an express authorization such as was included in the Coal-Steel Treaty might be interpreted as barring the Court from any review of the economic conclusions; or, at the least, it might be taken to indicate that the power of the Court to review conclusions is limited. On the other hand, it appears fairly clear that the absence of an express provision should not be interpreted as depriving the Court of any and all power to review economic conclusions. The Court must be free—as it is under the Coal-Steel Community Treaty—to review such conclusions where the subjective motivation of the administrator is an issue determinative of the legality of this act, that is, when the administrative act is attacked by an allegation of *détournement de pouvoir*. At least in that case the Court must be able to inquire into the conclusions if it is to determine whether the administrator has applied his power to an improper end.⁸⁸ In those

⁸⁶ Arts. 176 para. 2 and 215.

⁸⁷ E.C.S.C. art. 33 par. 1. Case 6-54, Sammlung, Vol. I, 213, at 235-236. See Matthies, *Zur Nachprüfungsbefugnis des Gerichtshofs der Montanunion*, 16 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 427, at 443-450 (1955/56).

⁸⁸ See Daig, ARCH. D. Ö. R. *supra* note 19, at 175. *Contra* Bebr, *The Development of a Community Law by the Court of the European Coal and Steel Community*, 42 MINN. L. REV. 845, at 858, n. 80 (1958), who regards art. 172 as the only instance where the Court may be given an unlimited right of review. It has been suggested that the Court should be given "full jurisdiction" to review the facts in cases where an application for exemption from antitrust provisions was denied. Nebolsine, 8 AM. J. COMP. L. 433 *supra* note 23, at 461.

instances, of course, where the Court exercises "full jurisdiction," its right with respect to the review of facts and economic conclusions is in no way limited.

In this context, English and American parallels are of interest. In English courts, as in the Community Court, the scope of review extends merely to testing the legality of administrative acts. As a result, an administrative decision unsupported by any facts whatsoever may not be quashed on that ground; however, a total lack of facts may provide sufficient basis for quashing on other grounds such as "error of law on the face of the record," "bad faith," or "unreasonableness."⁸⁹ In the same situation the Community Court could annul an administrative act for violation of the Treaty or perhaps also for *détournement de pouvoir*.

The scope of judicial review in the United States is substantially wider than in England or in the Community.⁹⁰ On the basis of the Administrative Procedure Act the United States Supreme Court has held in several recent cases that while the findings of an administrative agency are entitled to respect, "they must nevertheless be set aside when the record before a Court of Appeals clearly precludes the. . . [agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."⁹¹ A review of this breadth could be undertaken by the Community Court apparently only upon a showing of *détournement de pouvoir*.

B. REDRESS IN NATIONAL COURTS

I. JURISDICTIONAL LIMITATION ON NATIONAL COURTS

An enterprise may not seek the annulment of a Community act in national courts. The Treaty vests exclusive jurisdiction in the Community Court to review the validity of and strike down the administrative acts of the Community institutions. It bars any assertion of similar jurisdiction by national courts. On the other hand, national courts are not deprived of their jurisdiction over cases

⁸⁹ GRIFFITH AND STREET, *op. cit. supra* note 57, at 224-225; *cf. R. v. Furnished Houses Rent Tribunal for Paddington and St. Marylebone, Ex parte Kendal Hotels, Ltd.*, (1947) 1 All E.R. 448, 450. *Cf. Re The London County Council Order 1938*, (1945) 2 All E.R. 484.

⁹⁰ SCHWARTZ, *op. cit. supra* note 60, at 109.

⁹¹ *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, at 490 (1951); this test was followed in *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, at 112 (1956), and in *F.T.C. v. Standard Oil Co.*, 355 U.S. 396, at 400-401 (1958) where it was said that the Court of Appeals is required to make a "fair assessment" of the record. Also Administrative Procedure Act, § 9(a) and (c), 5 U.S.C. § 1009 (1958). *Cf. Cooper, Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958).

which may involve the application of the Treaty or of a Community act. But under Article 177 the Community Court has exclusive jurisdiction to render a final and binding interpretation of the Treaty and the acts of the Community institutions.

Thus, if any question concerning the interpretation of the Treaty or of an act of the Community institution or of the validity of such act arises in national judicial proceedings, the national court may, "if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon." But when such question arises before a national court from whose judgment there is no further appeal, such court is bound to refer it to the Community Court which renders a binding decision on the point.⁹² Any move by an enterprise to attack a Community act collaterally in the course of a proceeding before a national court would therefore be ultimately determined under the Community law by the Community Court. This pivotal arrangement is designed to preserve the integrity of the Community system in relation to Member States. It is designed to assure the uniform interpretation of the Treaty and of the Community acts which is necessary for the development of a uniform "quasi-federal" law.⁹³ It recalls the American concept of federal jurisdiction over "federal questions" arising in state courts.

Two factors may limit the efficacy of this provision. Article 177 leaves to the national court the decision whether the law suit before it can or cannot be adjudicated without reference to the Treaty or to a Community act. The Article does not provide for a procedure akin to the American writ of *certiorari* whereby a party to the proceeding could seek a determination by the Community Court. Consequently, while paying lip-service to the principle of Article 177, a German court of last resort was able to determine that the Treaty's antitrust article did not apply to the case before it and that it was therefore not bound to refer the case to the Community Court.⁹⁴

⁹² Art. 177.

⁹³ Cf. Morelli, *La Cour de Justice des Communautés Européennes en tant que juge interne*, 19 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (MAKAROV-FESTGABE) 269, at 271 (1958).

⁹⁴ In its judgment of October 21, 1958, the Court of Appeals (*Oberlandesgericht*) Düsseldorf held that the issue of the Treaty interpretation was only incidental to the main question and would not influence the decision in any way. It therefore refused to submit the question to the Community Court. Docket No. 2 W 47/58, reported in 1958 EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT 493 (No. 24), and 13 BETRIEBS-BERATER 1110 (No. 31, Nov. 10, 1958); Steindorff, *ACHIV DES VÖLKERRECHTS*, *supra* note 67, at 50 n. 3. Cf. also the decision of the Court of Zutphen (Netherlands) reported and commented on (by Steindorff) in 13 BETRIEBS-BERATER 931-933 (No. 26, Sept. 20, 1958).

While a national court has undoubtedly the power to dispose of a case exclusively on what U.S. federal law would call "state law grounds,"⁹⁵ its freedom to decide the case without reference to the Community Court ends when it begins to interpret the Treaty law.⁹⁶ In the instant case, the German court interpreted the Treaty in order to hold it inapplicable and thus failed to give effect to the mandate of Article 177. It is arguable that a procedure of *certiorari* must be introduced in order to avoid such incorrect decisions. Although the parties do not possess the right to have the "Community law question" reviewed, the Commission could sue the Member State of the national court for violation of the Treaty thus helping the Court preserve its power over the uniform development of Community law.

Again, the Community Court passing upon the conformity of a national law with the Treaty very likely will consider itself bound by the interpretation of that law as laid down by the national courts concerned—another factor limiting the scope of review of the Community Court somewhat as compared with a right of review of a court of last resort in a unitary state.⁹⁷ It will be recalled that the United States Supreme Court, in passing upon the conformity of a state law with federal law or the federal Constitution, insists as a rule on affording the state court concerned an opportunity to interpret the state law.

2. SUIT FOR UNCONSTITUTIONALITY OF COMMUNITY ACTS OR OF NATIONAL ACTS ISSUED PURSUANT TO THE TREATY

The question to be considered here is whether an enterprise has, as an alternative to a suit for annulment in the Community Court, the choice of attacking the Community act in national courts on the ground that the act (or for that matter the Treaty itself) is contrary to the national constitution. A somewhat different, but analogous, problem is whether an enterprise may attack as unconstitutional

⁹⁵ Cf. *Fox Films Corp. v. Muller*, 296 U.S. 207 (1935); *National Association for the Advancement of Colored People v. Alabama, ex. rel. Patterson Att'y Gen.*, 357 U.S. 449 (1958); *Minnesota v. National Tea Co. et al.*, 309 U.S. 551 (1940).

⁹⁶ Article 177 speaks of questions of "interpretation of Treaty." Article 219 dealing with disputes settlement refers to disputes concerning "interpretations and application" of the Treaty. Could it be argued that where the Treaty rule is so clear as not to require any interpretation reference to the Community Court is not required when such rule is applied in a national proceeding? *But cf.* 177(b) which deals with "*The validity and interpretation*" (emphasis added).

⁹⁷ Daig, ARCH. D. Ö. R. *supra* note 19, at 155.

in national courts an act issued pursuant to the Treaty by a national authority.

The question is of little interest in France, where treaties have constitutional dignity and cannot be reviewed by the courts,⁹⁸ in the Netherlands and Luxembourg, where the question was resolved by constitutional amendments and where courts are also precluded from a review for unconstitutionality,⁹⁹ or in Belgium, where the Constitution is little more than an aggregate of "maxims of political morality" which impose no restrictions on parliamentary authority.¹⁰⁰ In Germany and Italy, however, constitutionality may be raised by an individual or an enterprise by means of a special judicial procedure.

An act issued by German authorities pursuant to the E.E.C. Treaty could be subject to an attack before the Federal Constitutional Court by reference from a German court on the ground that the German federal statute ratifying the Treaty is contrary to the Federal Constitution, but it is unlikely that such an attack would succeed.¹⁰¹ A successful recourse to the Constitutional Court is even

⁹⁸ Bebr, *The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis*, 58 COL. L.R. 767, at 778 (1958). FRANCE, CONSTITUTION OF 1958, art. 55. Title VII of the Constitution of 1958 provides for a Constitutional Council which may be asked to pass on the constitutionality of laws before their enactment. The same applies to statutes ratifying treaties. CONSTITUTION art. 54. The Council must pass on the constitutionality in cases of special measures taken during national emergencies (art. 16), certain decree laws (art. 37), and certain organic laws (art. 46). See also, Ambassade de France, Service de Presse et d'Information, French Affairs, No. 82, March 1959. In no case is a control *a posteriori* by the Constitutional Council envisioned. The existing system, noted in the main text, whereby questions of treaty interpretation and constitutionality are not passed upon by ordinary courts, but for reasons of "ordre public" are referred to the executive branch, does not seem to have been disturbed by the new Constitution.

⁹⁹ For the Netherlands and Luxembourg: Bebr, *id.*, at 776-777, n. 43-44, 49-54.

¹⁰⁰ Lievens, AM. J. COMP. L. *supra* note 49, at 572.

¹⁰¹ An act issued by German authorities pursuant to the E.E.C. Treaty could conceivably be attacked on the basis of Art. 100 Bonner Grundgesetz (Basic Law). This article provides: "If a court considers unconstitutional a law, the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Federal Constitutional Court if the matter concerns a violation of the Basic Law." (Translation of the Basic Law by the Legal Staff of the Allied High Commission, Bonn, 1955). According to this provision, only a court before which a proceeding is pending, may refer the question of constitutionality of a Statute (not of an administrative act or order) to the Federal Constitutional Court. But in a pending case it could be argued that the basis of the attacked act, a statute, is invalid. Referring to Articles 20, 24(1), 59(2) and 79(3) of the Grundgesetz an enterprise could claim that the statute ratifying the E.E.C. Treaty in effect amended the Grundgesetz (because of the far-reaching impact of the Treaty) and thus should have been (but was not) adopted by the larger majority required for constitutional amendments. In the alternative, the enterprise could argue that the changes in the structure of the Federal Republic brought about by the Treaty are absolutely precluded by Art. 20 of the Basic Law and could not be effected even by a constitutional amendment (*e.g.*, transfer of power to bodies which are not subject to adequate parliamentary control).

less likely if the attack on the ground of unconstitutionality is directed against a Community act.¹⁰² In the first place, decisions of the Constitutional Court indicate that acts emanating from "German public authority" only are within its jurisdiction¹⁰³ and Community acts are not likely to be considered as emanating from such a source.¹⁰⁴ In the second place, even if the Constitutional Court should take jurisdiction, the complainant would have to show that one of its basic rights (for instance freedom of expression, free choice of profession, property right) has not only been restricted but destroyed "in essence" by the Community act.¹⁰⁵ Thirdly, appeals based on unconstitutionality can be brought before the Constitutional Court only after all other remedies have been exhausted.¹⁰⁶ This would seem to require the complainant to seek annulment of the Community act in the Community Court *on Treaty grounds* (at least where a plausible argument may be made that any such ground exists) *before* he may contest the act for unconstitutionality in the German court. The Community Court will, of course, not consider any allegation of unconstitutionality based on German law.¹⁰⁷ If the Community Court refuses annulment and the plaintiff does finally appeal to the Constitutional Court, Article 177 of the Treaty, which requires the national court to refer to the Community Court any question concerning the validity of a Community act, might conceivably be held to come into play. Thus the Com-

¹⁰² The complaint would be in the form of a *Verfassungsbeschwerde*.

¹⁰³ 1 Entscheidungen des Bundesverfassungsgerichts 10 No. 7: ". . . Öffentliche Gewalt im Sinne des § 90 Abs. 1 Bundesverfassungsgerichtsgesetz ist nur deutsche öffentliche Gewalt. Besatzungsrecht und Massnahmen, die deutsche Behörden auf Anweisung der Besatzungsmächte treffen, unterliegen der Verfassungsbeschwerde ebensowenig wie Massnahmen ausländischer öffentlicher Gewalt." LECHNER, BUNDESVERFASSUNGSGERICHTSGESETZ 258 (1954); GEIGER, GESETZ ÜBER DAS BUNDESVERFASSUNGSGERICHT 277 (1952).

¹⁰⁴ The Federal Republic transferred its public functions (*Hoheitsfunktionen*) to the Community as a "supranational" organization. Mosler, *Die Wendung zum supranationalen Gedanken im Schumanplan*, 3 RECHT, STAAT, WIRTSCHAFT 245-259 at 256 (1951); Schlochauer, *Der übernationale Charakter der Europäischen Gemeinschaft für Kohle und Stahl*, 6 JURISTENZEITUNG 289-290 at 290 (1951).

¹⁰⁵ Art. 19(2) Bonner Grundgesetz (Basic Law).

¹⁰⁶ Bundesverfassungsgerichtsgesetz § 90.

¹⁰⁷ Case 1-58 as yet unpublished. It would seem that the Community Court, as a practical matter, would, under the circumstances of the case suggested in the main text, attempt a Treaty interpretation which would be compatible with the national constitution. However, in one case Court Advocate Römer argued that art. 19 of the German Constitution was not controlling for the Community Court. Case 18-57, Sammlung, Vol. III, 247 at 266. In this context the interesting question arises to what extent the Court's competence under art. 177, par. 1, (a) and (b), to "interpret" the Treaty and to pass on the "validity and interpretation of acts of the institutions," when such questions are referred to it by national courts, encompasses the authority to render a *restrictive* interpretation for the purpose of avoiding unconstitutionality under national law.

munity Court might have two chances to give the Community act an interpretation compatible with the national constitution before the case could be decided by the German court. At any rate, the likelihood of success of an appeal against a Community act to the Constitutional Court is minimal.

Requirements of a constitutional test in the new Italian Constitutional Court are less stringent. Review of any law or any act having the force of law—for instance, a statute ratifying an international agreement—may be sought in the Constitutional Court upon certification of the question from any court (*autorità giurisdizionale*).¹⁰⁸ While the constitutional question may not be raised in a *recours populaire* but only within an actual adversary proceeding,¹⁰⁹ there is no requirement that all other remedies be exhausted before the Constitutional Court may consider the question. The Community Court would consider the question if it is referred to it perhaps by the Italian Constitutional Court itself as the national court of last resort.¹¹⁰

III. REDRESS UNDER NATIONAL LAW FOR VIOLATION OF THE TREATY OR OF A COMMUNITY ACT BY GOVERNMENTS OR OTHER ENTERPRISES

A. REDRESS FOR VIOLATION BY NATIONAL GOVERNMENTS

If a Member State fails to enact a measure required by the Treaty or by a Community act or issues a measure contrary to the

¹⁰⁸ Law No. 87 of March 11, 1953, art. 23, [1953] I Raccolla Ufficiale delle Leggi e dei Decreti della Repubblica Italiana 298, 304. See generally, Cassandro, *The Constitutional Court of Italy*, 8 AM. J. COMP. LAW 1-14 (1959).

¹⁰⁹ Thomas, *Italien: Der neue Verfassungsgerichtshof*, 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 327, at 336, n. 52 (1956-1957); Farelli and Chan, *Italy's Constitutional Court: Procedural Aspects*, 6 AM. J. COMP. L. 314, at 318 (1957).

¹¹⁰ As indicated initially in this section, the French Constitution of 1958 accords to treaties a position superior to statutes. Any treaty as domestic law cannot be changed by subsequent legislation but enjoys a position similar to the Constitution itself. In turn, the E.E.C. Treaty (which enjoys such constitutional standing in France) provides for regulations to be issued by Community institutions. These regulations—because of the position of the Treaty upon which they are based—partake of the position of the Treaty, *i.e.* cannot be modified by French legislation. It has therefore been said that the French Constitution consists of the Constitution of 1958 and the E.E.C. Treaty. In contrast, acts of the Community institutions enjoy a position of superiority only over *previous* national legislation in those Member States where the Treaty's position is the same as that of an ordinary statute. Thus, regulations issued by the institutions in the proper exercise of their Treaty powers would supersede a previous national law. REUTER, COURS DE DROIT INTERNATIONAL PUBLIC 171 (1958-1959).

Treaty or a Community act, does an enterprise which suffers damage from such violation have a remedy in a national court or before an administrative agency against the government? For instance, if during the transitional period a French exporter to Germany can show that he had to pay higher customs duties to German authorities because the German Government had failed to reduce its tariff as required by the Treaty, does he have a remedy in Germany?

The Treaty became national law of the Member States by virtue of ratifying acts of their national parliaments. The existence of a national remedy depends in the first place on whether the relevant Treaty provision imposes an obligation which is completely and clearly enough defined to be directly enforceable; and, secondly, on whether or not the provision was designed to give rights to individuals and enterprises which are enforceable by an appeal to national remedies. This is a matter of Treaty interpretation.¹¹¹ Beyond that national law will determine the nature of the remedy. An analysis of this latter question would require a detailed inquiry into national laws not contemplated here.

An attempt may be made to classify the Treaty provisions, dividing them into those which were and those which were not intended to modify national law directly upon ratification. The former require no implementing action subsequent to ratification whereas the latter do.¹¹²

Some provisions merely embody declarations of economic and social policy and are not intended to create independent legal obligations.¹¹³ Other provisions, imposing broad obligations on Member States¹¹⁴ or even obligations defined in fairly specific terms, require implementing action by the Member States, in the form of national legislative or administrative acts, or by the Community institutions; and these provisions cannot be interpreted as modifying national laws directly. The obligation to reduce internal tariffs by stages during the transitional period,¹¹⁵ falls into this category since it requires periodic implementing action by Member States. This is apparent not only from the language of the Treaty,¹¹⁶ but

¹¹¹ Cf. SPENGLER, *DIE WETTBEWERBSREGELN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT* 16 (1957).

¹¹² On ratification in national parliaments see E.C.S.C., *Assemblée Commune, INFORMATIONS MENSUELLES*, Numéro spécial, décembre 1957; Numéro spécial, janvier 1958; for ratification legislation see Chapter I, note 1, *supra*.

¹¹³ *E.g.*, art. 18 in which Member States "declare their willingness" to contribute to the development of international commerce. Similarly: arts. 50, 117 and 120.

¹¹⁴ Cf. arts. 5, 220.

¹¹⁵ Art. 14.

¹¹⁶ Arts. 14 and 11.

also from the entire scheme which was designed to establish the Common Market by progressive steps to be taken by the Members and from the flexibility of action left to Members. Consequently if a French exporter to Germany is forced to pay higher customs duties because the German government failed to reduce its tariff in accordance with its Treaty obligation, the French exporter would have no legal remedy in Germany against the German government. A similar conclusion would apply to other Treaty obligations imposed on Members with a view to the progressive abolition of restrictions within the Community.¹¹⁷

Some Treaty provisions may be construed as becoming directly applicable at the end of the transitional period. Thus, to change the above example, if the German Government continues to collect customs upon imports from France *after* the expiration of the transitional period without an authorization from the Community institutions, the French exporter may be in a position to appeal through German administrative procedure for annulment of the national administrative act imposing the customs charges on the theory that the Treaty prohibition of internal tariffs became absolute and directly applicable at the end of the transitional period.¹¹⁸

Again, certain Treaty articles prohibiting the imposition by a Member State of new restrictions which did not exist when the Treaty came into force, may be interpreted as directly applicable from the effective date of the Treaty. Thus it might be argued that a French exporter to Germany has a right of appeal before German authorities if the German government, contrary to the prohibition of Article 12, has introduced and sought to collect from him "new customs duties" which did not exist at the time the Treaty came into effect.¹¹⁹ In this case the result would be different (and a national remedy would not lie) in those Member States where any treaty (including the E.E.C. Treaty) is considered of no more effect than an ordinary statute so that a subsequent national law contrary to the Treaty would supersede the Treaty provision as domestic law.¹²⁰

¹¹⁷ *E.g.*, arts. 33, 48, 49, 52, 54, 59, 63, etc.

¹¹⁸ Arts. 8(7), 13(1). Perhaps a clearer example of a "self-executing" provision at the end of the transitional period is the provision relating to quotas. Art. 30: "Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States." *Cf.* also arts. 48 and 49.

¹¹⁹ Article 12 provides that "Member States, *shall refrain* from introducing, as between themselves, any new customs duties. . . ." For other "prohibitions" see *e.g.*, arts. 31, 53, 62, 76, 106(3). On the German constitutional law question see *v. MANGOLDT-KLEIN, DAS BONNER GRUNDGESETZ*, I, 676 (2nd ed., 1957) and references therein.

¹²⁰ In this case, the Member State would have violated its international obligation, but the enterprise would have no remedy under national law.

Whether or not there may be a remedy in national law, in practice a violation of a Treaty prohibition against new restrictions may be taken up by the Commission with the delinquent Member State and, if necessary, brought before the Community Court by the Commission or any other Member.

One provision—Article 221—seems designed to become directly applicable three years after the effective date of the Treaty unless the Member States issue implementing measures earlier. The Article provides for national treatment of nationals of Member States as regards financial participation in the capital of companies. Again, where the Treaty contains new conflict of laws rules, such rules appear directly and immediately applicable.^{120a}

Certain other provisions impose obligations upon Member States which not only are fairly clearly defined and capable of direct application, but appear designed to benefit a class or group of individuals.¹²¹ Thus, under Article 119 “[e]ach Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle” of equal pay for women workers with men. Where a Member State fails to enact the necessary legislation, could a woman worker, who as a result suffers discrimination, claim a remedy, after the expiration of the first stage, which would bring about the application of the Treaty provision with respect to her? In order to establish such right she would have to show that the obligation involved was imposed upon the Member State for the benefit of persons or a class of persons to which she belongs and with a view to conferring rights directly on them. A rule of international law recognized by German¹²² and French courts¹²³ holds that the conferral of rights on individuals must be clearly expressed in international agreements to overcome a presumption to the contrary. Unless the intention to benefit individuals is clear from the Treaty, the obligation of a Member State runs only to other Member States but does not give individuals an enforceable right. The language of Article 119 and the fact that it appears ancillary to the general provisions dealing with social matters would indicate that the woman would not be entitled to a remedy against her government.¹²⁴

^{120a} *E.g.*, art. 215.

¹²¹ Arts. 76, 106 (1), 119.

¹²² 117 Entscheidungen des Reichsgerichts in Zivilsachen 280; 143 *id.* 57.

¹²³ Dame Kirkwood, Conseil d'Etat, May 30, 1952 [1952] Recueil des Arrêts du Conseil 291.

¹²⁴ By like token, it may be said that art. 76 is ancillary to art. 75 and art. 106 to arts. 63-65. Cf. Katzenstein, *Der Arbeitnehmer in der europäischen Wirtschaftsgemeinschaft*, 13 BETRIEBS-BERATER 1081 (No. 21, Nov. 10, 1951).

Article 7 of the Treaty deserves particular attention in this context. It provides that "[w]ithin the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality is prohibited.¹²⁵ The Council *may* . . . lay down rules in regard to the prohibition of any such discrimination." It could be argued that this provision was intended by the parties to the Treaty to modify national laws directly and bind individuals and enterprises in the Community as well as the Member States with an immediate effect in those fields where the Treaty does not contain special provisions for a *gradual* removal of discrimination based on nationality; the fact that the Council may (but is not required) to issue implementing rules does not impair this conclusion.¹²⁶ On the other hand, others contend that this Article included in the part on "Principles" contains only a policy declaration or at most an obligation imposed exclusively upon Member States, to be implemented by subsequent measures. Those supporting this position point to the limiting language in Article 7 quoted above and to the Council's authority to issue implementing rules.¹²⁷ It would seem that at least some immediate and direct effect of this Article was intended by the Member States in those areas within the scope of the Treaty where neither the Treaty itself nor Council rules provide otherwise.¹²⁸

The extent to which the antitrust provisions ("Rules applying to enterprises" in the Chapter on "Rules governing competition") may be considered as affording a national remedy is explored elsewhere in this book.¹²⁹

¹²⁵ The English translation reads: ". . . shall hereby be prohibited." The German and French originals read: ". . . ist . . . verboten"; ". . . est interdite . . ." If read literally, Article 7 would prohibit discrimination against nationals of third states as well as of Member States. (Text published in Brussels; see note 199 *infra*.)

¹²⁶ Everling, *Die Regelung der selbständigen beruflichen Tätigkeit im Gemeinsamen Markt*, 13 BETRIEBS-BERATER 817 (No. 23, Aug. 20, 1958); von Boeckh in HANDBUCH DER EUROPÄISCHEN WIRTSCHAFT, KOMMENTAR, Art. 7 Anm. 5, 1A41, 21 (1958). Note also art. 90(1) of the Treaty prohibiting certain measures which are "contrary to the . . . rules provided for in article 7. . ."

¹²⁷ SPENGLER, DIE WETTBEWERBSREGELN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT 33; Steindorff, *Das Verbot von Wettbewerbsbeschränkungen in der Anfangszeit der Europäischen Wirtschaftsgemeinschaft*, 13 BETRIEBS-BERATER 89, at 92 (No. 3, Jan. 30, 1958).

¹²⁸ But see Kahn-Freund, "Labor Law and Social Security," Chapter VI *supra*.

¹²⁹ Riesenfeld, "Protection of Competition," Chapter X, *infra*. The provisions in question are arts. 85-90. See also the decision of the Court of Düsseldorf, *supra*, note 94; the decision of the Court of Zutphen (Netherlands) reported and commented on (by Steindorff) in 13 BETRIEBS-BERATER 931-933 (No. 26, Sept. 20, 1958); Koch, *Das Verhältnis der Kartellvorschriften des EWG-Vertrages zum Gesetz gegen Wettbewerbsbeschränkungen*, 14(1) BETRIEBS-BERATER 241-248 (No. 7, March 10, 1959), particularly n. 3.

Thus one may conclude that only the few Treaty provisions, some of which were mentioned above, which are capable of direct application and confer rights upon individuals, enable an enterprise to contest through national remedies a national administrative act based on a previous—and probably, as in France,¹³⁰ on a subsequent—national law contrary to these provisions. Such an appeal can probably also be brought if national authorities issue administrative acts which are at variance not with the Treaty itself but with administrative acts of the Community institutions provided that the Community acts are directly applicable in the Member States (as in the case of regulations) and are intended to benefit the appellant enterprise.

Professor Reuter suggests another national remedy which may be open to an enterprise if, for instance, the government of Belgium, in violation of the Treaty, enacts a measure favoring Belgian enterprises and discriminating against French enterprises on the ground of nationality. In this situation a French enterprise might be able to institute an action for unfair competition against a Belgian enterprise before a French court with a view to obtaining compensation for the damages caused by the defendant's activity based on the illegal Belgian measure. The plaintiff could obtain execution of the judgment on defendant's property in France.

It should be observed that where the remedies considered here involve an interpretation of the Treaty or a Community administrative act, the national court of last resort will have to refer this issue to the Community Court.

B. REDRESS FOR VIOLATION BY AN INDIVIDUAL OR ENTERPRISE

If an enterprise acts in violation of the Treaty or of a Community act to the prejudice of another, does the injured party have a national remedy?¹³¹ Obviously, the question would arise only under those provisions of the Treaty or under those Community acts which are held to be capable of direct application and to confer rights and impose obligations directly upon individuals and enterprises. The first phase of this inquiry would thus parallel that pursued in the preceding section. The second phase would require an analysis of national laws of the Member States with a view to determining whether a remedy would be available to the injured party in a na-

¹³⁰ CONSTITUTION OF 1958, art. 55.

¹³¹ The possibility of a remedy before the Community Court was explored above in connection with a suit for inaction. (Part II, Section A Subsection 5 above).

tional court or administrative agency. Such remedy could, for instance, take the form of an action for restitution where a contract contrary to a Treaty provision is held void or of an action in damages caused by a Treaty violation. Actions of this type based on the Coal-Steel Treaty and German law have already led to decisions in German courts. Because the cases concern rules of competition they are more appropriately discussed in the chapter on Protection of Competition in the European Economic Community.¹³² The conclusion reached there is that a violation of at least one Coal-Steel Treaty provision—the prohibition of restrictive agreements—may constitute tortious conduct involving liability for damages under German law. A similar conclusion with respect to the corresponding provision of the E.E.C. Treaty is suggested in a very tentative manner only.

IV. LEGAL REMEDIES IN CONTRACT AND TORT CASES TO WHICH THE COMMUNITY IS A PARTY

A. SUITS IN THE COMMUNITY COURT

In addition to its exclusive jurisdiction to annul administrative acts, the Community Court also has exclusive jurisdiction in tort actions (actions for “non-contractual liability”) brought against the Community.¹³³ The rules for these actions are much less detailed than those governing the complaints for annulment. Thus an enterprise may sue the Community in the Community Court if it suffers damages from an act of a Community employee in the performance of his duty (negligent driving of a Community truck, disclosure of a trade secret by an official, etc.) as well as from an act of a Community institution. The latter category includes damages arising from administrative acts which are annulled by the Community Court and damages arising from the Community’s unlawful inaction. The Treaty specifically provides that a judgment of annulment or a judgment finding that the Community failed to act in violation of the Treaty shall not prejudice any claims for damages.¹³⁴ A suit for

¹³² Riesenfeld, Chapter X *infra*.

¹³³ Arts. 178 and 183, Daig, ARCH. D. Ö. R. *supra* note 19, at 159.

¹³⁴ E.E.C. Treaty art. 176 para. 2, art. 215 para. 2; Protocol on the Statute of the Court of Justice of the E.E.C. art. 43. The Treaty, in its broad statement of the Community’s tort liability in art. 215 differs from the provisions of arts. 34 and 40 of the E.C.S.C. Treaty. For the E.C.S.C. tort liability see Kautzor-Schroeder, *Public Tort Liability under the Treaty Constituting the European Coal and Steel Community Compared with the Federal Tort Claims Act*, 4 VILLANOVA L. REV. 198, at 235, (1958/59). See also MUCH, DIE AMTSHAFTUNG IM RECHT DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL (Frankfurt/Main, 1952).

annulment is not a prerequisite to a suit for damages. Whether or not the Community is liable will be determined on the basis of "the general principles common to the laws of Member States."¹³⁵

Similarly, the Community Court has jurisdiction in cases involving contracts concluded under public or private law by the Community or on its behalf, but only if that Court's jurisdiction is stipulated by the parties in an "arbitration clause"¹³⁶ contained in the contract. The Community institution entering into a contract with an enterprise has the opportunity to insist on a stipulation of Community Court jurisdiction if the institution believes that the national court which would otherwise be competent might favor its own nationals.¹³⁷ Other motivations might be considerations of convenience and the desire to develop uniform jurisprudence in the field of contracts involving the Community. One author, subject to dark forebodings, foresees that the Community might insist on such a stipulation in order to complete its control over all transactions in which its institutions are involved, with the consequent overcrowding of the Community Court's docket.¹³⁸ The identical provision in the Euratom Treaty may have a greater impact because of the more extensive operational responsibilities of Euratom, envisaging the conclusion of contracts of purchase and sale particularly by its Supply Agency.

The Coal-Steel Treaty contains a similar provision allowing stipulation of the Community Court jurisdiction, and the Court adjudicated several cases arising from employment contracts between the Community institutions and their employees on the basis of such stipulation.¹³⁹ It is interesting to note that the bonds and notes issued by the High Authority in the United States are governed by a stipulation extending the jurisdiction of the Community Court to disputes between the holders of these obligations and the High Authority; the High Authority, however, has also waived any claim of immu-

¹³⁵ Art. 215.

¹³⁶ "Schiedsklausel," "clause compromissoire," "clausola compromissoria," "arbitragebeding." Art. 181.

¹³⁷ LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, PAR UN GROUPE D'ETUDE DE L'INSTITUT DES RELATIONS INTERNATIONALES, 223 (Bruxelles, 1953).

¹³⁸ Croquez, *Aspects Juridiques du Marché Commun*, 1 LE DROIT EUROPÉEN 65, at 71 (No. 2, 1958).

¹³⁹ Case 1-55, Samlung, Vol. II, 9; case 10-55, *id.* 379; case 1-56, *id.* 441. The stipulation was contained in the employment contract or in the Règlement du personnel to which the contract referred. E.C.S.C. Treaty art. 42. DELVAUX, LA COUR DE JUSTICE DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 36 (1956); Antoine, *La Cour de Justice de la C.E.C.A. et la Cour Internationale de Justice*, 57 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 210, at 251 (1953). Cf. E.E.C. Treaty art. 179.

nity to suit in a state or federal court.¹⁴⁰ The practice of the High Authority, in this respect, has varied in its various financial operations.

As confirmed by the cases under the Coal-Steel Treaty the proceeding before the Community Court arising under a contractual stipulation of jurisdiction does not differ from that instituted under the jurisdictional provisions of the Treaty. In this respect the Treaty terminology describing the stipulation as an "arbitration clause" is misleading.

B. SUITS IN COURTS OF MEMBER STATES

From the foregoing it is clear that the Treaty limits the jurisdiction of national courts in the Member States in cases to which the Community is a party. National courts have no jurisdiction over the Community in tort; they do, however, have jurisdiction in contract unless the contract stipulates the jurisdiction of the Community Court. Even where the national courts have jurisdiction over the Community for purposes of the suit,¹⁴¹ they have no jurisdiction over Community assets for purposes of execution. In this respect the Community enjoys immunity.¹⁴² A judgment of a national court must be submitted to the Community Court which has exclusive authority to allow execution against the Community.

In the obvious interest of enhancing its credit standing, the European Investment Bank of the Community has been made subject to action in national courts as any legal person, and its assets have been made liable to execution by order of such courts.¹⁴³ As a general practice, when a Bank extends a loan for the financing of a project within the European territory of a Member State, the loan contract stipulates that the courts of that Member State shall have exclusive jurisdiction over suits arising out of the contract and that the contract shall be governed by the law of that Member State. This practice is not necessarily followed in the guarantee or security agreements supporting the loan contract. The Bank has not, as yet,

¹⁴⁰ Art. 3 sec. 3 and 5, High Authority of the European Coal and Steel Community and the Bank for International Settlements, Tenth Supplemental Indenture to the Act of Pledge dated November 28, 1954, 5% Secured Bonds (Eleventh Series), Due July 1, 1978. SALMON, *LE RÔLE DES ORGANISATIONS INTERNATIONALES EN MATIÈRE DE PRÊTS ET D'EMPRUNTS-PROBLÈMES JURIDIQUES* 303 (1958). Cf. Delaume, *Jurisdiction of Courts and International Loans*, 6 AM. J. COMP. L. 189, at 208-209 (1957). Blondeel and Van der Eycken, *Les Emprunts de la G.E.C.A., 1955 LA REVUE DE LA BANQUE (Belgium)* 250-287.

¹⁴¹ Cf. art. 183.

¹⁴² Protocol on Privileges and Immunities of the European Economic Community art. 1.

¹⁴³ Protocol on the Statute of the European Investment Bank art. 29.

developed a practice with respect to loan contracts concerning projects located outside the European territory of Member States.

C. SUITS IN COURTS OF NON-MEMBER STATES

I. SUITS AGAINST THE COMMUNITY IN AMERICAN COURTS

An American enterprise which suffered damages at the hand of the Community might prefer to sue the Community in tort in an American court since courts of Member States have no jurisdiction and an action before the Community Court may be inconvenient. It would be necessary, of course, for the American court to acquire jurisdiction by attachment of Community assets or otherwise. Again, an enterprise may wish to bring a contract claim before an American court in the hope that a judgment could perhaps be satisfied out of the Community's American assets. Obviously the jurisdictional provisions of the Treaty by themselves would not be a bar to such suits because the United States is not bound by the E.E.C. Treaty.¹⁴⁴

A number of questions would arise in connection with a suit in an American court. The limited scope of this survey allows mere listing of some of these questions without any attempt at an examination:

1) Will the plaintiff enterprise be able to sue the Community in a state court only or will the federal courts be also available? While federal jurisdiction may be desirable as a matter of policy it is questionable whether it could be sustained under the Federal Constitution or present law.¹⁴⁵

2) If the contract between the enterprise and the Community stipulates jurisdiction of the Community Court, will an American court nevertheless accept jurisdiction? If the court should consider the stipulation as an arbitration agreement within the scope of an arbitration statute applicable in the jurisdiction it might grant a stay of the proceeding if such remedy is available under that statute.¹⁴⁶ However, because of the nature of the Community Court as a judicial body, because of the direct enforceability of its judgments

¹⁴⁴ See generally Wengler, *Die völkerrechtliche Stellung der Montanunion gegenüber dritten Staaten und Staatenverbänden*, 3 ACTES OFFICIELS DU CONGRÈS INTERNATIONAL D'ETUDES SUR LA C.E.C.A. 9 (1957).

¹⁴⁵ For a discussion see Note, *The Status of International Organizations under the Law of the United States*, 71 HARV. L. REV. 1300, at 1301-1306 (1957-1958). Cf. *Intl. Refugee Organization v. Republic S.S. Corp.*, 189 F. 2d 858 (4th Cir. 1951).

¹⁴⁶ Domke lists fifteen State Arbitration Statutes in addition to the Federal Arbitration Act. UNION INTERNATIONALE DES AVOCATS, ARBITRAGE INTERNATIONAL COMMERCIAL 197 (Dalloz, Sirey 1956). KELLOR, ARBITRATION IN ACTION, Annexes I-II, at 217-358 (1941).

within the Community, and despite the misleading Treaty terminology, the American court is more likely to view the stipulation not as an "arbitration clause" but as an agreement specifying jurisdiction of a "foreign court." In that event a modern American court might decide whether or not to take jurisdiction not on the basis of the so-called rule against "ouster" of jurisdiction but rather in the exercise of its discretion under the doctrine of *forum non conveniens*, perhaps taking also into account the equality of the bargaining positions of the parties.¹⁴⁷

3) Will the Community be able to maintain successfully a claim of immunity against suit in an American court? It is possible, if not likely, that the legal status of the Community in the United States will be determined by special Congressional legislation which would simultaneously authorize accreditation of a Community diplomatic mission in Washington. In the absence of such legislation the following observations may be pertinent.

Traditionally, American courts grant immunity from suit to states under a rule of international law originally founded on the concept of the equality and sovereignty of states.¹⁴⁸ The courts have been liberal in according this immunity, responding to and at times going beyond the wishes of the executive branch.¹⁴⁹

On the other hand, surveying the practice of the United States in 1946, a distinguished American commentator concluded that the United States has denied the existence of any obligation under customary international law to extend to public international organizations or their officials any immunities; a demand for a special status has been "uniformly resisted" on the ground that such status "is

¹⁴⁷ Application of Hamburg-American Line, 135 Misc. 715, 238 N.Y. Sup. 331, affirmed without opinion, 228 App. Div. 802, 239 N.Y. Sup. 914 (1930) holding that a clause stipulating exclusive jurisdiction of "Hamburg Courts" and German law as the applicable law is not an agreement to arbitrate within the meaning of the Arbitration Law. The Court observed that "[I]n any event, the clause cited in the contract herein is not sufficiently broad to be construed as an agreement to arbitrate." *Contra* an earlier opinion of a lower court in Kelvin Engineering Co. v. Blanco, 125 Misc. 728, 210 N.Y. Sup. 10 (1925). On agreements attempting to give exclusive jurisdiction to foreign courts see I EHRENZWEIG, CONFLICT OF LAWS 145-150 (1959); Case-Notes, 23 So. CAL. L. REV. 595 (1950); Sudburg v. Ambi Verwaltung K.A.A., 213 App. Div. 98, 210 N.Y. Sup. 164 (1925) and other cases in 56 A.L.R. 2d 300 (1957). But see Wm. H. Muller and Co. v. Swedish American Line, 224 F. 2d 806 (2d Cir. 1955) cert. den. 350 U.S. 903, 76 Sup. Ct. 182 (1955) and Learned Hand in Krenger v. Pennsylvania R. Co., 174 F. 2d 556, at 561 (2d Cir. 1949).

¹⁴⁸ Harvard Research in International Law, *Competence of Courts in Regard to Foreign States*, P. C. Jessup, Reporter, 26 AM. J. INT'L. L. SUPPL. 451-738 (1932). For a recent expression of this thought see Loomis v. Rogers, 254 F. 2d 941 (D.C. Cir. 1958).

¹⁴⁹ Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru: The Ucayali, 318 U.S. 578 (1943).

as yet dependent upon treaty or upon the municipal law and practice of the state concerned, and . . . there is, therefore, no justification under the law of the United States for conceding any privileged position to international organizations . . . in this country."¹⁵⁰ Since 1946 the United States has become a party to a number of treaties creating international organizations which grant to these organizations in the territories of the member states privileges and immunities necessary for the fulfillment of their purposes.¹⁵¹ Such grant is based not on the extension of the concept of sovereign immunity but rather on the recognition that independence from local authority is necessary for the organizations to fulfill their international functions.¹⁵² The International Organizations Immunities Act enacted in 1945 accords immunity in American courts to public international organizations in which the United States participates pursuant to a treaty or under authority of an act of Congress and which have been designated by the President through an executive order. The immunity includes "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments" except insofar as immunity may be waived.¹⁵³

It has been vigorously argued that whatever the state of international law may have been in the past a new rule of customary international law has been established by consistent national practice in recent years which requires non-member states to grant immunity to any international organization which they have "recognized."¹⁵⁴

¹⁵⁰ Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT'L L. 332, at 333 (1946); 4 Hackworth, *Digest of International Law* 419-423 (1942). Cf. Note, *The Status of International Organizations under the Law of the United States*, 71 HARV. L. REV. 1300, at 1309-1312 (1958). In one case before a lower court arising prior to the Immunities Act judicial immunity was granted to an international organization of which the United States was a member without a treaty provision requiring immunity. In that case a writ of attachment, directed to the Pan American Union as garnishee and based on judgment against an employee of the Union, was struck down in the attachment proceeding before the Municipal Court of the District of Columbia, the Court having sustained the plea to the court's jurisdiction. Penfield, *The Legal Status of the Pan American Union*, 20 AM. J. INT'L L. 257 (1926).

¹⁵¹ E.g., Charter of the U.N. art. 105.

¹⁵² Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, at 847 (1947).

¹⁵³ International Organizations Immunities Act Sec. 2(b), 59(1) Stat. 669 (1945), 22 U.S.C. Sec. 288a(b) (1958).

¹⁵⁴ Lalive, *L'Immunité de juridiction des états et des organisations internationales*, 84 RECUEIL DES COURS 293, 304, (1953, Vol. III); on U.S. practice *id.* 319-324; on Coal-Steel Community *id.* 376-383; for a more recent survey of American and foreign practice see Dinh, *Les privilèges et immunités des organismes internationaux d'après les jurisprudences nationales depuis 1945*, 1957 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 262.

The Community could not assert immunity from judicial process in American courts on the basis of any treaty or under the Immunities Act.^{154a} Whether or not it could prevail on the basis of customary international law is a question.¹⁵⁵ However, it is likely that the courts would follow a request for immunity from the Department of State. Whether or not the Department would make such a request is another question. The United States has "recognized" the Communities in the sense that it has had considerable dealings with them as entities endowed with international legal personality. The United States has concluded agreements with the Coal-Steel Community¹⁵⁶ and Euratom¹⁵⁷ and maintains official relations with all three Communities through a special diplomatic mission in Brussels.¹⁵⁸ The United States is expected to negotiate agreements on tariff concessions with the Community rather than with the individual Member States within the framework of the General Agreement on Tariffs and Trade (G.A.T.T.)¹⁵⁹ It could also be argued that immunity ought to be granted because the Community may be more nearly likened to a "state" than any other international organization. In the absence of new legislation the Department may nevertheless be reluctant to do more than to point generally to the United States relations with the Communities but refrain from a specific

^{154a} It could hardly be argued that the U.S. "participates" in the Community within the meaning of the Immunities Act.

¹⁵⁵ In one case where immunity was claimed by the International Refugee Organization before an American court in the U.S. Zone of Occupied Germany, the Court denied the existence of any obligation to accord on *German territory* immunity on the basis of a treaty or the Immunities Act but nevertheless granted immunity on the basis of a policy statement by the United States High Commissioner, "the highest executive authority" in the U.S. Zone, which the Court held it could not question. Apparently as a make-weight argument the Court added: ". . . because of the fact that I.R.O. is an agency of many foreign governments, it would seem all the more reasonable that the High Commissioner should not permit an action in our courts that would directly affect other sovereign powers." The opinion certainly does not indicate that the Court recognized any obligation to grant immunity under customary international law. *Anton Schaffner v. International Refugee Organization*, Civil Case No. 11, Opinion 665, U.S. Ct. App., Allied High Commission for Germany, Aug. 3, 1951, in 46 AM. J. INT'L. 575 (1952). Had the case arisen in the United States I.R.O. could have claimed immunity under the Immunities Act and Executive Order 9887, 3 C.F.R., 1943-1948 Compilation.

¹⁵⁶ Loan Agreement signed at Washington April 23, 1954, entered into force April 23, 1954, T.I.A.S. 2945; Agreement Supplementing and Amending the Loan Agreement of April 23, 1954, signed at Luxembourg Dec. 8 and at Washington Dec. 16, 1954, entered into force Dec. 16, 1954, T.I.A.S. 3126.

¹⁵⁷ Agreement Relating to Cooperation for Peaceful Application of Atomic Energy signed at Brussels May 29 and at Washington June 18, 1958, entered into force Aug. 27, 1958, T.I.A.S. No. 4091 [1959]; [1959] Journal Officiel 312.

¹⁵⁸ EURATOM COMMISSION, FIRST GENERAL REPORT 78-81 (1958), E.E.C. COMMISSION, FIRST GENERAL REPORT 126 (1958), E.C.S.C., SEVENTH GENERAL REPORT 38 (1959).

¹⁵⁹ Cf. E.E.C. art. 111(2), 113(3).

request for immunity, leaving it to the courts to decide the immunity issue on the basis of common law. One factor which may be considered relevant is the provision in the E.E.C. Treaty to the effect that subject to the powers conferred upon the Community Court by the Treaty "cases to which the Community is a party shall not for that reason alone be excluded from the competence of domestic courts or tribunals."¹⁶⁰ One could argue that since the Community in principle is subject to suit in contract before domestic courts, it should not enjoy immunity in American courts.¹⁶¹ On the other hand, the availability of a remedy against the Community either in the Community Court or in a national court within the Community would reduce the importance of the American forum for the plaintiff suing the Community and thus the need for denying immunity.

It has been suggested that the uncertainty as to the immunity of the Coal-Steel Community in American courts was one of the reasons for stipulating the jurisdiction of the Community Court in disputes arising from obligations issued by the High Authority in the United States.¹⁶²

Even if immunity is granted in principle to the Community, the question arises whether it may nevertheless be disallowed in a given case—and the suit permitted—on the ground that in the matter before the Court the Community has acted in a "proprietary" function (for instance, when it entered into a contract to buy securities for purposes of investing funds for which it is responsible) rather than in a "governmental" function. This distinction, which applies to activities of states under the more recent commercial treaties concluded by the United States and which is advocated by the United States Department of State, regrettably has not been established by judicial decision as a rule of American law as yet.¹⁶³

The Community has been endowed with sufficient "domestic" legal personality in the Member States and we may assume that the court would recognize the Community's capacity to sue.¹⁶⁴

¹⁶⁰ E.E.C. Treaty art. 183.

¹⁶¹ Judge Mack in the *Pesaro* case, 277 Fed. 473 (S.D.N.Y. 1921); *National City Bank v. Republic of China*, 348 U.S. 356, at 363 (1955).

¹⁶² Delaume, 6 AM. J. COMP. L., *supra* note 140, at 208-209.

¹⁶³ Treaty of Commerce, Friendship and Navigation between the United States and Japan of Oct. 30, 1953, art. XVIII (2). T.I.A.S. No. 2863. The distinction between governmental and proprietary functions was adopted in a 1952 Department of State policy declaration, the "Tate Letter," 26 DEP'T. STATE BULL. 984 (1952). See *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *Ex parte Peru*, *The Ucayali*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, *The Baja California*, 324 U.S. 30 (1945).

¹⁶⁴ Art 211. Jenks, *The Legal Personality of International Organizations*, 22 BRIT. YB. INT'L L. 267, 273-79 (1945); Preuss, *supra* note 150, at 333.

2. ENFORCEMENT OF JUDGMENTS AGAINST THE COMMUNITY

If an American enterprise obtains a judgment against the Community, how can it be enforced? As pointed out above, under the Treaty the courts of the Member States may not levy execution against the Community assets without an authorization from the Community Court regardless of whether the judgment was rendered by a domestic or foreign court or by the Community Court itself. Thus if enforcement of the judgment is sought within the Community an application for authorization will have to be made to the Community Court.

In considering the application the Court will have to decide whether the foreign judgment should be given effect (i.e., whether it should be accorded *exequatur*).¹⁰⁵ Since the law governing the recognition of foreign judgments varies in the Member States, the Court may seek to develop its own rules based on principles common to the national laws. Unless the Court adopts the French rule authorizing in fact a complete review of the foreign judgment, it may limit itself to considering whether the recognition of the foreign judgment would be contrary to public policy of the Community, whether the foreign court had jurisdiction, and possibly whether reciprocity exists in the recognition of foreign judgments.¹⁰⁶ It could, however, be argued that the *exequatur* proceeding must take place in the competent national court which ultimately will direct the execution upon the Community assets and that the Community Court has no other function than to decide whether immunity against execution will be waived. Under the first of the two possible interpretations suggested above an "authorization" by the Community Court would have the force of its judgment. The competent national court in the Community would be required to perform the execution against Community assets on a showing of nothing more than the authenticity of the "authorization" paper.

If enforcement of a judgment against the Community is sought in a non-Member State such as the United States with respect to the Community's assets located there, the outcome will depend in the first place upon the question, discussed above, whether the Community is given immunity from judicial process. It may be of interest to note, however, that American courts deny execution against assets belonging to a foreign *state* even where they disallow the immunity

¹⁰⁵ REUTER, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 80 (1953).

¹⁰⁶ NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 236-238 (1943).

of such state from suit.¹⁶⁷ International organizations to which the Immunities Act is applied would presumably enjoy similar immunity.

3. ENFORCEMENT OF JUDGMENTS OBTAINED BY THE COMMUNITY

If the Community obtains a judgment against an enterprise either in a national court of a Member State or in the Community Court, will such judgment be enforceable outside the Community and specifically in the United States? If the judgment was rendered by a court in a Member State, the American court would apply its rules concerning suits on foreign judgments.¹⁶⁸ If the judgment was rendered by the Community Court, the American court will consider it more likely a "foreign judgment" than an arbitral award. If the Community Court's judgment was rendered in a suit on a contract in which that Court's jurisdiction was stipulated, it is difficult to conceive of reasons based on lack of jurisdiction or public policy justifying an American court's denying enforcement.¹⁶⁹

It is most improbable that an American court would allow enforcement of a Community Court judgment imposing, for instance, a penalty against an American enterprise for violation of an anti-trust provision of the Treaty. Such judgment would very likely be refused enforcement on the general principle refusing enforcement of foreign penalties.¹⁷⁰

V. THE COMMUNITY COURT: PROCEDURE AND SOURCES OF LAW

An enterprise seeking relief in the Community Court will be directly concerned with the procedures applicable in cases before the Court and the sources of law upon which it will draw.

A. PROCEDURE AND FINALITY

I. TIME LIMITATIONS

An enterprise must bring its appeal for annulment within two months from the time it was notified or had knowledge of the act

¹⁶⁷ *Dexter & Carpenter Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705, at 708 (2d Cir. 1930), *cert. den.* 282 U.S. 896 (1931).

¹⁶⁸ STUMBERG, *CONFLICT OF LAWS* 130-133 (2d. ed., 1951).

¹⁶⁹ If the Court follows the doctrine of reciprocity under *Hilton v. Guyot*, 159 U.S. 113 (1895), lack of reciprocity would be difficult to establish before the Community Court has had occasion to pass upon the conclusiveness of an American judgment.

¹⁷⁰ STUMBERG, *supra* note 168, at 118-119, 130.

it seeks to contest.¹⁷¹ Suits for inaction of an institution may be brought only after the institution has failed to act during a period of two months following a request for action; the suit must be brought within two months after the lapse of that period.¹⁷² A party with *résidence habituelle* outside of Europe is given an additional month. Actions in tort must be brought within five years from the "occurrence of the circumstance giving rise thereto,"¹⁷³ while the limitation on contract claims, where jurisdiction of the Court has been stipulated, presumably will be determined by the "law applying to the contract."¹⁷⁴ The bar resulting from the lapse of the time limitations may be overcome by proof of an "Act of God or force majeure."¹⁷⁵

2. PROCEDURE

The proceeding before the Court is divided into a written and an oral stage.¹⁷⁶ Like the French Conseil d'Etat, the Court is grouped into chambers to which the President of the Court assigns cases and which prepare the cases for public hearing and final disposition. This procedure differs from that of the International Court of Justice where chambers may be utilized with the consent of the parties only.¹⁷⁷ The Court may appoint a *rapporteur* from among the judges to guide the case through the preliminary investigation ("instruction") after the basic documents, such as the complaint, the answer, and replies, have been filed.¹⁷⁸ As is true in cases before the French Conseil d'Etat,¹⁷⁹ but not in those before the International Court of Justice,¹⁸⁰ the written proceeding and the preliminary investigation

¹⁷¹ Art. 173 para. 3.

¹⁷² Art. 175 paras. 2-3. These time limitations are increased by specified periods of time to allow for the distance of the parties from the Court. Règlement de procédure art. 81 § 2 (hereinafter cited as Rules of Procedure), [1959] Journal Officiel 350, at 368. (For certain modifications of the texts of the Rules in the four languages see [1960] Journal Officiel 13-16.) A decision of the Court provides for an additional two days if the parties reside in Belgium, six days for Germany, Metropolitan France and the Netherlands, ten days for Italy, fifteen days for other European countries, and one month for all other countries. [1959] Journal Officiel 378.

¹⁷³ Protocol on the Statute of the Court art. 43 (hereinafter cited as Protocol).

¹⁷⁴ Art. 215.

¹⁷⁵ Protocol art. 42.

¹⁷⁶ Protocol art. 18.

¹⁷⁷ Rules of Procedure arts. 24 and 46; for the French Conseil d'Etat see SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 131-149 (1954). Statute of the I.C.J. arts. 26(3) and 29. The United States Supreme Court does not utilize chambers.

¹⁷⁸ Rules of Procedure arts. 45-54.

¹⁷⁹ SCHWARTZ, *op. cit.*, *supra* note 177, at 131-147.

¹⁸⁰ Statute of the I.C.J. art. 43(5) which shows the large scope of the oral proceeding before that Court.

of the case by the chamber are more important than the oral hearing. During this preliminary investigation witnesses are called either by the parties, or—in keeping with the inquisitional nature of the Court's procedure—by the Court; expert testimony may be taken upon a Court order calling for *expertise*.¹⁸¹ Oral hearings are scheduled only after all relevant information has been collected, testimony heard, and expert reports received in the preliminary investigation.¹⁸² During the oral hearing the parties have a final chance to argue their views and the Court Advocate General presents his conclusions and observations to the Court,¹⁸³ but evidence may be submitted only by order of the Court.¹⁸⁴ Both the preliminary investigation and the oral hearing are public unless otherwise ordered by the Court.¹⁸⁵

In all proceedings an enterprise, whether a natural or legal person, must be represented by counsel who is a member of the bar of one of the Member States or who is a professor of law whose national law allows him to practice before national courts.¹⁸⁶ There is no separate bar of the Community Court.¹⁸⁷ Thus, the conditions for admission to practice before the Community Court are midway between the strict requirements of the United States Supreme Court, which has a special bar of its own, and the much looser provisions of the International Court of Justice which require that parties be represented by "agents" without specifying their qualifications.¹⁸⁸

The legal department of the High Authority has defended the Authority before the Court and has acquired an outstanding reputation in presenting the Community view in the face of what at times appeared to be cryptic complaints by some plaintiffs. The legal departments of the Authority and of the E.E.C. and Euratom Commissions have now been consolidated into a "common service" composed of some forty-nine lawyers. Since so much of the formal power

¹⁸¹ Rules of Procedure arts. 47 and 49; SCHWARTZ, *op. cit. supra* note 177, at 127-138, explains that in the Conseil d'Etat an "order for *expertise*" means the calling of expert witnesses, by the Court, from a permanently established list of experts in particular professional fields. These experts have the power to conduct their own investigation and to submit a report on their findings. The latter is also true of the Community Court procedure. Rules of Procedure art. 49.

¹⁸² Rules of Procedure arts. 54-55.

¹⁸³ Rules of Procedure arts. 56-59.

¹⁸⁴ Rules of Procedure art. 60.

¹⁸⁵ Rules of Procedure arts. 46 § 2 and 56.

¹⁸⁶ Protocol art. 17 pars. 2 and 5; Rules of Procedure art. 36.

¹⁸⁷ Riese, *Die Verfahrensordnung des Gerichtshofes der Europäischen Gemeinschaft für Kohle und Stahl*, 6 NEUE JURISTISCHE WOCHENSCHRIFT 521, at 524 (1953).

¹⁸⁸ Rules 5-6 of the United States Supreme Court, 28 U.S.C. Appendix 1958; Statute of the I.C.J. art. 42.

of decision has been shifted in the new treaties from the "executive" to the Councils of Ministers, some appeals may now have to be directed against acts of the Councils. The question will therefore arise as to who will conduct the defense of the Councils against such appeals: will it be the "common service" which has the legal talent with accumulated valuable experience or will the Councils be defended by the small legal section in the Secretariat of the Councils?

For purposes of service all parties must elect domicile at the seat of the Court and specify persons who are authorized to accept service of all communications and documents.¹⁸⁹ The proceeding is conducted in one of the four official languages of the Community—Dutch, French, German, Italian. If the defendant is a Member State, or a person, natural or legal, of the nationality of a Member State, the language of that state will be used; if the defendant is an institution of the Community, or a person, natural or legal, of the nationality of a third country, the language of the plaintiff will be used. In all cases, the Court may, however, make special arrangements.¹⁹⁰

3. THE JUDGMENTS OF THE COURT

The judgments of the Court are final. They are not subject to review except in three specified cases. (1) A judgment may be reviewed by the Court upon the application of a third party which is affected by the judgment but was not represented in the case.¹⁹¹ (2) The Court may be asked by an interested party or institution to interpret its judgment if difficulties arise as to its meaning and scope.¹⁹² Strictly speaking, this is not a case of *review* of the judgment, since the request for an interpretation may not be used as a means for obtaining another determination of the case on the merits.¹⁹³ (3) Finally, a case may be re-opened and judgment reviewed in the sense of a proceeding *de novo*—if, within a ten year period, a new fact is discovered which would have "decisive influence," but the appeal must be instituted within three months after the appellant learned the new fact.¹⁹⁴

¹⁸⁹ Rules of Procedure arts. 38 § 2 and 40 § 1 last par.

¹⁹⁰ Rules of Procedure art. 29 § 2.

¹⁹¹ Protocol art. 39; Rules of Procedure art. 97.

¹⁹² Protocol art. 40; Rules of Procedure art. 102.

¹⁹³ See E.C.S.C. case 5-55, *Sammlung*, Vol. I, 275, at 292-293. A similar provision is included in the Statute of the I.C.J. art. 60.

¹⁹⁴ Protocol art. 41; Rules of Procedure arts. 98-100. Art. 61 of the Statute of the I.C.J. provides for a review in identical terms. Both provisions envision a procedure in two stages: (a) a judgment finding the existence of a previously unknown fact, and (b) the proceeding reviewing the original judgment. Curiously enough, the Treaty

Judgments vary in form. Some follow the syllogistic pattern of French courts while others are in the narrative form of German (and American) courts as well as of the International Court of Justice.

In striking contrast to the rights of litigants in an American court, parties before the Community Court have a right to a decision by the Court which takes account of their main lines of argument. If a judgment fails to consider one of the party's principal arguments, the party concerned may request the Court for a ruling.¹⁹⁵

The Court has the power to render judgments by default. Like the International Court of Justice, the Court in such cases is required to examine not only whether it has jurisdiction but also whether the claim "seems to be well founded."¹⁹⁶ As pointed out previously, the judgments of the Court are enforceable in Member States on the same conditions as administrative acts of the Community institutions.

B. THE COURT'S SOURCES OF LAW¹⁹⁷

The Treaty contains no general and comprehensive statement of the sources of law analogous to Article 38 of the Statute of the International Court of Justice.¹⁹⁸ The Community Court draws upon the Treaty and extrinsic aids to its interpretation, upon international law, national laws of the Member States, and general principles common to these national laws, and upon acts and practices of the Community institutions.

I. THE TREATY

The most important source of Community law is, of course, the Treaty, to which several lists, protocols, and supplementary conventions are annexed.¹⁹⁹ It is the standard by which all activities of the

omits the limitation contained in the Statute of the I.C.J. whereby a review is excluded if the party failed to discover the fact through its own negligence.

¹⁹⁵ Rules of Procedure art. 67.

¹⁹⁶ Rules of Procedure art. 94 §§ 1-2; Statute of the I.C.J. art. 53.

¹⁹⁷ Steindorff, ARCHIV DES VÖLKERRECHTS *supra* note 67, at 52-55.

¹⁹⁸ Statute of the I.C.J. art. 38: "1. The Court. . . shall apply:

- (a) international conventions, . . . ;
- (b) international custom, . . . ;
- (c) the general principles of law recognized by civilized nations;
- (d) . . . , judicial decisions and the teachings of the most highly qualified publicists. . . ."

¹⁹⁹ The Final Act of the Intergovernmental Conference on the Common Market and Euratom lists the relevant texts. See Treaty establishing the European Economic Community as published by the Secretariat of the Interim Committee for the Common Market and Euratom 365-368 (Publication 1931 bis/5/57/4, Brussels).

institutions are tested. Its provisions are to be interpreted in the light of the provisions laying down the general principles and objectives of the Community.²⁰⁰ The practice in the United Nations where Charter provisions are consistently interpreted in the light of the "Purposes and Principles" of the United Nations offers an analogy. In the *Geitling* case, for example, the Court utilized the general principles stated in Article 4 of the Coal-Steel Community Treaty to interpret the concept of "discrimination" of the anti-cartel article.²⁰¹

Some clarification may be also gained by comparing the text of a provision in the French, German, Italian, and Dutch versions of the Treaty, all of which are equally authentic. The purpose of such a comparison (which at times may compound the confusion rather than clarify) is not to arrive at a majority vote but to seek clarification of the true scope of the provision, to find that version which serves the ends of the Treaty best.²⁰²

Of the preparatory materials commonly used as extrinsic aid for the interpretation of a treaty relatively few documents are available reflecting the opinions of the negotiators of the E.E.C. Treaty and the positions of the governments during the negotiations. Foremost among them is the "Spaak Report."²⁰³ On the other hand, a number of reports of Member Governments to their parliaments, their statements at the time of the ratification debates, and records of these debates are available. They have, however, a limited value for purposes of establishing the intent of the Treaty framers, and most of these materials are in any case not very enlightening.

The four volumes of judgments of the Court rendered under the Coal-Steel Community Treaty offer an important "extrinsic aid" since many of its provisions were included verbatim in the E.E.C. Treaty. This use of precedent would be justified on the presumption that the continued use of a term indicates the intent to accept its established interpretation. Caution is in order, however, when the

²⁰⁰ *E.g.*, Part One of the Treaty is entitled "Principles." See Lagrange, *L'Ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice*, 74 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 841, at 844-847 (1958).

²⁰¹ Case 2-56, Sammlung, Vol. III, 9. Cf. Bebr, *The Development of a Community Law by the Court of the European Coal and Steel Community*, 42 MINN. L. REV. 845 (1958).

²⁰² Daig, ARCH. D. Ö. R. *supra* note 19, at 157. See art. 248. Polach, *On the Margin of the Rome Treaties*, 7 AM. J. COMP. L. 593 (1958).

²⁰³ Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères (Spaak Report), published by the Comité Intergouvernemental créé par la Conférence de Messine (1956); see also the Messine Declaration and other documents collected in X CHRONIQUE DE POLITIQUE ÉTRANGÈRE, Nos. 4-6 (Brussels 1957).

connotation of an identical term is varied in the new Treaty, however slight the variation may be. Thus, as shown above, *détournement de pouvoir* (misapplication of power) is a ground for appeal against administrative acts in both Treaties. To the extent that a definition of its meaning is needed under the new Treaty, the Coal-Steel jurisprudence will serve as a valuable precedent although it must be used with circumspection.²⁰⁴

2. INTERNATIONAL LAW

It has been suggested that to the extent that the Court applies international law it should look to Article 38 of the Statute of the International Court of Justice as the best general statement of sources of international law.²⁰⁵

Several types of international agreements may provide a source of Community law: those concluded by the Community as a person under international law with third states (for example, trade agreements), those concluded among Member States,²⁰⁶ and finally those to which the Treaty makes explicit reference. Such reference is contained, for example, in Article 131, paragraph 3 of the Treaty which provides for the association of the overseas territories with the Community "in conformity with the principles stated in the Preamble" to the Treaty; the Preamble, in its eighth paragraph, refers to the Charter of the United Nations. The result of this reference is that the association of the overseas territories under the Treaty must not only conform to the particular provisions of the Treaty but also take into consideration the principles of the United Nations Charter, such as the principle of self-determination,²⁰⁷ however limited the legal content of this principle may be at this time.

The Court will resort to customary rules of international law and general principles when interpreting the above international agreements, when defining the relations of the Community with third countries (such as the right of active and passive legation), and perhaps as a subsidiary source when enunciating a rule applicable to

²⁰⁴ Pinay, *La Cour de Justice des Communautés Européennes*, 1959 REVUE DU MARCHÉ COMMUN 138, at 144 (No. 12).

²⁰⁵ MATHIJSEN, *op. cit. supra* note 50, at 90 and 157-158. Fitzmaurice, *Some Problems regarding the Formal Sources of International Law*, SYMBOLAE VERZIJL 161-168, 173-176 (1958) includes natural law as one of the sources of international law.

²⁰⁶ Cf. art. 220.

²⁰⁷ Germany, Deutscher Bundestag, 2 Wahlperiode, *Schriftlicher Bericht des 3. Sonderausschusses Gemeinsamer Markt/Euratom über den Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft* . . . (1957), Drucksache 3660, at 56.—U.N. Charter art. 73.

the relations between Member States in matters not arising directly under the Treaty—not unlike the United States Supreme Court when it resorts to rules of international law in adjudicating controversies among the States of the Union.²⁰⁸ In one instance, without drawing a sharp distinction between sources, the Court applied a rule of interpretation which it held was “generally recognized both in international law and national law.”²⁰⁹

3. NATIONAL LAWS OF MEMBER STATES AND GENERAL PRINCIPLES COMMON TO THEM

The Treaty refers explicitly to national law, for instance when it provides that forced execution of a pecuniary obligation imposed upon an enterprise by an institution shall be governed by the rules of civil procedure in force in the Member State where it takes place.²¹⁰

The Treaty refers explicitly to the “general principles common to the laws of the Member States” as the source of law to govern Community tort cases. The Court is required to scrutinize the six national legal systems for common principles, a task of some magnitude considering the differences among these systems.²¹¹ This source is reminiscent of the general principles of law of civilized nations included in Article 38 of the Statute of the International Court of Justice.

In cases of contracts to which the Community is a party the Treaty requires reference to “the law applying to the contract concerned.” How will the Community Court determine the choice-of-law rule pointing to the applicable law? One possibility would be for the Court to refer to the choice-of-law rule of some other forum—as American federal courts since *Erie v. Tompkins*²¹² have done in diversity-of-citizenship cases, applying the choice-of-law rule of the State in which they are sitting. The Community Court could, for instance, refer to the choice-of-law rule of the national court which would have had jurisdiction if the contract had not stipulated the jurisdiction of the Community Court.²¹³ Another possibility would

²⁰⁸ Cf. *Virginia v. Tennessee*, 148 U.S. 503 (1893); *Arkansas v. Tennessee*, 246 U.S. 158 (1917); *New Jersey v. Delaware*, 291 U.S. 361 (1934).

²⁰⁹ Case 8-55, Sammlung, Vol. II, 297, at 312.

²¹⁰ Art. 192.

²¹¹ Art. 215 par. 2. Daig, ARCH. D. Ö. R. *supra* note 19, at 183-184. Braband, *Liability in Tort of the Government and its Employees: a Comparative Analysis*, 33 N.Y.U.L. REV. 18 (1958).

²¹² *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

²¹³ Daig, ARCH. D. Ö. R. *supra* note 19, at 203; cf. RAAPE, INTERNATIONALES PRIVATRECHT 527 (4th ed. 1955).

be for the Court to apply the substantive law of the court of the jurisdiction in which, in the absence of the Community Court, the plaintiff would presumably have sought relief—an approach followed at times by special international tribunals.²¹⁴ Since courts in more than one state may well have jurisdiction with respect to the contract case in question, as well as for other reasons, the better rule might be for the Community Court to develop its own choice-of-law rules from the general principles common to the laws of the six Member States.²¹⁵ Since the jurisdiction of the Community Court in contract cases must in any event be stipulated by the parties, the contract may stipulate also the law which the parties wish to govern the contract. New York law, for example, was stipulated as governing High Authority obligations issued in the United States.²¹⁶ The Coal-Steel Community Treaty contains no provision concerning the applicable law in tort or contract cases involving the Community comparable to the provision in the E.E.C. Treaty discussed above.

Where will the Community Court seek a rule of law in those instances in which the Treaty is silent and contains no specific reference to national law or to the common general principles? The answer to this question will have a profound effect on the growth of Community "common law." When the Treaty provides that "any . . . legal person" has the right of appeal to the Community Court,²¹⁷ the Court most likely will look to the national law of the appellant to determine whether or not it is a "legal person." In most instances, however, the Court may be well advised to look to the common general principles rather than to an individual na-

²¹⁴ NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 43 (1943), referring to decisions of the Mixed Arbitral Tribunal instituted by the Treaty of Versailles. WOLFF, *PRIVATE INTERNATIONAL LAW* 91-94 (1945).

²¹⁵ The Permanent Court of International Justice stated in the Serbian and Brazilian Loan Cases:

"The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties. Moreover, this would seem to be in accord with the practice of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law."

Serbian Bonds Issued in France, P.C.I.J. ser. A, No. 14 at 41 (1929).

²¹⁶ High Authority and Bank for International Settlements, Tenth supplemental Indenture to the Act of Pledge dated November 28, 1954, 5% Secured Bonds (Eleventh Series), June 1958, Art. III, sec. 10. However, questions with respect to the interpretation or application of the Act of Pledge are to be determined "in accordance with the law which would otherwise be appropriate for such determination." See Salmon, note 140 *supra*, at 278.

²¹⁷ Art. 173 para. 2.

tional law in order to develop Community definitions of such concepts as "worker," "non-wage-earning activities," "current payments," and the like.²¹⁸ In one case the Coal-Steel Community Court applied a principle common to the laws of the Member States, that is that a party is deemed to have notice of a letter when it has come in regular course "within the internal sphere of the addressee."²¹⁹ In another case the Court, faced with an administrative law question for which it could not find a rule in the Treaty itself felt compelled to make the decision "taking into account the rules recognized in the legislation, doctrine and jurisprudence of the Member States."²²⁰

Even where the Treaty concept may have been adopted from a particular national system, such as the French notion of *détournement de pouvoir*, the Coal-Steel Community Court has sought to devise a Community definition rather than looking to French law only.²²¹

4. ACTS AND PRACTICES OF THE INSTITUTIONS

The acts of the Council and the Commission adopted in the exercise of their power are a vital source of Community law. The regulations and other acts of the institutions will eventually have to fill important gaps in the Community legal framework. The "law-making" process is dependent upon more or less specific authorization in the Treaty. It may extend somewhat beyond these confines, however, under the "general clause" of Article 235 which authorizes the Council to take measures, which while not expressly sanctioned in the Treaty, are necessary for the achievement of its objectives. The same clause in the Coal-Steel Treaty has already been invoked by the High Authority.²²² Finally, the practices of the institutions may lay a basis for customary rules.

To what extent does the Court itself "make law" drawing upon

²¹⁸ Arts. 48(2), 52 para. 2, 67(2). See Reuter, *Aspects de la Communauté Economique Européenne*, 1958 REVUE DU MARCHÉ COMMUN 161, at 168 (No. 3).

²¹⁹ E.C.S.C. case 8-56, Sammlung, Vol. III, 189, at 200.

²²⁰ Joint E.C.S.C. cases 7-56 and 3-57 to 7-57, *id.* 83, at 118-119.

²²¹ Lagrange, *supra* note 200, at 857 and n. 14. Perhaps the same approach could apply to the Coal-Steel provisions concerning the tort liability of the Community which employ the French distinction between *faute de service* and *faute personnelle*. See generally, Kautzor-Schroeder, *supra* note 134, at 201. MUCH, *op. cit.*, *supra* note 134, particularly at 31, 67-77.

²²² The provision is art. 95 of the E.C.S.C. Treaty. In its decision 27-58, [1958] Journal Officiel 486, the High Authority, with the unanimous consent of the Council utilized art. 95 to institute a subsidy to the coal industry in order to prevent unemployment resulting from the extraordinarily high stock piling of coal. In decision 22-59, [1959] Journal Officiel 418, art. 95 was used to grant temporary unemployment compensation to Belgian coal workers.

the sources indicated above? The jurisprudence of the Court itself is unquestionably an important source of law particularly where the Court interprets incomplete and ambiguous provisions of the Treaty. "Wherever there are courts, the law grows in the hands of the judges."²²³ Some view the Court's power to "make law" with misgivings. Since the Court is not subject to any control, these critics are not prepared to concede that it can "make law" in the sense that the other institutions make law.²²⁴ Continental legal theory is more strongly opposed to judge-made law²²⁵ than is the common law tradition. Yet it seems likely that the Community Court, in due course, will play a significant role in the development of Community law. The need for the Court to assist in adapting the broad Treaty provisions to concrete situations is accentuated by the fact that there is no Community legislature endowed with general legislative power and that the Treaty may be formally revised only through a cumbersome amendment process requiring the ratification by all Member States.

CONCLUSIONS

Enterprises—whether natural or legal persons, whether nationals of a Member State or of a third State such as the United States—are accorded the right to appeal to the Community Court against administrative acts of the Commission and of the Council which directly and specifically affect them on the grounds defined in the Treaty. Similarly, under specific circumstances enterprises may contest the failure of the institutions to issue an administrative act. The adequacy of these legal remedies will depend to an important degree on the jurisprudence of the Court, whether it will, for instance, continue the practice of the Coal-Steel Community Court and interpret broadly the right of appeal. The Coal-Steel Community Court utilized the concept of *détournement de pouvoir* to give private parties standing to contest general decisions. In view of the limiting language of the E.E.C. Treaty, the question may arise whether the Court will be able or willing to grant appeals under that Treaty in all situations where "direct and specific concern" of the enterprise affected would warrant it.

Under an arrangement resembling somewhat a federal system

²²³ Mathijsen, *op. cit. supra* note 50, quoting Schwarzenberger at 105-106; Ophüls, *Gerichtbarkeit und Rechtsprechung im Schumanplan*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 693-694 (1951).

²²⁴ STEINDORFF, *op. cit. supra* note 29, at 16-17.

²²⁵ For two classic statements, see LAUN, *DAS FREIE ERMESSEN UND SEINE GRENZEN* 105 (1910), and HAURIUO, *PRINCIPES DE DROIT PUBLIC* 33-40 (1916).

national courts of last resort must refer to the Community Court for binding determination questions concerning the Treaty or acts of the Community institutions which arise in proceedings before these courts. Where the right of a party depends on the proper application of the Community law, the adequacy of its legal remedy may depend on the compliance by the national courts with the Treaty mandate. In at least one case a national court gave less than the intended effect to this Treaty mandate and refused to submit certain questions to the Community Court. A possible solution would be the development by the Community Court of a procedure similar to the writ of *certiorari* in American law whereby the Community Court on request of a party could direct the national court of last resort to submit to it the record. Such procedure would deepen the "breach" in the "integrity of national systems."

Where the Community becomes liable to an enterprise for damages on account of an act of a Community employee or of a Community institution, the enterprise may seek recovery in the Community Court only. This Court will decide the case in accordance with the general principles common to the laws of the Member States. Where, on the other hand, an enterprise has entered into a contract with the Community, it may sue on such contract in the competent national court only, unless the jurisdiction of the Community Court is stipulated in the contract. In case of such stipulation, the Community Court will decide the question of contractual liability in accordance with "the law applying to the contract concerned." Thus from the viewpoint of the development of a "quasi-federal legal system," the Court has the potential to develop a "Community law" not only in the sphere of the administrative and constitutional law of the Community, but also in the private law sphere by drawing upon general principles common to the laws of the Member States.

The armory of legal remedies will, of course, not depend only on the attitude of the Court. The regulations and other administrative acts which the institutions are required to issue for the implementation of the Treaty will have an important impact on the remedies of the enterprises in the Community.