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HOW FLEXIBLE IS COMMUNITY LAW? AN UNUSUAL APPROACH TO THE CONCEPT OF "TWO SPEEDS"†

Claus-Dieter Ehlermann*

I. THE "TWO SPEED" DEBATE

Since Willy Brandt, former Chancellor of the Federal Republic of Germany, launched the idea in Paris in November, 1974, that the Community might progress faster if its economically stronger Member States were allowed to develop more quickly,¹ the debate on the concept of a "two (or multi) speed" Community has not slackened. Indeed, the discussion has intensified in recent years, and it will likely continue as long as the underlying reasons remain with us. Those reasons include the conviction that the Community has lost its original impetus, the slowdown in the decisionmaking process through the search for consensus (though majority voting would be legally possible), and the increased difficulty of reaching unanimity in a Community enlarged first from six to nine, then to ten and probably soon to twelve Member States. In addition, the successive accessions have made the Community more heterogeneous, and the prosperous years before the first enlargement have been replaced by a difficult period of economic adaptation.

Clearly, the "two speed" concept is closely linked to other proposals for institutional reform; it would lose much of its appeal if majority voting were to become more popular and, in particular, if such voting could be used in those areas where the Treaty today requires a unanimous decision of the Council.² Though it would certainly be wrong to assume that all promoters of the "two speed" concept agree with the consensus principle as practised in Brussels, they would have to admit that their instrument of reform diminishes the pressure for a reinstatement and extension of the rule regarding majority voting.

The concept of "two speeds" *de lege ferenda* and the connected question of possible flexibility in Community law *de lege lata* raise a number of highly complex institutional questions that go to the very roots of the Community system. We offer the following analysis of such questions to Eric

† The views expressed in this Article are strictly personal.

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1. Address given to the Organisation Française du Mouvement Européen, Paris, Nov. 19, 1974, 30 EA D33 (1975).

2. See, e.g., the Commission's suggestions for adjustments of the Treaties in *Enlargement of the Community: Transitional period and institutional implications*, 1978 BULL. EUR. COMM., Supp. 2, at 12 [hereinafter cited as *Enlargement of the Community*]. A revised version of these suggestions is published in *Institutional Implications of Enlargement: More Flexibility in Decision-Making*, 1983 COM 116 final (Mar. 1, 1983), and mentioned in 1983 BULL. EUR. COMM., No. 3, at 76.

Stein, whose writing and teaching have contributed so greatly to the understanding of the Community's foundations.

A. *The "Two Speed" Concept*

There is no generally accepted definition of the "two speed" concept or of any other term ("two-tier" Community; "Europe à géométrie variable"; "Europe à la carte"; "abgestufte Integration") that is used to designate the same or a similar phenomenon. For the sake of simplicity, we will limit ourselves to quoting the well-known and relatively precise formula used by Leo Tindemans, then Prime Minister of Belgium, in his December, 1975, report to the European Council on European Union. In his chapter on economic and monetary policy Tindemans states:

It must be possible to allow that:

— within the Community framework of an overall concept of European Union as defined in this report and accepted by the Nine,

— and on the basis of an action programme drawn up in a field decided upon by the common institutions, whose principles are accepted by all,

(1) those States which are able to progress have a duty to forge ahead,

(2) those States which have reasons for not progressing which the Council, on a proposal from the Commission, acknowledges as valid do not do so,

— but will at the same time receive from the other States any aid and assistance that can be given them to enable them to catch the others up,

— and will take part, within the joint institutions, in assessing the results obtained in the field in question.³

Tindemans does not raise the question whether his proposal conforms with the Treaties; he refers, however, to article 233 of the EEC Treaty — the Benelux clause — as a precedent.⁴

B. *Legal Analysis: The State of Play*

So far, the debate over the "two speed" concept has been essentially political. While its promoters have pointed to possible advantages, its opponents have stressed the dangers that would flow from the acceptance of such a decisionmaking technique. Solid legal analysis is rather rare. We have identified only two publications dealing specifically with our subject — the first by E. Grabitz and B. Langeheine,⁵ and the second, rather more detailed, by B. Langeheine alone.⁶ Since the first seems to have been a preliminary study for the second, we will refer mainly to the second publication.

Langeheine arrives at the conclusion that a "two speed" concept similar to Tindemans' suggestion is in principle compatible with the EEC Treaty, provided it is not used in core areas of the Common Market and in the

3. Cf. *European Union: Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council*, 1976 BULL. EUR. COMM., Supp. 1, at 20, 21.

4. See Treaty Establishing the European Economic Community, Mar. 28, 1957, art. 233, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty].

5. Grabitz & Langeheine, *Legal Problems Related to a Proposed "Two-Tier System" of Integration within the European Community*, 18 COMMON MKT. L. REV. 33 (1981).

6. Langeheine, *Abgestufte Integration*, 18 EUR 227 (1983).

Community's external relations.⁷ However, Langeheine subjects the application of the "two speed" formula to one fundamental condition: the "two speed" technique can be used only if all Member States agree; it is excluded in areas controlled by majority voting.⁸ This unanimity requirement is astonishing. We must take it as an indication that he is afraid of the logical consequences of his interpretation. And we must admit that we are unable to agree with the condition of unanimity: under existing Community law, consensus is not a valid argument in favor of legality.⁹ Nor is it one even on a strictly practical level, as it cannot prevent individuals and companies from enforcing their rights before the courts. Only a Treaty amendment could transform the unanimity requirement into a decisive, legalizing factor.

C. *The "Two Speed" Concept — A Complex Treaty Amendment*

Contrary to the views expressed by Grabitz and Langeheine, the Commission has always maintained that introduction of the "two speed" concept in its pure and simple form (i.e., without legally acceptable reasons for nonparticipation) would require a Treaty amendment. If one reflects on the type of questions that would be raised during the amendment process, and that would have to be answered by the negotiators, it becomes clear that such an amendment would have to be much more complex than expected at first sight. The questions concern (1) the type of Community activities open to "two speed" operations; (2) the requirements as to the participating (and nonparticipating) Member States; (3) the decisionmaking process; (4) the financing of "two speed" operations; and (5) the consequences of such operations on the external powers of the Community. We will briefly set out the most important of these problems.

1. *Type of Community Activities Open to "Two Speed" Operations*

The first issue is whether "two speed" operations should be allowed in all areas in which the Community can act or whether they should be restricted to certain precisely delimited fields. Other open issues include whether "two-speed" operations should be unrestricted or subject to substantive conditions, and whether they should be allowed only for new activities, or also with respect to existing Community rules ("*acquis communautaire*").

2. *Requirements as to the Participating (and Nonparticipating) Member States*

The possibility of nonparticipation could be limited to certain Member States, or all Member States could have the right to "stay behind." In either case, it might be useful to require a certain number of participating Member States in order to attain a critical mass.

7. Langeheine requires "objective reasons" for nonparticipation in decisions taken by the Community; however, he also accepts "reasons of a political nature." See *id.* at 230 [Author's translation — Ed.].

8. See *id.* at 254-57.

9. See Part II-C-1 & note 76 *infra*.

3. *The Decisionmaking Process*

A "two speed" operation will normally consist of one basic decision (which will allow one or several Member States not to apply it during a fixed or open-ended period), amendments to this basic decision, detailed rules for its application and implementation and, where appropriate, day-to-day management decisions of a purely ephemeral character.

What is the position of those Member States that are allowed not to participate in the scheme? Is it conceivable that they should be excluded from participation in the adoption of the basic decisions or from the adoption of amendments to the basic decisions, even though they are expected to apply it at some time in the future? Should they be excluded from the formulation of the detailed rules for its application and implementation? And from day-to-day management?

The numerical thresholds for majority decisions by the Council¹⁰ are based on the assumption that all Member States participate in the voting process. For majority decisions not involving all Member States, different, i.e., lower, thresholds would have to be agreed upon. These new thresholds would have to take into account the voting weight of those Member States not entitled to vote on the given issues.¹¹

4. *Financing of "Two Speed" Operations*

Some "two speed" operations, particularly those involving research, industrial development, or restructuring of industries, require financial means. Should such operations be paid for out of the general Community budget, i.e., financed by the Community's own resources? Should Community resources coming from a nonparticipating Member State be refunded (totally or only in part)? Or should "two speed" operations be financed, like the present supplementary research programmes, by special contributions from participating Member States?¹²

10. Cf. EEC Treaty, *supra* note 4, art. 148(2) (providing a weighted voting system for Council decisions taken by qualified majority).

11. Langeheine, *supra* note 6, at 258, suggests a gentleman's agreement according to which Member States that choose to stay behind should abstain. That is a perfectly workable suggestion for unanimous Council decisions, which cannot be blocked by an abstention. Cf. EEC Treaty, *supra* note 4, art. 148(3). But it is inappropriate where majority voting is called for, because it is generally agreed that an abstention cannot be considered a positive vote. Expressed differently, article 148(3) is not applicable, *mutatis mutandis*, in the case of majority voting.

12. See Part II-A-8 *infra* for discussion of the supplementary research programmes.

The financing of "two speed" operations poses a real problem for Langeheine, who applies the Treaty without any amendment. He suggests limiting such operations, during an experimental phase, to actions that do not require spending on the Community level. Langeheine, *supra* note 6, at 258-59. This is, once again, a perfectly acceptable suggestion. We cannot agree, however, with his statement that it would be theoretically possible today (i.e., without any Treaty amendment!) to finance "two speed" operations without using the budget, through special contributions from the participating Member States. His position is not compatible with art. 199 of the EEC Treaty ("All items of revenue and expenditure of the Community . . . shall be shown in the budget"), or with art. 4 of the Council Decision 70/243/ECSC, EEC, Euratom, on the Replacement of Financial Contributions from Member States by the Communities' own Resources, [Special Ed. 1970 (I)] O.J. EUR. COMM. (No. L 94/19) 224, 226 (Apr. 28, 1970) ("the budget of the Communities shall, irrespective of other revenue, be financed

5. *Consequences of "Two Speed" Operations on the External Powers of the Community*

Today it is generally recognized that the Community's external powers are not limited to those provisions which expressly deal with international affairs.¹³ According to the Court of Justice:

Whenever Community law has created for the institutions of the Community powers within its *internal* system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express [authorizing] provision.¹⁴

This international authority becomes an exclusive power insofar as the Community has adopted common rules that might be affected by an international agreement. Only the Community is entitled to negotiate and conclude such an agreement.¹⁵

Is a "two speed" operation equivalent to "common rules" conferring an exclusive international power with respect to all (i.e., also the nonparticipating) Member States? Or does an exclusive power exist only in relation to those Member States that do participate in the operation?¹⁶ If this latter alternative is correct, the Community might be unable to commit the whole of its territory; as a consequence, we might see the birth of a new type of mixed agreement.¹⁷

D. *The Position of the Commission*

We do not know to what extent the promoters of the "two speed" concept have been aware of the institutional complexities of their proposal. If they had fully realized these difficulties, they might have adopted a more prudent approach, for instance, that expressed by the Commission. In its considerations on the institutional implications of the second and third enlargements the Commission stated:

The basic feature of the Community's legal system is the principle that there should be a single body of secondary legislation. This principle is clearly set out in the second paragraph of Article 189 of the EEC Treaty, which states that a regulation shall be binding in its entirety and directly applicable in all Member States.

This principle of universality does not imply the uniformity of Community law. On the contrary, the Court of Justice has ruled that the principle of non-discrimination is a general principle of law binding on all Community bodies. So different cases must be handled in different ways. And the only way of distinguishing between fundamental and incidental differences is to refer to the principles and objectives on which the Treaty is founded.

entirely from the Communities' own resources."). Article 4(6) of that Decision, referring to supplementary research programmes, is the only exception to that principle.

13. See EEC Treaty, *supra* note 4, arts. 113, 238.

14. Advisory Opinion 1/76, 1977 E. Comm. Ct. J. Rep. 741, 755 (emphasis added).

15. Commission of the Eur. Communities v. Council of the Eur. Communities (Case No. 22/70), 1971 E. Comm. Ct. J. Rep. 263, 275-76 (grounds 28, 31) (AETR).

16. Surprisingly, this aspect of the "two speed" concept has not been discussed at all by legal authors.

17. See generally MIXED AGREEMENTS (D. O'Keeffe & H.G. Schermers eds. 1983).

This means, for instance, that the unity of the common market should not be put at risk, that — in the context of the harmonization of legislation — existing differences between Member States should not be aggravated, and that any deferred or differentiated application of Community law should cease as soon as circumstances allow.

Given the greater heterogeneity of an enlarged Community, it might be advisable to write into the Treaty itself some definition of the criteria and limitations governing the type of differentiated application that would be compatible with the principles and aims of the Community.¹⁸

In spite of the last paragraph, which prudently suggests a treaty amendment, this is not a proposal to introduce a "two speed" concept, but a plea for flexibility within the existing Community framework.¹⁹ The key sentence seems to be the first one of the second paragraph, which is even clearer in French than in the English translation.²⁰ It recognizes a fundamental principle, hardly perceived in the early years of the Community, which has become more and more apparent since the first enlargement. Whatever may happen to the "two speed" concept, the Community will need the existing possibilities for differentiated application;²¹ it will increasingly use the flexibility that the Treaty already offers. The following pages will demonstrate and analyze this flexibility.

II. THE FLEXIBILITY OF EXISTING COMMUNITY LAW

Before analyzing, in general terms and in theory, the possibilities for and limits of differentiated application, it is useful to look at practical examples in existing Community legislation. Before we turn to regulations and directives adopted by the Council, we will briefly examine the Treaty²² in order to identify those instruments of flexibility that the founders used. It seems likely that their followers have imitated them, so that secondary Community legislation simply repeats techniques that were successfully applied earlier.

A. *Flexibility in the Treaty (Primary Community Law)*

1. The most important device ensuring flexibility is undoubtedly the principle of progressiveness (or gradualness) which materializes essentially in the transitional period and its different stages.²³ It should be remembered that progression from one stage to another entailed not only

18. *Enlargement of the Community*, *supra* note 2, ¶ 52, at 17.

19. A more skeptical reader of this passage is Dewost, *L'application territoriale du droit communautaire: Disparition et résurgence de la notion de frontière*, in *LA FRONTIERE* 253, 267 (Société Française pour le Droit International, 1980).

20. "Le principe de l'unicité n'implique pas l'uniformité du droit communautaire." *La période de transition et les conséquences institutionnelles de l'élargissement*, 1978 *BULL. COMM. EUR.*, Supp. 2, at 18.

21. We will use this term as a synonym for *de lege lata* admissible differences in Community law.

22. The following analysis will focus on the EEC Treaty and legislation enacted under this Treaty. However, the results apply equally, *mutatis mutandis*, to the ECSC and the EURATOM Treaties.

23. See, e.g., EEC Treaty, *supra* note 4, art. 8.

amendments to substantive law,²⁴ but also changes in institutional rules.²⁵

2. Increased flexibility is provided for in areas where the elimination of obstacles to the free movement of goods, services, capital and persons is attributed to decisions of the Council. However, the Court of Justice has limited this flexibility in most cases to the end of the transitional period.²⁶

3. Though it is doubtful whether it is right to cite in this context provisions that allow Member States to apply restrictions justified on grounds of public policy, public security or public health,²⁷ we would like to refer expressly to article 224, which allowed a major operation of differentiation during the Falklands crisis.²⁸

4. Safeguard clauses are an instrument of flexibility *par excellence*. The Treaty is full of them. Most of these clauses were limited in time (principle of progressiveness!);²⁹ others are still available.³⁰ It should be noted that the prolonged authorization of safeguard clauses can be a powerful means of differentiation in the application of Community law.³¹

5. All Treaty provisions mentioned so far are identical for all Member States. Others distinguish among the ten Member States, particularly the rules concerning the composition of the European Parliament³² and the

24. See, e.g., the provisions on the gradual abolition of customs duties, quantitative restrictions, taxes and measures of equivalent effect in intra-Community trade and the progressive application of the common customs tariff, EEC Treaty, *supra* note 4, arts. 12-15.

25. See, e.g., EEC Treaty, *supra* note 4, arts. 43(2), 75(1), 114 (providing for the change from unanimous to qualified majority decisionmaking).

26. See *Charmasson v. Minister for Economic Affairs & Finance (Paris)* (Case No. 48/74), 1974 E. Comm. Ct. J. Rep. 1383; 1396-97 (Preliminary Ruling); *Reyners v. Belgian State* (Case No. 2/74), 1974 E. Comm. Ct. J. Rep. 631, 656 (Preliminary Ruling); *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (Case No. 33/74), 1974 E. Comm. Ct. J. Rep. 1299, 1312-13 (Preliminary Ruling).

27. See, e.g., EEC Treaty, *supra* note 4, arts. 36, 48(3), 56(1).

28. See Council Regulation (EEC) No. 877/82, suspending imports of all products originating in Argentina, 25 O.J. EUR. COMM. (No. L 102) 1 (Apr. 16, 1982); Council Regulation (EEC) No. 1176/82, 25 O.J. EUR. COMM. (No. L 136) 1 (May 18, 1982); Council Regulation (EEC) No. 1254/82, 25 O.J. EUR. COMM. (No. L 146) 1 (May 25, 1982); Council Regulation (EEC) No. 1577/82, 25 O.J. EUR. COMM. (No. L 177) 1 (June 22, 1982). The embargo regulations were formally binding on all the Member States, but neither the second nor the third regulation was applied by Italy and Ireland; these two Member States invoked article 224. EEC Treaty, *supra* note 4, art. 224 (covering certain grave situations in which Member States may have to act individually). Denmark also invoked article 224, but applied the sanctions on the basis of a national statute, specifically enacted to avoid recourse to the Council Regulations. For a detailed discussion of the embargo against Argentina, see Kuyper, *Community Sanctions Against Argentina: Lawfulness under Community and International Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 141 (D. O'Keefe & H.G. Schermers eds. 1982); see also Stein, *European Political Cooperation (EPC) as a Component of the European Foreign Affairs System*, 43 *ZAÖRV* 49, 64-68 (1983).

29. In particular, the general safeguard clause in article 226 became obsolete at the end of the transitional period.

30. See EEC Treaty, *supra* note 4, arts. 108, 109, 115.

31. See Decision of the Commission 68/406/EEC, authorizing the French Republic to take certain protective measures in accordance with article 108(3) of the EEC Treaty, 11 J.O. COMM. EUR. (No. L 295) 10 (Dec. 7, 1968) [Author's translation. — Ed.]. This Decision is still in force.

32. See EEC Treaty, *supra* note 4, art. 138(2); Act concerning the election of the representatives of the Assembly by direct universal suffrage, art. 2, 19 O.J. EUR. COMM. (No. L 278) 5 (Oct. 8, 1976).

Economic and Social Committee,³³ the number of votes accorded each member of the Council,³⁴ the scales for the original financial contributions,³⁵ and the institutional arrangements for the European Investment Bank.³⁶

6. Some Treaty provisions contain special rules for certain disadvantaged regions; these regions are either defined in general terms (so that all Member States can benefit from them)³⁷ or specifically designated (so that only one Member State can invoke the exception).³⁸

7. Treaty provisions that apply only to one Member State are particularly interesting in the context of the present study. Traditionally, these exceptions and derogations are relegated to protocols attached to the Treaty. Some of them are limited in time;³⁹ others expire at a certain date unless they are extended in accordance with a special procedure;⁴⁰ a third category of derogations continue to apply until the Council decides to abolish them.⁴¹ Finally, there are exceptions of a permanent nature.⁴²

8. Only one provision (which has the rank of primary Community law, though it was adopted under the authority of the Treaty) expressly authorizes a typical "two speed" operation. We refer to Article 4(6) of the Decision on own resources, which deals with the financial aspects of so-called "supplementary research programmes."⁴³ In contrast to normal research programmes, supplementary research programmes are financed only by some Member States.

B. *Flexibility and Differentiated Application of Secondary Community Law*

Contrary to what one would expect, differentiation is to be found in all areas of the Community's activities, even in the most integrated parts, such

33. See EEC Treaty, *supra* note 4, art. 194.

34. See EEC Treaty, *supra* note 4, art. 148.

35. See EEC Treaty, *supra* note 4, art. 200.

36. See EEC Treaty, *supra* note 4, Protocol on the Statute of the European Investment Bank, arts. 4, 11.

37. See, e.g., EEC Treaty, *supra* note 4, art. 92(3)(a).

38. See, e.g., EEC Treaty, *supra* note 4, arts. 82, 92(2)(c); see also Documents concerning the accession to the European Communities, Jan. 22, 1972, Protocol No. 4 on Greenland, 15 J.O. COMM. EUR. (No. L 73) 165 (Mar. 27, 1972) [hereinafter cited as Act of Accession of 1972].

39. E.g., EEC Treaty, *supra* note 4, Protocol on the Tariff quota for imports of raw coffee; Act of Accession of 1972, Protocols No. 6 & 7 concerning Ireland, *supra* note 38, at 166-67, 168-69, and Protocol No. 18 on the import of New Zealand butter and cheese into the United Kingdom, *supra* note 38, at 173-74 (the latter Protocol is limited in time as to the provisions for cheese).

40. E.g., Act of Accession of 1972, Protocol No. 18 on the import of New Zealand butter and cheese into the United Kingdom, *supra* note 38, at 174 (as to the provisions for butter).

41. E.g., EEC Treaty, *supra* note 4, Protocol on the tariff quota for import of bananas.

42. E.g., EEC Treaty, *supra* note 4, Protocol on German internal trade and connected problems.

43. Council Decision 70/243/ECSC, EEC, EURATOM, on the Replacement of Financial Contributions from Member States by the Communities' own Resources, [Eng. Special Ed. 1970 (I)] O.J. EUR. COMM. (No. L 94/19) 224 (Apr. 28, 1970).

as the common agricultural policy. Likewise, differentiation is not limited to decisions or directives, but is as often to be found in regulations, in spite of their definition as instruments of "general application" that are "applicable in all Member States."⁴⁴

Twenty-five years of Community practice offer a fairly wide spectrum of flexibility and differentiation. We will therefore limit our exposé to a few examples.

1. Like the authors of the Treaty, the Council frequently applies the principle of progressiveness. Typical examples are:

— the progressive elimination of differences in the level of agricultural support prices;⁴⁵

— the recent decision of the Council about the gradual abolition of monetary compensatory amounts;⁴⁶

— the latest common market organization, i.e., the organization for mutton and lamb,⁴⁷ described by the Court of Justice as "intended to assimilate the markets in the different Community regions gradually in order to achieve a uniform market and a uniform system of prices."⁴⁸

In approximating national laws, the Council frequently uses the technique of adopting minimum standards.⁴⁹ Another way of ensuring flexibility is to allow Member States to choose between several solutions. These options can be permanent,⁵⁰ or they may be limited to a certain time period.⁵¹

2. Like the Treaty, secondary Community law often contains safeguard clauses. Typical examples are the standardized safeguard provisions of the common agricultural market organization.⁵²

44. EEC Treaty, *supra* note 4, art. 189.

45. Council Regulation (EEC) No. 19/62, portant établissement graduel d'une organisation commune des marchés dans le secteur des céréales, art. 6(4), 5 J.O. COMM. EUR. (No. 30) 933, 936 (Apr. 20, 1962) (not translated into English).

46. See Council Regulation (EEC) No. 855/84 of 31 Mar. 1984 on the calculation and dismantling of the monetary compensatory amounts applying to certain agricultural products, 27 O.J. EUR. COMM. (No. L 90) 1 (Apr. 1, 1984), corrected by Council Regulation (EEC) No. 1004/84 of Apr. 10, 1984, 27 O.J. EUR. COMM. (No. L 101) 2 (Apr. 13, 1984).

47. See Council Regulation (EEC) No. 1837/80 on the common organization of the market in sheepmeat and goatmeat, 23 O.J. EUR. COMM. (No. L 183) 1 (July 16, 1980).

48. Kind KG v. EEC (Case No. 106/81), 1982 E. Comm. Ct. J. Rep. 2885, 2916.

49. See, e.g., Council Directive 75/130/EEC, on the establishment of common rules for certain types of combined road/rail carriage of goods between Member States, 18 O.J. EUR. COMM. (No. L 48) 31 (Feb. 22, 1975); Council Directive 75/440/EEC, concerning the quality required of surface water intended for the abstraction of drinking water in the Member States, 18 O.J. EUR. COMM. (No. L 194) 26 (July 16, 1975).

50. See, e.g., Council Directive 76/464/EEC, on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, art. 6, 19 O.J. EUR. COMM. (No. L 129) 23 (May 18, 1976); Council Regulation (EEC) No. 2831/77, on the fixing of rates for the carriage of goods by road between Member States, art. 2, 20 O.J. EUR. COMM. (No. L 334) 22 (Dec. 24, 1977).

51. See, e.g., Council Regulation (EEC) No. 2892/77, implementing in respect of own resources accruing from value added tax the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, art. 3, 20 O.J. EUR. COMM. (No. L 336) 8 (Dec. 27, 1977).

52. See Council Regulation (EEC) No. 2727/75, on the common organization of the market in cereals, art. 26, 18 O.J. EUR. COMM. (No. L 281) 1 (Nov. 1, 1975); see also Council Directive 77/780/EEC, on the coordination of laws, regulations and administrative provisions

3. The Council has been even more inclined than the Treaty drafters to enact rules that concern all Member States but differentiate among them. Good illustrations are the quotas of the Regional Fund⁵³ and the application of the general rules on monetary compensatory amounts.⁵⁴

4. The common agricultural policy contains a number of provisions that refer to certain regions of the Community. Sometimes these regions are defined in general terms;⁵⁵ in other cases, they are specifically designated. We are obviously most interested in the second group, which includes both positive Community action (e.g., the Council Regulation on producer groups and associations thereof, with respect to certain French regions⁵⁶) and negative Community action (e.g., the exclusion of Greenland from the scope of the Council Directives on the protection of animals during international transport,⁵⁷ and on taxes other than turnover taxes which affect the consumption of manufactured tobacco⁵⁸ and the exclusion of Greenland, together with certain German and Italian territories, from the scope of the Sixth Council Directive on VAT⁵⁹).

5. This leads us to the most delicate group of provisions, namely those which are expressly limited to one or several Member States. We can again distinguish between positive (i.e., operations in favor of a Member State) and negative (exclusion or derogation limited to one or several Member States) Community action. Even more important is the distinction between temporary and permanent differentiation; the latter in particular raises problems of compatibility with the Treaty. By way of example:

a) positive Community action:

— the measures adopted in order to solve (temporarily) the so-called

relating to the taking up and pursuit of the business of credit institutions, art. 2(5), 20 O.J. EUR. COMM. (No. L 322) 30 (Dec. 17, 1977) (although couched in terms of a safeguard clause, this article in fact almost completely restores the freedom of the Member States). The merits of a general safeguard clause are discussed by Olmi, *Aspects institutionnels et juridiques de l'élargissement. L'impact sur les institutions et le droit des Communautés européennes*, in *A COMMUNITY OF TWELVE? THE IMPACT OF FURTHER ENLARGEMENT ON THE EUROPEAN COMMUNITIES* 76, 104 (W. Wallace & I. Herreman eds., Cahiers de Bruges, N.S. 37, Semaine de Bruges, 15th, 1978).

53. See Council Regulation EEC No. 214/79, amending Regulation EEC No. 724/75 establishing a European Regional Development Fund, art. 2, 22 O.J. EUR. COMM. (No. L 35) 1 (Feb. 9, 1979), amended on the accession of Greece by Council Regulation (EEC) No. 3325/80, 23 O.J. EUR. COMM. (No. L 349) 10 (Dec. 23, 1980).

54. See Commission Regulation (EEC) No. 1245/83, fixing the monetary compensatory amounts and certain coefficients and rates required for their application, 26 O.J. EUR. COMM. (No. L 135) 3 (May 23, 1983).

55. The best known example is certainly Council Directive 75/268/EEC, on mountain and hill farming and farming in certain less-favoured areas, 18 O.J. EUR. COMM. (No. L 128) 1 (May 19, 1975).

56. Council Regulation (EEC) No. 1360/78, 21 O.J. EUR. COMM. (No. L 166) 1 (June 23, 1978).

57. Council Directive 77/489/EEC, 20 O.J. EUR. COMM. (No. L 200) 10 (Aug. 8, 1977).

58. Council Directive 79/32/EEC, 22 O.J. EUR. COMM. (No. L 10) 8 (Jan. 16, 1979).

59. Sixth Council Directive 77/388/EEC, on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, 20 O.J. EUR. COMM. (No. L 145) 1 (June 13, 1977); see also Council Regulation (EEC) No. 1496/68, on the definition of the customs territory of the Community, [Eng. Special Ed. 1968 (II)] O.J. EUR. COMM. (No. L 238) 1 (Sept. 28, 1968).

British budget problem,⁶⁰

— the interest subsidies granted (temporarily) to Ireland and Italy and linked to their participation in the European monetary system;⁶¹

— special financial rules for British subsidies reducing the price of butter.⁶²

b) negative Community action:

— the successive extensions of the deadline for implementation of the First and Second Council Directives on turnover taxes, first in favor of Belgium and Italy,⁶³ and subsequently in favor of Italy alone;⁶⁴

— the longer delay in the implementation of the harmonized rules on nonautomatic weighing machines in favor of the United Kingdom and Ireland;⁶⁵

— the temporary derogation from the common rules on the lead content of petrol in favor of Ireland;⁶⁶

— the temporary derogations from the common rules on allowances for travelers in favor of Denmark and Ireland;⁶⁷

— the derogation from the Sixth Council Directive on VAT in favor of Member States that applied reduced rates and exemptions with refund on December 31, 1975.⁶⁸ This derogation is not limited in time; it can only be removed by unanimous act of the Council;

— the derogation from the common rules on crystal glass in favor of Germany; this derogation is permanent.⁶⁹

60. See, e.g., First Council Regulation (EEC) No. 2744/80, establishing supplementary measures in favour of the United Kingdom, 23 O.J. EUR. COMM. (No. L 284) 4 (Oct. 29, 1980), adopted to that effect.

61. Council Decision 79/691/EEC, applying Regulation (EEC) No. 1736/79 on interest subsidies for certain loans granted under the European monetary system, 22 O.J. EUR. COMM. (No. L 200) 18 (Aug. 8, 1979).

62. Council Regulation (EEC) No. 880/77, on the granting of a consumer subsidy for butter, 20 O.J. EUR. COMM. (No. L 106) 31 (Apr. 29, 1977).

63. Third Council Directive 69/463/EEC, on the harmonization of legislation of Member States concerning turnover taxes — introduction of value added tax in Member States, [Eng. Special Ed. 1969 (II)] O.J. EUR. COMM. (No. L 320/34) 551 (Dec. 20, 1969).

64. Fourth Council Directive 71/401/CEE, en matière d'harmonisation des législations des États membres relatives aux taxes sur le chiffre d'affaires — Introduction de la taxe à la valeur ajoutée en Italie, 14 J.O. EUR. COMM. (No. L 283) 41 (Dec. 24, 1971); Fifth Council Directive 72/250/CEE, en matière d'harmonisation des législations des États membres relatives aux taxes sur le chiffre d'affaires — Introduction de la taxe à la valeur ajoutée en Italie, 15 J.O. EUR. COMM. (No. L 162) 18 (July 18, 1972) (neither translated into English).

65. Council Directive 73/360/EEC, on the approximation of the laws of the Member States relating to nonautomatic weighing machines, 16 O.J. EUR. COMM. (No. L 335) 1 (Dec. 5, 1973).

66. Council Directive 78/611/EEC, on the approximation of the laws of the Member States concerning the lead content of petrol, 21 O.J. EUR. COMM. (No. L 197) 19 (July 22, 1978).

67. Third Council Directive 78/1032/EEC, on the harmonization of provisions laid down by law, regulation or administrative action relating to the rules governing turnover tax and excise duty applicable in international travel, 21 O.J. EUR. COMM. (No. L 366) 28 (Dec. 28, 1978).

68. Sixth Council Directive 77/388/EEC, on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, art. 28, 20 O.J. EUR. COMM. (No. L 145) 1, 20-21 (June 13, 1977).

69. Council Directive 69/493/EEC, on the approximation of the laws of the Member

6. Secondary Community law offers no examples of the nonparticipation of a Member State in the decisionmaking process.⁷⁰ A precedent can, however, be found in the 1972 Act of Accession. According to article 109, the substantive provisions of the so-called Yaoundé II Convention⁷¹ between the Community and certain African States and Madagascar were not to be applied by the three new Member States; as a consequence, under article 114 the new Member States were not entitled to participate in decisionmaking in the Council and in the Committee of the European Development Fund with respect to that Convention.⁷²

7. Existing Community law illustrates both options set out in Part I with respect to the problems of financing "two speed" operations.⁷³ The supplementary research programmes, for example, are funded, according to Article 4(6) of the Decision on own resources, by means of financial contributions from the Member States concerned. On the other hand, the interest subsidies granted to Ireland and Italy, which are linked to their participation in the European monetary system, are paid out of the Community budget; the United Kingdom's share of the cost of these subsidies is reimbursed.⁷⁴

C. Decisions of the Court of Justice

We have identified one opinion under article 228 and several judgments which deal directly with problems of differentiated application. The opinion is concerned with institutional aspects, the judgments with questions of substantive law.

1. In its advisory opinion on a draft agreement establishing a European "laying-up" fund for inland waterway vessels,⁷⁵ the Court of Justice examined the institutional arrangements for the management of the fund. It criticized particularly the composition and the functioning of the Supervisory Board. The Board was designed to consist of one representative from each Member State except Ireland;⁷⁶ decisions were to be taken normally by a simple majority, but this majority had to include the affirmative vote of certain Member States. The Court declared that these provisions "alter in a manner inconsistent with the Treaty the relationships between Member

States relating to crystal glass, [Eng. Special Ed. 1969 (II)] O.J. EUR. COMM. (No. L 326/36) 599 (Dec. 29, 1969).

70. Cf. Part I-C-5 *supra*. But see Part II-C-1 *infra*.

71. Convention of Association between the European Community and Associated African States and Madagascar, July 29, 1969, [Eng. Special Ed. 2d Series I(2)] O.J. EUR. COMM. (No. L 282) 1 (Dec. 28, 1970).

72. Act of Accession of 1972, *supra* note 38, arts. 109, 114.

73. See Part I-C-4 *supra*.

74. Council Regulation (EEC) No. 1736/79, on interest subsidies for certain loans granted under the European monetary system, art. 8, 22 O.J. EUR. COMM. (No. L 200) 1, 2 (Aug. 8, 1979); Commission Answer to Written Question No. 1390/83 by Mr. Pearce, 27 O.J. EUR. COMM. (No. C 52) 29 (Feb. 23, 1984).

75. Advisory Opinion 1/76, 1977 E. Comm. Ct. J. Rep. 741.

76. According to the Opinion, Ireland had expressed the wish not to be represented. 1977 E. Comm. Ct. J. Rep. at 758. We must deduce that consensus is not an argument to legalize an otherwise illegal arrangement.

States within the context of the Community."⁷⁷

2. In *Holtz & Willemsen GmbH v. Council and Commission of the European Communities*,⁷⁸ the Court examined the legality of an additional subsidy introduced by a Council Regulation limited to oil seeds harvested in the Community and produced in Italy. The Court's reasoning is of such fundamental importance to our subject that we will quote it in full:

The objectives referred to in Article 40 of the Treaty, that is the establishment of a common agricultural policy and a common organization of agricultural markets, presupposes [*sic*] the adoption of common rules and criteria and the consequent exclusion of any discrimination based on the nationality or locality of the oil mills.

In this light the various factors in the common organization of the markets, protective measures, aids, subsidies, etc. may be distinguished according to the areas and other conditions of production or consumption only in terms of criteria of an objective nature which ensure a proportionate distribution of advantages and disadvantages for those concerned without distinguishing between the territory of Member States.

Additional subsidies limited to oil mills established in one of the Member States are therefore in general incompatible with the objectives of the common agricultural policy in so far as they are not justified by circumstances special to the whole of the national market in question.

At its initiation however the common organization of the market may not completely measure up to the objectives listed in Article 39 of the Treaty and may contain gaps capable of endangering the stability of the market in a part of the Community.

Although it is incumbent upon the institutions responsible to seek with all due diligence the causes of such difficulties and to adapt the regulations on the common organization of the markets as soon as possible to remedy the defects revealed, they are at liberty, in the meantime, to take provisional measures, which are limited to those Member States in which the market has been more particularly affected.⁷⁹

3. The judgment of the Court of Justice in *Milac GmbH v. Hauptzollamt Freiburg*⁸⁰ discussed the legality of differentiated intervention prices for skimmed-milk powder and so-called corrective amounts intended to neutralize the price differences. The Court repeated the first two paragraphs of ground 13 of the *Holtz & Willemsen* decision and added: "Therefore the principle of non-discrimination between producers or consumers within the Community is one of the fundamental principles of the Treaty which must

77. 1977 E. Comm. Ct. J. Rep. at 757 (grounds 9, 10). The Court's criticism goes much further. It considers the results of the negotiations "incompatible with the requirements implied by the very concepts of the Community and its common policy." 1977 E. Comm. Ct. J. Rep. at 757 (ground 8). "The Court is of the opinion that the structure thereby given to the Supervisory Board and the arrangement of the decision-making procedure within that organ are not compatible with the requirements of unity and solidarity." 1977 E. Comm. Ct. J. Rep. at 758 (ground 12). We do not believe, however, that this criticism is pertinent in this context, as it relates to the quite different problem of substitution of Member States for the Community and its institutions.

78. (Case No. 153/73), 1974 E. Comm. Ct. J. Rep. 675.

79. 1974 E. Comm. Ct. J. Rep. at 695 (grounds 13-14).

80. (Case No. 8/78), 1978 E. Comm. Ct. J. Rep. 1721 (Preliminary Ruling).

be observed by any court."⁸¹

4. A third decision, *S.p.A. Eridania v. Minister of Agriculture and Forestry*,⁸² examined the legality of a derogation in favor of Italy to "alter" the production quotas for sugar "in so far as is necessary for the implementation of restructuring plans for the beet and sugar sectors."⁸³ The essential argument of the plaintiff was again discrimination. Without referring to the *Holtz & Willemsen* or *Milac* decisions the Court stated: "Discrimination within the meaning of Article 40 of the Treaty cannot occur if inequality in the treatment of undertakings corresponds to an inequality in the situations of such undertakings."⁸⁴ *In concreto*, the Court finds that the differences in treatment are "based on objective differences arising from the underlying economic situations; they cannot be considered discriminatory."⁸⁵

5. In *Kind KG v. EEC*,⁸⁶ the Court of Justice was confronted with the new common market organization for mutton and lamb and its various intervention mechanisms. Referring to earlier decisions, the Court recalled that different treatment may not be regarded as discrimination "unless it appears to be arbitrary, or in other words, as stated in other judgments, devoid of adequate justification and not based on objective criteria."⁸⁷

6. It may be useful to add that none of the Court's decisions dealing with problems of differentiated application mentions the principle of the universality of Community law (the "*principe d'unicité*") to which the Commission's text of 1978 refers.⁸⁸ The Court's judgments confirm, however, the view that differentiation is not confined to directives and decisions. The decision in *La Compagnie d'Approvisionnement v. Commission*⁸⁹ is particularly instructive, leaving no doubt that the regulations concerning trade with France after the devaluation of the French franc are real regulations.

D. Theoretical Analysis

On the basis of our findings of fact with respect to primary Community law, the practice of Community institutions, and the decisions of the Court of Justice, we will try to approach the problem of differentiated application in a more general theoretical manner.

81. 1978 E. Comm. Ct. J. Rep. at 1732-33 (ground 18).

82. (Case No. 230/78), 1979 E. Comm. Ct. J. Rep. 2749 (Preliminary Ruling).

83. 1979 E. Comm. Ct. J. Rep. at 2765.

84. 1979 E. Comm. Ct. J. Rep. at 2767 (ground 18).

85. 1979 E. Comm. Ct. J. Rep. at 2768 (ground 19).

86. (Case No. 106/81), 1982 E. Comm. Ct. J. Rep. 2885.

87. 1982 E. Comm. Ct. J. Rep. at 2921 (ground 22).

88. *See Enlargement of the Community*, *supra* note 2, ¶ 52, at 17; Part I-D *supra*. The same principle is invoked by Dewost, *supra* note 19, who deduces it from articles 3, 7 and 189 of the EEC Treaty. Is it possible that the so-called universality principle is influenced by the need, emphasized by the Court, to ensure uniform and simultaneous application of Community law throughout the Community? *See Felli Variola SpA v. Amministrazione italiana delle Finanze* (Case No. 34/73), 1973 E. Comm. Ct. J. Rep. 981, 992 (Preliminary Ruling). It should be noted, however, that in this last case we are dealing with the relationship between Community law and national law, i.e., the notions of direct effect and supremacy of Community law.

89. *Compagnie d'Approvisionnement de Transport et de Crédit v. Commission* (Case No. 65/69), 1970 E. Comm. Ct. J. Rep. 229, 234.

1. The starting point is simple. With the exception of article 4(6) of the Decision on own resources concerning supplementary research programmes, primary Community law is silent on the subject. Whether and to what extent differentiation is allowed is therefore a matter of interpretation.

2. Secondary Community law must conform to the general tasks of the Community⁹⁰ and to the more specific objectives assigned to its different policies.⁹¹ Grabitz and Langeheine⁹² have shown that differentiation is not per se incompatible with these tasks and objectives. Even if the Treaty does not expressly enumerate the specific objectives of a certain activity, those objectives can normally be deduced by interpretation. For example, article 100 would clearly be infringed if a differentiating directive, instead of approximating the laws of Member States, were to aggravate existing differences;⁹³ the same would apply if a directive based on article 54(3)(g) were to make existing safeguards more divergent.⁹⁴

3. Secondary Community law must conform to general principles of Community law. In essence, this means in our context that differentiated applications must respect the principle of nondiscrimination.⁹⁵ Since we are examining the limits of differentiation, we are not concerned with the problem that a uniform rule might be illegal because it does not take into account existing inequalities. We are faced with the opposite question: are the differences in the rule illegal because the situations to which the rule applies are the same or can the differences in the rule be justified by existing inequalities?

It is well known that categorizing facts for the purpose of the nondiscrimination test is one of the most difficult tasks that a lawyer has to face. He has not only to establish whether there *are* factual differences; he has also to determine whether those differences are relevant or irrelevant in the light of the Community legal system in which he operates. The Community legal order is obviously not a "neutral" legal system. It is permeated by the general tasks of articles 2 and 3 of the Treaty, particularly the assignment to establish a common market and progressively to approximate the economic policies of the Member States. It is in line with these objectives that Community law has a natural tendency to overlook factual differences instead of emphasizing them. It will therefore be difficult to argue that the Community legislature has violated the principle of nondiscrimination in adopting a uniform rule, in spite of natural differences; the goals of the Treaty establish a sort of presumption in favor of uniformity.

This does not mean, however, that Community institutions are not enti-

90. See EEC Treaty, *supra* note 4, arts. 2, 3.

91. *E.g.*, EEC Treaty, *supra* note 4, art. 39 (the common agricultural policy).

92. See Grabitz & Langeheine, *supra* note 5; Langeheine, *supra* note 6.

93. This example is taken from *Enlargement of the Community*, *supra* note 2, at 17.

94. This example is given by Olmi, *supra* note 52, at 105.

95. See *Albert Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen* (Nos. 117/76, 16/77), 1977 E. Comm. Ct. J. Rep. 1753, 1769 (Preliminary Ruling); see also *H.O. Wagner v. Bundesanstalt für landwirtschaftliche Marktordnung* (Case No. 8/82), 1983 E. Comm. Ct. J. Rep. 371, 387 (Preliminary Ruling); *Moulins et Huileries de Pont-à-Mousson v. Office National Interprofessionnel des Céréales* (Nos. 124/76, 20/77), 1977 E. Comm. Ct. J. Rep. 1795, 1811 (Preliminary Ruling).

bled to take into account factual differences in pursuing their efforts to reach the goals of the Treaty. But the essential question remains: what are those factual — or, in the words of the Court of Justice, "objective" — differences that justify differentiation?

Without going into details, we would like to suggest that under existing Community law a fundamental distinction must be made between economic and social factors on the one hand and political phenomena on the other. Economic and social differences (both terms used in the widest sense) can in principle justify differentiation; purely political phenomena cannot.⁹⁶ For instance, the fact that the British government (or the majority in Parliament or even public opinion in the United Kingdom) is opposed to joining the European monetary system would not be a valid argument for differentiation (provided the rules governing the EMS were Community law). However, if the British pound were still in a special position compared with other currencies, a case could be made for a derogation in favor of the United Kingdom. This distinction and the resulting limitation on differentiation are essentially what make it impossible, *de lege lata*, to use the "two speed" concept. A Treaty amendment would be necessary in order to vitiate the distinction.

It is obvious that the existence of legitimate, factual (objective) differences is not enough, in itself, to justify any differentiation. The difference in treatment has to be proportionate to the differences in the factual (objective) situations. Also, since differences that exist today may disappear or diminish tomorrow, the differentiated rule must be adaptable to changing circumstances.⁹⁷

The nondiscrimination test must also be applied to all differentiating rules, i.e., including those which grant a certain Member State a longer period for implementation. Even if in view of the principle of progressiveness or gradualness such an extension is relatively benign, it should be justified by objective differences.⁹⁸

We are convinced — as indicated earlier⁹⁹ — that the answer to the question of discrimination has to be independent of the type of decision-making process (consensus or majority voting). Discrimination does not disappear because there is assent!

4. One might ask whether, in addition to the principle of nondiscrimination, the Community legislature must respect a prohibition of distortion of competition. We do not believe that a separate general principle of this kind exists; it is included within the principle of nondiscrimination.

5. Secondary Community law must also be in conformity with the spe-

96. See Dewost, *supra* note 19, at 264.

97. Whether the same is true where the factual situation remains unaltered is examined in Part II-D-6 *infra*.

98. Olmi, *supra* note 52, at 106, seems to require respect of the nondiscrimination principle only with respect to substantive rules, not for the granting of a longer deadline for implementation.

99. See Part I-B *supra*. More generally, we do not agree with Langeheine's insufficient considerations with respect to the discrimination problem. See Langeheine, *supra* note 6, at 239. His earlier publication hardly mentions the problem. See Grabitz & Langeheine, *supra* note 5, at 41.

cific prohibitions enunciated by the Treaty in order to establish the Common Market. It is true that according to their wording these prohibitions are addressed to the Member States. However, article 9 ("The Community shall be based upon a customs union . . . which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect . . .") and articles 30 and 34 ("Quantitative restrictions . . . shall . . . be prohibited between Member States.") express fundamental rules which must be respected by Community institutions also.¹⁰⁰ The same applies, *mutatis mutandis*, to the prohibitions enunciated in articles 48, 52 and 59.¹⁰¹

These considerations explain the conclusions of the Court of Justice in *Société Les Commissionnaires Réunis v. Receveur des Douanes*:¹⁰²

It is clear from all these provisions and their relationship *inter se* that the extensive powers, in particular of a sectorial and regional nature, granted to the Community institutions in the conduct of the Common Agricultural Policy must, in any event as from the end of the transitional period, be exercised from the perspective of the unity of the market to the exclusion of any measure compromising the abolition between Member States of customs duties and quantitative restrictions or charges or measures having equivalent effect.¹⁰³

Until recently, the only exception to this rule admitted by the Court of Justice concerned monetary compensatory amounts.¹⁰⁴ In *Kind KG v. EEC*,¹⁰⁵ the Court went a step further: it accepted the legality of the so-called "claw-back," a tax charged on all exports of mutton and lamb from Member States that have opted for a support system operating through subsidies to farmers. The reasoning of the Court, justifying the claw-back despite the prohibition of charges having equivalent effect and the requirement of conditions for trade similar to those existing in a national market, is general and could be applied to other situations. But it is strongly colored by the

100. See *Syndicat national des fabricants raffineurs d'huiles de graissage v. Groupement d'intérêt économique "Inter-Huiles"* (Case No. 172/82), 1983 E. Comm. Ct. J. Rep. 555, 571-72 (opinion of Mrs. Advocate General Rozès); *Yoshida v. Kamer van Koophandel en Fabrieken voor Friesland* (Case No. 34/78), 1979 E. Comm. Ct. J. Rep. 115, 147-48 (Preliminary Ruling) (opinion of Mr. Advocate General Capotorti); *Simmenthal v. Amministrazione delle Finanze dello Stato* (Case No. 70/77), 1978 E. Comm. Ct. J. Rep. 1453, 1470 (Preliminary Ruling); see also *REWE v. Landwirtschaftskammer Rheinland* (Case No. 37/83) (Ct. J. Eur. Comm. Feb. 29, 1984, not yet published), *digested in* 1984 PROC. CT. J. EUR. COMM., No. 7/84, at 7, 8 (Feb. 27-Mar. 2).

101. EEC Treaty, *supra* note 4, art. 48 (secures freedom of movement for workers), art. 52 (protects freedom of establishment), art. 59 (abolishes restrictions on freedom to provide services).

102. (Nos. 80/77, 81/77), 1978 E. Comm. Ct. J. Rep. 927; see also *Commission v. Council* (Case No. 218/82) (Ct. J. Eur. Comm. Dec. 13, 1983), 1984 COMMON MKT. REP. (CCH) ¶ 14,019, *digested in* 1983 ECJR 126 (concerning the allocation and administration under the Lomé Convention of a Community tariff quota for rum).

103. 1978 E. Comm. Ct. J. Rep. at 946-47.

104. See *Société Les Commissionnaires Réunis S.à.r.l. v. Receveur des Douanes* (Nos. 80, 81/77), 1978 E. Comm. Ct. J. Rep. 927, 947 (ground 37); see also *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof* (Case No. 5/73), 1973 E. Comm. Ct. J. Rep. 1091, 1112-13 (preliminary ruling); *Rewe-Zentral AG v. Hauptzollamt Kehl* (Case No. 10/73), 1973 E. Comm. Ct. J. Rep. 1175, 1192 (preliminary ruling).

105. (Case No. 106/81), 1982 E. Comm. Ct. J. Rep. 2885, 2920, 2922 (grounds 21 & 27).

particular circumstances of the case, namely the belated — and extremely difficult — establishment of a common market organization for mutton and lamb, and its progressive character.¹⁰⁶

Unlike the violation of the principle of nondiscrimination, the prohibition against restrictions within the Community does not directly affect the legality of rules that differentiate among Member States. But this prohibition makes it impossible to use certain methods (like charges and measures having equivalent effect) without which differentiation cannot work. Because prohibition is both stricter and more demanding than the principle of nondiscrimination, it is probably a more efficient limitation on the possibilities of differentiation than any general rule.

6. A final problem concerning the question of differentiation and time remains to be solved. Do rules which differentiate among Member States have to be limited in time, and if so, what are the ultimate deadlines? In *Holtz & Willemssen*, the Court of Justice certainly took the view that the subsidy in favor of Italian oil mills had to be limited in time.¹⁰⁷ The references in *Kind KG v. EEC* to the general approach of the Council, its aim to achieve a uniform market by degrees and the developing character of the common market organization,¹⁰⁸ are signs pointing in the same direction. It should be noted, however, that the regulation establishing the common market organization for mutton and lamb does not contain a deadline terminating the initial differentiation.

What is the legal explanation for the requirement of a deadline? Is it that objective differences which initially justified different treatment — and which persist — are no longer legitimate? Or does the requirement of a time limit flow from the obligation on the Council to act within a certain period (like the obligation under article 40 to establish during the transitional period a common organization of agricultural markets for all products or under article 75(1)(a) and (b), to lay down common rules and conditions for a common transport policy)? Or is the obligation to put an end to differentiation inherent in the notion of the Community?

We must admit that we find these questions even more difficult than the application of the nondiscrimination principle. There is no hard and fast rule or easy answer; rather, the solution will depend on a series of factors which have to be evaluated together. The two most important factors are certainly the type of situation which justifies differentiation and the existence (or absence) of an obligation to act. While natural differences (like climate and distance) are likely to justify permanent differentiation, situations that are the product of the historical development of human societies are more likely to call for only temporary differentiation. This is particu-

106. The difficulties preceding the adoption of the common market organization for mutton and lamb in 1980 are illustrated by the decisions of the Court of Justice in *Commission v. France* (Case No. 232/78), 1979 E. Comm. Ct. J. Rep. 2729, as well as the Commission's attempt to obtain interim measures by the Court in *Commission v. France* (Nos. 24, 97/80), 1980 E. Comm. Ct. J. Rep. 1319.

107. See Part II-C-2 *supra*.

108. See *Kind KG v. EEC* (Case No. 106/81), 1982 E. Comm. Ct. J. Rep. 2885, 2921-22 (grounds 24 & 27).

larly so if they are at the root of differentiation in areas where the Community has a precise obligation to act in order to bring about a certain result.

Another factor that has to be taken into account is the consequence of differentiation. Differentiation which is unlimited in time but which leads to interference with one of the fundamental freedoms is certainly more difficult to justify than the same type of differentiation in peripheral areas of the common market. However, this factor must not be overrated. We must remember that the Court of Justice has upheld the claw-back and the system of monetary compensatory amounts, neither of which is limited in time. Finally, there is the ideal of the Community itself. Together with other factors, it will be a powerful argument in favor of a time limit; yet it will hardly suffice alone — unless one succumbs to the temptation to take one's personal wishes for legal stringency.¹⁰⁹

7. Let us assume that the Council has adopted a rule that legitimately differentiates among Member States; it has decided against a time limit though it was legally bound to establish one. What are the consequences of such an omission? Does it affect the legality of the rule,¹¹⁰ and if so, from the very beginning or only from the date which the Council should have fixed? Or is the omission without consequences for the differentiating rule, but simply the source of an action for failure to act?¹¹¹

The answer to these questions is obviously influenced by the solution to the problem discussed above. If the requirement of a time limit flows from the notion of discrimination, the legality of the differentiating rule is certainly at issue. But if this requirement is rather the result of an obligation on the Council to act within a certain period, might it not be more appropriate to use article 175?

III. CONCLUSION

We will not answer this last question, as we have not been able to solve the preceding, more fundamental problem. We hope, however, to have shown that the scope for differentiation in existing Community law is considerable. It is probably greater than most observers believe. Its exact limits depend essentially on three key questions: the principle of nondiscrimination; the prohibition of obstacles within the Community; and the more or less open question of the extent to which differentiation must be limited in time.

Because existing Community law leaves considerable room for differentiation, there is much less need for the introduction of the "two speed" concept than is normally assumed. Even more important, however, are the complexities of any Treaty amendment intended to legalize this concept. The "threshold" for such an amendment is very high indeed. It seems,

109. Olmi, *supra* note 52, at 105-06, seems to take a different view. It should, however, be noted that he does not require immediate respect of the principle of nondiscrimination. *See* note 98 *supra*.

110. *See* EEC Treaty, *supra* note 4, art. 173 (providing for challenge before the Court of Justice of the legality of Council acts).

111. *See* EEC treaty, *supra* note 4, art. 175 (providing for challenge before the Court of Justice of the Council's failure to act after demand has been made).

therefore, safe to assume that the "two speed" concept will never become the subject matter of a formal Treaty amendment.

That does not mean, however, that the Community will never use *de facto* methods which might be very close to this concept, even while denying what it is doing. It will defend its actions on the basis of the existing possibilities of differentiation. Experience will finally show how wide these are.