

4-1-1963

Jurisdictional Relationship between the Court of the European Communities and the Courts of the Member States

Arthur Lenhoff
University at Buffalo School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Conflict of Laws Commons](#)

Recommended Citation

Arthur Lenhoff, *Jurisdictional Relationship between the Court of the European Communities and the Courts of the Member States*, 12 Buff. L. Rev. 296 (1963).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol12/iss2/11>

This Leading Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

JURISDICTIONAL RELATIONSHIP BETWEEN THE COURT OF THE EUROPEAN COMMUNITIES AND THE COURTS OF THE MEMBER STATES*

ARTHUR LENHOFF**

I

INTRODUCTORY OBSERVATIONS

Also from the standpoint of supranational jurisdiction and adjudication, the three European Communities created in the nineteen-fifties require particular attention.⁴⁶⁸ These Communities are based on treaties entered into between the "Six," as the member States are usually called, i.e., Belgium, France, (West) Germany, Italy, Luxemburg, and The Netherlands. Those treaties are the Paris Treaty of 1951 (in effect since July 23, 1952) on which the European Coal and Steel Community, hereinafter called E.C.S.C., is founded, the Rome Treaties of 1957 (effective date January 1, 1958) which established the European Economic Community, hereinafter called E.E.C., and the European Atomic Energy Community, called Euratom. For the purpose of the following discussion the E.C.S.C. and E.E.C. are of particular significance while Euratom on the whole reflects the legal features of the E.E.C. Treaty.

The bases and operations of the Communities cannot be considered under the aspect of mere international treaties regulating relations between states. This is manifested by many features, as will be seen. The effect of regulations and decisions of the organs of the Communities upon member States as well as private parties is one of them.

For the purpose of carrying out the tasks entrusted to it by the Treaty, the E.C.S.C. Treaty authorizes the High Authority—its chief executive—to issue decisions which are binding in any respect.⁴⁶⁹ However, it would be a mistake to identify the term "decisions" in the sense as applied by the Treaties with an adjudication of a particular situation. The term covers much more than an individual adjudication. This can be seen from the E.C.S.C. Treaty which distinguishes between "individual" and "general" decisions.⁴⁷⁰ The Court of Justice—hereafter this Court of the Communities will be designated as

* This article constitutes the Appendix to Chapter VI of the author's book on Jurisdiction and Judgments: A Comparative Study, which the Parker School of Foreign and Comparative Law (Columbia University) intends to publish.

The footnotes in this article are numbered as in the original manuscript.

** Distinguished Professor of Law Emeritus, State University of New York at Buffalo, School of Law. D.U.J., University of Vienna, Austria; Professor of Law, University of Vienna (until 1938); Judge of the Austrian Constitutional Court (1929-1934); admitted to practice in New York, 1946.

468. This double aspect is the justification for the inclusion of the problems within a special sector of this Chapter.

469. E.C.S.C. treaty article 14.

470. Cf. E.C.S.C. treaty articles 14, 33 and E.E.C. treaty article 189. Buergenthal, *Appeals for Annulment by Enterprises in the E.C.S.C.*, 10 Am. J. Comp. L. 227, 247 (1961).

JURISDICTIONAL RELATIONSHIP

“Court”⁴⁷¹—has defined a “general” decision as a quasi-legislative measure creating norms which might be applicable *erga omnes*.⁴⁷²

The similarity of such general decisions with statutory enactments is expressed in more distinguished terms in the E.E.C. Treaty. By article 189 of this Treaty, the Council and the Commission—the latter is the chief administrative organ of this Community—are authorized to frame regulations and directives, to take decisions and to issue recommendations. The “regulations” have been compared with our Federal statutes because they establish general rules which are directly applicable without the need of member state legislation.⁴⁷³

In order to achieve common rules, the Council shall, as articles 100 and 101 of the E.E.C. Treaty prescribe, issue directives for the harmonization of the laws and regulations of the member States which directly affect the establishment or operation of the Common Market or for the correction of differences between the laws of the member States where such laws interfere with the conditions of competition on the Common Market.

Regulations enacted by the organs of the Communities within their sphere are directly binding upon member States. Decisions (in the narrow sense) of these organs obligate directly the member State and the private parties to which they relate.⁴⁷⁴ Furthermore, the treaties impose the duty on the member States to take, on the one hand, all general or particular measures which are appropriate to ensure the carrying out of the obligations arising out of the treaty in question and, on the other hand, to abstain from any measures which might jeopardize the attainment of the objectives of the treaty.⁴⁷⁵

It is true that if legislative or administrative acts of a member State are in conflict with its obligations under the treaty, the Court cannot annul those acts. So the Court itself declared in *Humblet v. State of Belgium*.⁴⁷⁶ However, the Court added: “If the Court declares in its judgment that a legislative or an administrative act of a member State violates Community law, then this State is required under article 86 of the E.C.S.C. Treaty to repeal this act and to remedy the legal consequences caused possibly by this act. This obligation

471. Since October 7, 1958, one single court of justice of the European Communities exists. Thus, by this court the Court of Justice of E.C.S.C. was replaced. In similar manner the single Assembly has replaced the Common Assembly of the E.C.S.C. Cf. articles 1 and 3 of the Rome Convention on Common Institutions of the European Communities of March 27, 1957. For an English translation of this Convention see 51 Am. J. Int. L. 1000.

472. Court, *Firma Nold v. H. A.*, case no. 18-51, 5 Sammlung der Rechtsprechung des Gerichtshofes (hereupon called Slg.) 89, 112 (1958). Cf. Buergethal *loc. cit.* (note 470 *supra*) 247.

473. Stein and Hay, *Legal Remedies of Enterprises in the E.E.C.*, 9 Am. J. Comp. L. 375, 376 (1960).

474. See E.E.C. articles 7, 85, 86 and E.C.S.C. articles 65, 66.

475. E.E.C. treaty article 5. The provision in the E.C.S.C. treaty article 86 is even more direct in the command. “The member states bind themselves to take any appropriate general and particular measures to assure the execution of their obligations . . . and to refrain from . . .”

476. See the reasoning of the Court in case no. 6-60 of December 16, 1960, *Humblet v. State of Belgium*, 6 Slg. 1163, at 1184; J (Clunet) 1962, 478.

(of the State) follows from the treaty . . . which has the force of law within the territories of the member States as a result of their ratification and which has precedence over national law."⁴⁷⁷

Also according to the E.E.C. Treaty, a judgment of the Court affirming such a violation of a member State's obligation imposes the duty on the State to comply with the judgment which means to enact the necessary legislative or administrative changes.⁴⁷⁸ In the case of non-compliance by the State with such declaratory judgment of the Court, it is left to Council and Commission to decide whether any measures and what kind of them should be taken for obtaining compliance; for the E.E.C. Treaty itself—in contrast to the E.C.S.C. Treaty—does not provide for sanctions against the State.⁴⁷⁹

The foregoing discussion brings into focus features of Community law tellingly explaining why the Communities cannot be likened to mere international organizations. There is, *first*, the supremacy of Community law over State law, including the constitutional aspects of the latter. *Second*, many of the legislative, quasi-judicial and administrative decisions of these organs, i.e., the Council (composed of representatives of the member States), the High Authority of the E.C.S.C., and the Commission of the E.E.C. have binding effect also upon private parties with respect to the activities of the latter. *Third*, the exercise of jurisdiction by the Court over a member State is not conditioned on voluntary submission; a fact which presents a remarkable example of an encroachment on the traditional area of sovereignty.⁴⁸⁰ *Fourth*, the validity of an official act of a member State can be questioned by the organs of the Community or by another member State. *Fifth*, even private parties are subject to Treaty provisions controlling their activities. Furthermore, they have a standing before the Court⁴⁸¹ and may even, where Community law so provides, institute proceedings in the Court against their own State.⁴⁸²

All this helps to make the point that the six European States are welded in two single supranational units for certain vital purposes.

It goes without saying that the Communities are legal persons which can sue and be sued in the State courts.⁴⁸³ In the light of international law the Communities present a form of composite state sui generis. The E.E.C. is a customs union,⁴⁸⁴ but it is much more than that. Its principal purpose of estab-

477. *Id.* at 1184, referring to E.C.S.C. article 88.

478. E.E.C. Treaty article 171.

479. 2 Groeben and Boeckh, Commentaries on the E.E.C. Treaty 127 (1960, in German).

480. E.E.C. Treaty articles 169-171. The contrast to the condition upon which the International Court of Justice can assume jurisdiction is obvious.

481. See E.C.S.C. Treaty article 33(2) and E.E.C. Treaty articles 173(2), 175(3).

482. *Humblet v. State of Belgium*, quoted in note 476 *supra*, 6 Slg. at 1188/9.

483. E.C.S.C. Treaty article 6; E.E.C. Treaty article 211.

484. 1 Groeben and Boeckh *op. cit.* (note 479 *supra*) p. XIII and XIV. Ouin, Establishment of the Customs Union (in 1 Stein and Nicholson, American Enterprise in the European Common Market) 101 (1960).

JURISDICTIONAL RELATIONSHIP

lishing a common market requires the coverage of almost all fields of economy and even of the control over competition and of the regulation of restrictive business agreements and practices.

Naturally, serious legal difficulties are encountered by the complex relation between Community law on the one hand and the laws of the member States on the other. Obviously, the very objectives of the Communities call for uniform interpretative decisions on all matters within the scope of the treaties which means within the wide area of their application. On the other hand, the activities of the business enterprises are subject to the jurisdiction of both the Communities and the member States. The desire to create an independent judicial organ that has the function to find solutions of the intricate problems involved points to the *raison d'être* of the multinational⁴⁸⁵ Court.

II

THE RELATION BETWEEN JURISDICTION OF THE COURT AND THAT OF MUNICIPAL COURTS IN MATTERS NOT BASED ON COMMUNITY LAW

(aa) The jurisdiction of the Court has an exceptional character.⁴⁸⁶ The scope covered by it is limited. In this sense article 183 of the E.E.C. Treaty declares that, subject to the authority conferred upon the Court by the Treaty, jurisdiction over disputes to which the Community is a party is not withdrawn from the national courts. For this reason it would be unjustified to read a general jurisdictional clause into the articles 31 of the E.C.S.C. Treaty and 164 of the E.E.C. Treaty. Despite the general language used in these articles (the wording of which is quoted in the margin⁴⁸⁷) a court review cannot be obtained of each and every aspect of the activities of the executive organs of the Communities.⁴⁸⁸

There are very few types of private-law litigation which fall within the exclusive jurisdiction of the Court. It is of course true that litigations between the E.E.C. and its employees fall, according to the Treaty, under the jurisdiction of the Court,⁴⁸⁹ and that its decision will not be controlled by state law but by the Regulations concerning "the service for officials and the conditions of employment for other employees."⁴⁹⁰

However, by contrast, no such *exclusive* jurisdiction of the Court exists

485. The seven judges of the Court are appointed for a term of six years by agreement among the Six. E.E.C. Treaty article 167(1), E.C.S.C. Treaty article 32a-c.

486. Bebr, *The Relationship Between Community Law and the Law of the Member States* (in Int. L. and Comp. L.Q. Suppl. publication no. 4) 8 (1962) and in *The Relation of the E.C.S.C. Law to the Law of the Member States: a Peculiar Legal Symbiosis*, 58 Colum. L. Rev. 767, 769 (1958); Ropers, *Conflict Between the Court of Justice of the Communities and the National Jurisdiction*, 36 JCP 1962.1.1709 (in French).

487. The wording of these articles reads: "The Court shall ensure observance of law and justice in the interpretation and application of the treaty."

488. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 109. See there also the reference to contrary views.

489. E.E.C. Treaty article 179.

490. By article 212 of the E.E.C. Treaty the Council has been authorized to enact, in collaboration with the Commission, such a regulation.

over this type of litigations where the E.C.S.C. and its employees are concerned. In the first decision rendered in such a case the Court pointed out that its jurisdiction is based on article 42 of the E.C.S.C. Treaty on which the plaintiff-employee heavily relied, and on article 27 of the Internal Regulation of December 1, 1953.⁴⁹¹ The reference to these provisions, particularly article 42, shows that where the Court entertains the proceedings, it is the parties' will which has conferred jurisdiction over such a matter on the Court. It goes without saying that in the absence of such conferment the municipal courts would have the jurisdictional authority to hear and to decide such litigations.

Simultaneously, this remark serves to underscore two important facts. *First.* Concerning subject-matter jurisdiction, the scope of jurisdiction of the Court under the E.E.C. Treaty is not coextensive with that provided for in the E.C.S.C. Treaty.

Second. As for matters other than those subject to the jurisdiction of the Court, the Communities are not exempt from the jurisdiction of the national courts and other national authorities; for the Protocols (integrated in the Treaties) concerning Privileges and Immunities of the E.C.S.C. and of the E.E.C. grant them only the usual relief from taxes and custom duties, and warrant the inviolability of their premises and so on. Naturally, also the taking of measures of forced execution by courts or administrative agencies of the national states against property, including claims, of the Communities is restricted by the Treaties; such executionary measures are not excluded but they can be taken only upon an authorization on the part of the Court.⁴⁹²

(bb) Thus, as a rule, state courts maintain their jurisdictional power over the Communities in all litigations arising out of contracts and other transactions. As the first paragraph of article 215 expressly states, the law which according to the conflict rules of the forum controls the contract at issue, must be regarded also as determinative with respect to matters relating to the responsibility of the Community.⁴⁹³ There are two exceptions. But the exceptions concern only the jurisdictional delimitation between the Court and the national courts. They do not go to the applicable law because in neither of the exceptional situations Community law is to be applied.

The first exception concerns litigations arising out of contracts of the Communities. The Treaties provide for concurrent jurisdiction. The Court

491. Court, *Kergall v. Common Assembly of the E.C.S.C.*, case 1/55, 2 Slg. 9, 21. According to article 42 of the E.C.S.C. Treaty the Court shall exercise jurisdiction where it may be so provided in a contract to which the Community is a party or which is undertaken on its behalf. For the conclusion that the jurisdiction in such disputes is one created only by the parties' choice, see also the Official Comments (*Denkschrift*) of the German Federal Government on the E.E.C. Treaty as to § 179 (in German).

492. E.C.S.C. Treaty article 76 and Protocol on Privileges and Immunities of April 18, 1951; E.E.C. Treaty articles 218, 239 and Protocol on Privileges and Immunities of April 17, 1957, particularly article 1 cl. 3.

493. The law of Belgium, within the territory of which, *i.e.*, in Brussels the seat of the organs of the E.E.C. is, will in the absence of a different intent of the parties be regarded as the controlling law. *Cf.* 2 *Groeben and Boeckh op. cit.* (note 479 *supra*) 188, 359.

JURISDICTIONAL RELATIONSHIP

is competent to adjudicate such a litigation only if the parties to the contract have therein conferred jurisdiction on the Court.⁴⁹⁴

In the second place, the Court possesses exclusive jurisdiction over actions against a Community for damages caused through the fault of an organ or an employee of the Community in the course of his function.⁴⁹⁵ The E.E.C. Treaty refers in article 215(2) to "the general principles common to the laws of the member States," as to the legal source for the liability of the Community in cases of this type.

True, the corresponding provision of the E.C.S.C. Treaty—article 40—does not contain such a reference to the general principles of the law of the member States. However, in *Algera v. Common Assembly* the Court held that in the absence of a Treaty rule resort must be taken to the "rules recognized in legislation, doctrine, and decisions of the member States."⁴⁹⁶ Accordingly, with respect to either Community not only the question of damages but also the questions as to whether the act of the organ or of the employee was a faulty official act (*faute de service*), that is, a service-connected fault,⁴⁹⁷ and whether liability requires a certain higher degree of culpability⁴⁹⁸—wilfulness or gross negligence—are to be determined on the basis of those general principles. From the first paragraph of article 40 of the E.C.S.C. Treaty can be seen that the regulation of the jurisdiction of the Court over such claims follows the same line.

However, the Court has no jurisdiction over actions against the E.E.C. for damages caused by wrongful acts committed by an official or employee outside his official activities. Such wrongful acts are called "personal faults."⁴⁹⁹ Accordingly, the adjudication over such claims belongs to the courts of the member State within the territory of which the act was committed.⁵⁰⁰

At this point it is interesting to note that the E.E.C. Treaty departs from the E.C.S.C. Treaty in the jurisdictional approach as well as in the matter of

494. E.E.C. Treaty article 181; E.C.S.C. Treaty article 42.

495. E.E.C. Treaty articles 178, 215(2); E.C.S.C. Treaty article 40, Protocol on the Privileges and Immunities of the E.E.C. article 11(a).

496. Court, July 12, 1957, *Algera et al. v. Common Assembly* (E.C.S.C.), cases 7/56 and 3-7/57, 3 Slg. 83, 118 [the action was based on the unlawful revocation of provisions of the regulation concerning terms of service of the plaintiffs in question].

497. The French Council of State has for more than 100 years developed, without the help of legislation, the liability of the state for damages caused by service-connected faults of officials and employees of the state. However, the state has been held not to be responsible if the illegal or tortious act of the officer or employee is not connected with the exercise of his official duties; and is therefore a "personal fault." For the French theory see the Conclusions of the Commissaire, Conseil d'Etat July 26, 1918 (Lemonnier), S.1918.II.41. It is not disputed that the draftsmen's approach to these questions was strongly influenced by the French doctrines.

498. In the *Algera* case, note 496 *supra*, 3 Slg. at 133, the Court brought up the question of the kind of culpability required, but did not hold it necessary to decide the question because the procedural irregularity committed by the organ of the defendant presented a sufficient basis for the latter's liability. *Id.* at 133.

499. For the distinction between personal faults and service-connected faults see note 497 *supra*.

500. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 363.

responsibility of the Community toward third parties for wrongful acts of officials or employees committed at the occasion of their services, but not directly connected with their performance.⁵⁰¹ According to the second paragraph of article 40 of the E.C.S.C. Treaty the Court is clothed with exclusive jurisdiction over claims of this kind raised against officials and employees or against the Community. However, the Treaty limits this vicarious liability of the Community in two ways. On the one hand, the Community is liable only if it is impossible for the injured party to recover damages from the tortfeasor. On the other hand, the Court can charge the Community only with "equitable damages." According to this concept, adopted by the German and Belgian civil codes for a certain type of case, the Court in determining the extent of compensation has to take into account the individual circumstances, particularly also the economic situation of the claimant.⁵⁰²

Turning to the E.E.C. Treaty, we see that the Court lacks jurisdiction over a claim of a third party against the Community for this kind of faults of employees. Such claims belong to the jurisdiction of the national courts.⁵⁰³

It may be added that Community law based on the treaties and other supranational enactments and decisions denies the Court as well as the national courts jurisdiction over claims of third parties against an official or employee for damages caused by service-connected faults. The exclusion of the jurisdiction of the Court follows simply from the silence of the E.C.S.C. Treaty and the E.E.C. Treaty. Concerning national courts, the Protocols on Privileges and Immunities, mentioned previously, have granted officials and employees of the Communities exemption from State jurisdiction as to acts performed by them in their official capacity, including speeches and writings.⁵⁰⁴ However, since the Communities are burdened with the liability for damages caused by such acts, the injured parties are not prejudiced by the exemption.

It should be noted that the third paragraph of article 215 of the E.E.C. Treaty refers the question of the personal liability of officials and employees toward the Community to the Service Regulation and Terms of Employment.⁵⁰⁵ According to article 179 of this Treaty, jurisdiction is to be exercised by the Court in proceedings concerning this liability.

On the point of the liability of the employees toward the E.C.S.C. the Personal Regulation for the former contains a provision according to which the rights of the latter to indemnification from the former presupposes a particularly high degree of culpability in the exercise of their functions

501. Also the adoption of the term "personal fault," peculiar to French administrative law, demonstrates the influence of French law upon the E.C.S.C. Treaty in this matter. See article 40(2) of the E.C.S.C. Treaty.

502. E.C.S.C. Treaty article 40(2) (cl. 2). As for "equitable compensation," see German BGB § 829, Belgian civil code (as am. 1935) art. 1386 *bis*.

503. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 365/6.

504. Protocol on the Privileges and Immunities of the E.C.S.C. of April 18, 1951 article 11(a) and Protocol on the Privileges and Immunities of the E.E.C. of April 17, 1957 article 11(a).

505. For these regulations see article 212 of the E.E.C. Treaty.

JURISDICTIONAL RELATIONSHIP

or at the occasion thereof.⁵⁰⁶ However, in contrast to the E.E.C. Treaty, the E.C.S.C. Treaty does not vest the Court with jurisdiction as to matters relating to the employer-employee relationship. The reasons why, therefore, the jurisdiction of the Court must also in this matter be regarded as the result of the parties' will rather than of a command of the Treaty, has been discussed in the preceding pages.

III

COURT: THE SCOPE OF ITS EXCLUSIVE POWER TO DETERMINE COMMUNITY-LAW MATTERS

(a) Logically, the discussion of this jurisdictional subject requires first of all an answer to the question of what is Community law. From previous discussions in the Introductory Subsection, it could be seen that the concept of Community law is not coextensive with the rules laid down directly in the E.C.S.C. and E.E.C. Treaties, their annexes, annexed Protocols and implementing Conventions;⁵⁰⁷ it reaches far beyond that. All the regulations and general directives laid down by the governing organs of the Communities—the Council and the High Authority of the E.C.S.C. and the Commission of the E.E.C.—and their decisions, particularly the “general decisions” rendered by them, and, subject to some limitations, their recommendations and opinions, much as these types of legal norms may differ in form, scope and binding effect,⁵⁰⁸ are part and parcel of Community law.⁵⁰⁹

Since the Treaties have given the Communities the power to enter into international agreements or arrangements on certain matters,⁵¹⁰ it stands to reason that these agreements fall likewise within the scope of Community law.⁵¹¹

As will presently be seen, one of the main duties of the Court is that of deciding whether the previously mentioned legislative, quasi-legislative, quasi-judicial, or administrative acts of the organs of the Community are consistent with the Treaties to which they refer and with the limitations placed therein upon their authorization.

Equally, the normative effect of the decisions rendered by the Court must not be overlooked. The Court is the supreme interpreter of the Treaties and other sources of Community law. Like the decisional law of the highest

506. Personal regulations concerning the Personnel, article 14.

507. E.C.S.C. Treaty article 84, E.E.C. Treaty article 239.

508. For these differences between the various normative utterances of the supreme organs of the Communities, from regulations down to recommendations; see article 14 of the E.C.S.C. Treaty and article 189 of the E.E.C. Treaty. Cf. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 165-199.

509. All these normative utterances of the organs have been called the “legislation of the Community.” Mathijssen, *Le Droit de la Communauté Européenne du Charbon et de l'Acier: Une Étude des Sources* 32 (1958).

510. See, e.g., E.C.S.C. Treaty articles 53, 71-75; and particularly E.E.C. Treaty article 113.

511. Cf. Ropers, *Le Marché Commun et la Justice Française*, 35 J.C.P. 1961.1.1629.

tribunals of the States, judgments of the Court may fulfill the task of supplementing the "unwritten law."⁵¹² For instance, one of the gaps not filled by the Treaties is the question of the res-judicata effect of the decisions of the Court upon national, judicial, and administrative tribunals. Certainly, rules of the "ordre public Communitarian," so important for the question of the applicability of rules of State law and of the recognition of conclusiveness of State decisions, will be based on "written" legal norms as well as on decisional law developed by the Court.⁵¹³

(b) Turning to the jurisdiction of the Court over matters governed by Community law, a distinction must be made between the passing of judgment on acts by the organs of the Communities, on the one hand, and mere interpretation of Treaty provisions on the other. The former belongs to the exclusive jurisdiction of the Court according to both treaties, while only the E.E.C. Treaty gives the Court exclusive authority in matters of interpretation. There is no jurisdictional monopoly of the Court over the interpretation of the E.C.S.C. Treaty. Accordingly, municipal courts maintain their power to interpret this Treaty in litigations before them.⁵¹⁴ More on this distinction will be said in the following Subsection.

According to the Treaties, the power of the Court is, above all, that of the control over the legality of the acts of the highest legislative or administrative organs of the Communities, that is, of the Council on the one hand and the High Authority (E.C.S.C.) and the Commission (E.E.C.) on the other. Thus, the Court is given the exclusive authority to declare acts of these organs of the Communities null and void on certain grounds. Just as the whole concept of the annulment proceedings reflects the French influence,⁵¹⁵ so are the grounds evincing illegality of the acts on which the demand for annulment can be based patterned upon the appeal for annulment of administrative acts by French law.⁵¹⁶

There are four grounds on which an appeal for annulment can be based. The first ground is lack of jurisdiction on the part of the authority which originated the act. In this regard, it does not make any difference which of the three aspects of jurisdiction—subject matter, space, or time—was involved.⁵¹⁷

Major violations of procedural rules form the second ground for appeal.

512. *E.g.*, the Court in its judgment of December 10, 1957, *Société des Usines de la Sarre v. High Authority*, 1/57 and 14/57, 3 Slg. 213, 235 referred to its decision of July 16, 1956 no. 8/57. See also *Bebr loc. cit.* (no. 486 *supra*) 58 Colum. L. Rev. at 782.

513. See also *Ropers loc. cit.* (note 486 *supra*) 36 J.C.P. 1962 I 1704.

514. The distinction can clearly be seen from a comparison of art. 41 of the E.C.S.C. Treaty with art. 177 of the E.E.C. Treaty. For details see particularly *Bebr, loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 789 *et seq.*

515. Art. 33 of the E.C.S.C. Treaty speaks of an "appeal" while art. 173 of the E.E.C. Treaty uses the word "review."

516. "Contentieux de l'annulation." *Cf.* 1 Arminjon, Nolde and Wolff, *Traité de Droit Comparé* no. 214 p. 348 (1950).

517. In each of these three aspects the concept of "incompetence" of the French administrative law is reflected. For the significance of lack of jurisdiction particularly of subject-matter jurisdiction see Everling's article in "Der Betriebsberater" 1959, 52.

JURISDICTIONAL RELATIONSHIP

Incidentally, the E.C.S.C. Treaty limits—in article 38—the jurisdiction of the Court to these two grounds as for attacks on the legality of acts of the Assembly or of the Council, whereas the E.E.C. Treaty excludes any such attack on acts of the Assembly, but allows it against acts of the Council on the same grounds as in appeals against acts of the Commission.⁵¹⁸ In both Treaties the challenge of acts of the High Authority or Commission can be predicated not only on the two grounds already mentioned but also on two other grounds, namely, on the one hand “a violation of the Treaty or of any legal norm relating to its application” and, on the other hand, “an abuse of power.”

(c) Now let us take up those two grounds of appeal. The meaning of “violation of the Treaty” is clear; but it is not easy to find a generally accepted answer to the question of what is the meaning of the companion phrase “any legal norm relating to the application.” Can the Court in the case of an order of the High Authority acting in transgression of its power and apparently in violation of an article of a State Constitution pass upon the meaning of that article? To all probability, the answer should be NO.

In the case *Friedrich Stork & Co.*⁵¹⁹ the Court said: “It is the function of the High Authority to apply Community law. It lacks power to apply the municipal law of the member States. Thus, the Court, according to article 31 of the E.C.S.C. Treaty, has to ensure the observance of the law in the interpretation and application of the Treaty and of its implementing regulations. Generally, it is not for the Court to sit in judgment on provisions of municipal law.”⁵²⁰

Naturally, it is one thing for the Court to refer to a provision of State law or to a principle or standard common to the law of all member States as a means to an interpretation of Community law, or to apply State law rules in an action which is not based on their violation, but might be based on violation of Community law.⁵²¹ But it is an entirely different matter whether a violation of a legal norm which cannot be regarded as Community law is sufficient to establish jurisdiction of the Court.

There can hardly be an argument that violations of laws or regulations which had been enacted by a member State in compliance with its obligations under the Treaty, are subject to the review of the Court. Furthermore, as indicated previously, solutions of legal problems found by the Court in the course of its work grow into the body of Community law. However, it is much more difficult to agree with statements of a few writers to the effect that a reviewing

518. E.E.C. Treaty art. 173 (1).

519. Court, February 4, 1959, *Friedrich Stork & Co. v. High Authority*, case no. 1-58, 5 Slg. 43.

520. *Id.* at 63/4. [Author's translation.] As for art. 31 see note 487 *supra*.

521. See, e.g., the opinion in the *Algera* case (note 496 *supra*) 3 Slg. at 118 [interpretation] and Court, March 20, 1959, *Firma I. Nold, KG., vs. High Authority*, case no. 18/57, 5 Slg. 89 at 110. [Question of whether a corporation in liquidation has a right to institute such a proceeding before the Court.]

jurisdiction of the Court on appeals must be understood so as to extend to violations of "international custom and universally recognized principles of law." The words between quotation marks point to the provisions of the Statute of the International Court of Justice concerning the sources of international law.⁵²²

As may be recalled, "abuse of power" constitutes the fourth ground for a challenge of an act of the authorities. The meaning of this ground is derived from French administrative law. There, an administrative act can be challenged upon the ground that the administrative organ exercised the authority granted it, for an end different from that for which authority was conferred upon the organ.⁵²³ In the French term "misapplication of power" (*détournement de pouvoir*) this meaning is well expressed. Examples are, on the one hand, acts effected for the promotion of private interests or for the extension of favors to a certain political group or for the satisfaction of a personal rancor.⁵²⁴ On the other hand, the Court has held that even acts resulting from a serious lack of foresight or prudence may be attacked as abuse of power.⁵²⁵

(d) As for the Court, additional light will perhaps be thrown upon problems of its jurisdiction and the effect of its judgments by a few additional remarks. As a rule, the Council or member State has the right to bring appeal for the grounds discussed. Furthermore, the E.C.S.C. Treaty grants this right—in article 33 paragraph 2—to enterprises or associations, and the E.E.C. Treaty—in article 173 paragraph 2—to "any natural or legal person." However, while the Council or a State may demand annulment of decisions⁵²⁰ without having to prove a special interest, all the other parties have a right to appeal only as to those decisions whose addressee the appellant is, or which, although addressed to another, affect their interests.⁵²⁷

Thus, the question arises whether also the legality of regulations—"general decisions"⁵²⁸—can be challenged by such parties. According to the E.C.S.C.

522. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 133 refer indeed to art. 38 of that Statute, and see also the writings of other authors taking a different view, cited there.

523. Waline, *Traité Élémentaire de Droit Administratif* 142 *et seq.* (6th ed. 1950).

524. 1 Arminjon, Nolde & Wolff, *op. cit.* (note 516 *supra*) 348.

525. Court, July 16, 1956, *Fédération Charbonnière de Belgique vs. High Authority*, case no. 8-55, 2 Slg. 297, 317 relied on by Advocate General Roemer in the *Nold* case cited in note 521 *supra*, 5 Slg. at 147.

526. The E.C.S.C. Treaty refers, in art. 33, also to "recommendations" while the E.E.C. Treaty in art. 173 excludes them from a review by the Court. The explanation for this divergence lies in the difference between the two treaties as to the meaning of the term "recommendations." According to art. 14 of the E.C.S.C. Treaty they are binding with respect to the objectives but leave the choice of proper means for attaining the objectives to the addressees of the recommendations. By an interesting "change of meaning" the same word as used in the E.E.C. Treaty must, according to art. 189 of this Treaty, be understood as being devoid of any binding effect. *Cf.* Daig, *Jurisdiction in the E.E.C. and Euratom*, 83 *Archiv des Öffentlichen Rechts*, 132, 166 (1958, in German).

527. Berté and Miller, *Common Market and Euratom*, note 4 to Article 173 (1957, in German); Daig, *loc. cit.* (note 526 *supra*) 169.

528. For their identity with regulations see Court, June 26, 1958, *Société des anciens Établissements Aubert et Duval v. High Authority*, case no. 10/57, 4 Slg. 421, 438: "A general decision establishes a legal norm and sets forth therein, in abstract form, the conditions for its applications as well as the legal consequences." Daig, *loc. cit.* (note 525

Treaty, enterprises can bring appeal against "general decisions" under two limitations. On the one hand, the only ground on which the appeal can be based by such a party is "abuse of power." On the other hand, the provision of article 33(2) of the Treaty limits this right of appeal to regulations which "affect" the appellant. In the view of the Court, an enterprise will be regarded as being "affected" by abuse of power with respect to a "general decision" (= regulation) if the compliance with it would have detrimental effects on the business operations of the appellant.⁵²⁹

This is the point to refer to the E.E.C. Treaty. A party other than a State, the Council, or the Commission can challenge only a decision under the circumstances mentioned previously. The word "regulations" is omitted in article 173 of the E.E.C. Treaty; but article 174 shows that the concept of acts against which appeals can be brought according to the former provision includes "regulation."⁵³⁰

As the wording of article 173 shows, the name given an act is not determinative of its legal character. It is expressly stated that an act, although it might have the form of a regulation or of a decision addressed to another person than the appellant, must be regarded as a decision and therefore subject to an attack if it is of direct and specific concern to the appellant.⁵³¹

(e) The Court does not sit as a board of revision to substitute its judgment for that of the authorities of the Communities. This means that the function of the Court is to control the legality of the proceedings of the authorities and their determinations, but the Court has not the task to exercise the discretionary functions which the Treaties have conferred upon them.⁵³² This explains why the Court, as a provision of article 33 of the E.C.S.C. Treaty emphasizes, "may not review the evaluation of the economic facts and circumstances which lead to the decisions of the High Authority. . . ." Naturally, as the provision just quoted expressly says,⁵³³ the Court will enter into such an evaluation when the demand for review is based on "abuse of power"; for such an abuse must, from the legal standpoint, be characterized as an illegality,⁵³⁴ or at least as an obvious misinterpretation of a rule of Community law.⁵³⁵

supra) 166 and Matthies, *The Law of the E.C.S.C. and the Member States Courts*, 9 JZ 305 (1954, in German).

529. Court, June 21, 1958, *Wirtschaftsvereinigung Eisen- und Stahlindustrie etc. v. High Authority*, case no. 13/57, 4 Slg. 271, at 297 and see also the Court in the *Aubert et Duval* case cited in note 528 *supra*, 4 Slg. at 439.

530. E.E.C. Treaty art. 174(2): "The Court shall if it considers it necessary point out those effects of the regulation annulled which shall be deemed to remain in effect."

531. *Cf.* Daig *loc. cit.* (note 526 *supra*) 169.

532. "Control of questions of law, not of questions of discretion." Daig, *loc. cit.* (note 526 *supra*) 150; Groeben and Boeckh, *op. cit.* (note 479 *supra*) 110, 134.

533. Although the E.E.C. Treaty does not contain a similar provision, the definition of the other Treaty must be read into the latter. Groeben and Boeckh, *op. cit.* (note 479 *supra*) 134, Daig, *loc. cit.* (note 526 *supra*) 175.

534. Daig, *loc. cit.* 150, 175: "Article 33 is not aimed at a control of discretion but at a review of questions of law."

535. E.C.S.C. Treaty art. 33(1)(cl.2). This provision does not presuppose a violation

(f) It is important to bear in mind that the Treaties have set a time limit for the institution of proceedings for the annulment of an act of the authorities of the Communities. Thus, if the appeals are not lodged within one month—article 33(3) E.C.S.C. Treaty—or two months—article 173(3) of the E.E.C. Treaty—from the date of the publication or notification of the act in question,⁵³⁶ the act has become incontestable. As a result, proceedings of the type discussed in the preceding pages are no longer available. In other words acts can be annulled with effect *erga omnes* only prior to the expiration of the limitation periods.⁵³⁷

It might, of course, happen that in a litigation before a municipal court the question of the validity of an act of a Community authority may be a prejudicial question long after the publication or notification of the act. However, the way in which such an incident is to be handled and the effect of an incidental decision asked of the Community court by the municipal court in the proceeding before the latter, will be discussed in the following Sub-section.

Furthermore, the E.C.S.C. Treaty, in article 36, gives an enterprise a second chance to contest the "regularity" of acts concerning it before the Court, despite the expiration of the limitation period. According to the wording of this article, an enterprise is permitted to raise the point of illegality in connection with its appeal from sanctions or penalties imposed upon it under a provision of the Treaty.

Likewise, such a belated and therefore only "incidental review of the legality"⁵³⁸ is not unknown to the E.E.C. Treaty. There, article 184 confines such a contesting to "regulations"; but it does not limit it to appeals against sanctions and penalties. It can be used in any legal proceeding which involves such a "regulation." It will be seen in a moment that despite the apparent dissimilarity between the two Treaties on this subject, there is enough resemblance between them.

In a case brought before the Court through appeal against an individual decision which did not concern sanctions or penalties, the High Authority put in the defense of the expiration of the limitation period. The defense argued that although the appeal against the individual decision was brought in time, there had been no timely appeal against the regulation on which the individual decision was based. The Court denied the defense. It is true, as the Court conceded, that the wording of article 36 of the E.C.S.C. Treaty provides for actions against decisions imposing sanctions and penalties. However,

of the wording of a Community rule, but an obvious misconception thereof, Daig, *loc. cit.* 175.

536. Failing in notification, the period commences from the time when the appellant obtained knowledge. E.E.C. Treaty art. 173(3).

537. *Conclusions* of Advocate General Lagrange to the Court, June 28, 1955 in *Assider v. High Authority*, case no. 5/55, 1 Slg. 297 at 300.

538. German writers speak of an "incidental control of legal norms." Cf. Daig *loc. cit.* 176, and 2 Groeben and Boeckh *op. cit.* 155.

JURISDICTIONAL RELATIONSHIP

the Court stated that "it would be wrong to apply this article only to such decisions; for the article enounces a general principle identical with the rule expressed in article 184 of the E.E.C. Treaty."⁵³⁹

Naturally, in contrast to judgments rendered in principal proceedings, i.e., actions directed at the annulment of illegal acts, those incidental judgments of the Court have binding effect only between the parties.

(g) After the Court has annulled the challenged act, the organ of the Community which originated it, such as the High Authority (E.C.S.C.) or the Commission (E.E.C.), has to take the necessary measures to give effect to the judgment of the Court.⁵⁴⁰ Thus, it is left to the careful discretion of the authority in question to choose among the various measures appropriate for the achievement of the designed end.⁵⁴¹

According to article 34(1) of the E.C.S.C. Treaty the annulment of a decision afflicted, as the Court had declared, with a fault for which the Community is responsible, carries with it the obligation to give redress to the enterprise or enterprises for the direct and special damage suffered by them as a result of the wrongful act. Failure on the part of the High Authority to comply with this obligation by offering equitable redress and reasonable indemnity, will constitute a new basis for an "appeal" and for "damages" by new proceedings in the Court.

(h) Of other bases of the jurisdiction of the Court, a few need here to be mentioned. First of all, the draftsmen of the Treaties were aware that the administration of justice would be defective if there were no remedy against failure to act on the part of the institution of the Community which in the given situation was, according to the rules of the Community law, required to act. By both the E.C.S.C. Treaty and the E.E.C. Treaty the Court has jurisdiction over actions to remedy such a failure.

A gate to the institution of a proceeding is opened if the High Authority (E.C.S.C.) or the Council or Commission (E.E.C.) continues in its inaction for two months after a member State, or the party aggrieved by the inaction,⁵⁴² had required the authority in question to act.⁵⁴³

Concerning the procedural approach, the two Treaties differ. By article 35 of the E.C.S.C. Treaty the inaction is to be regarded as a "negative" decision, namely, one of the denial of the requested act. Accordingly, the inaction is treated as a decision⁵⁴⁴ instinct with illegality and therefore subject to

539. Court, June 13, 1958, *Meroni & Co. v. High Authority*, case no. 9/56, 4 Slg. 9 at 26. See to the same effect Court, case no. 10/56, 4 Slg. 58 at 66 and case no. 15/57, 4 Slg. 159, at 190.

540. E.C.S.C. Treaty art. 34(1); E.E.C. Treaty art. 176(2).

541. 2 Groeben and Boeckh *op. cit.* (note 479 *supra*) 142.

542. Consistently with the concepts of the E.C.S.C. Treaty, only an enterprise or an association (in the meaning of art. 48 of the Treaty) has a standing to institute such a proceeding, art. 35(1).

543. E.C.S.C. Treaty art. 35(1)(3); E.E.C. Treaty art. 175.

544. E.C.S.C. Treaty art. 35(3); Schlochauer, *Jurisdiction in the E.C.S.C.*, 3 *Archiv des Völkerrechts* 395, 407 (1952, in German); Court, April 23, 1956, *Groupement des*

such an appeal to the Court, which, as was discussed in the preceding pages, is an action for a judgment declaring an act null and void.

However, in the view of the other Treaty (E.E.C.), the proceeding is for a judgment characterizing the failure to act as a breach of Community law.⁵⁴⁵

According to both Treaties, a judgment against the authority in question will direct it to take the measure or measures stated in general terms in the judgment; for the Court will, of course, abstain from prescribing the contents of the measures, a task which must be left to the administrative authority.⁵⁴⁶

Beyond this, a party damaged by the non-action has a right to indemnification if the failure to act amounts to a violation of the official duties of one or more of the persons in charge of the matter in question. From the standpoint of the E.C.S.C. Treaty, this liability results from the judgment declaring the failure to act to be an invalid decision.⁵⁴⁷ In the view of the E.E.C. Treaty, the demand to indemnification pursues a right separate from that which seeks action where there was wrongful inaction.⁵⁴⁸

Heretofore the discussion dealt with failures to act where acting was required by a command of Community law. There is a difference worthy of discussion between breaking one's duties by inaction, and forbearing the taking a decision where there is power but not duty to do so. Accordingly, discretionary abstention from acting is not subject to a judicial attack; otherwise the exercise of discretion assigned by Community law to a quasi-legislative or administrative authority would be supplanted by that of the Court.

Naturally, where the authority in question has abused its discretionary power by failing to act, the conduct can no longer be regarded as an exercise of discretion; it is the commission of legal wrong by omission and therefore subject to the same treatment as the violation of a duty to act, a topic which was discussed previously. The E.C.S.C. Treaty contains, in article 35(2), an express provision to this effect. In the E.E.C. Treaty there is no such express provision; but there can be no doubt that the principle applies also to abuse of discretion of this kind within the realm of this Treaty.⁵⁴⁹

(i) Member States are bound to comply with the obligations imposed upon them under the Treaties.⁵⁵⁰ However, each Treaty has chosen its own method

Industries Sidérurgiques Luxembourgeoises v. High Authority, case nos. 7/54, 9/54, 2 Slg. 53.

545. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 139, 140.

546. *Id.* 140. E.C.S.C. Treaty art. 34; E.E.C. Treaty art. 176. Daig, *loc cit.* (note 526 *supra*) 180.

547. E.C.S.C. Treaty art. 34.

548. In this sense, the E.E.C. Treaty art. 176(1) deals in the first paragraph with the measures required for the implementation of the judgment establishing the wrongful failure to act; while the second paragraph refers to art. 215(2) which—see the discussion in the preceding Subsection II—recognizes, along with art. 178(2) the jurisdiction of the Court for such claims and the liability of the Community for damage caused by its institutions or employees in the exercise of their duties.

549. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 138.

550. For the E.C.S.C. Treaty see art. 86; as for the E.E.C. Treaty see arts. 5, 6 and many specific provisions in, *e.g.*, arts, 12, 16, 18, 23, 30-37, 53 and 67.

JURISDICTIONAL RELATIONSHIP

to deal with the nonfulfillment by a State of its Treaty obligations. Both Treaties are in agreement in one important point, namely the exclusive conferment of judicial control over the subject on the Court.

According to the E.C.S.C. Treaty, the High Authority has first to render a decision stating that the member State in question committed a breach of a specific obligation, e.g., to amend any of the price tariffs of its railroads.⁵⁵¹ The decision of the High Authority will allow the government of the State a specified period of time to rectify the breach. If the government of the State questions the legality of the decision, it must assume the role of a plaintiff by lodging an "appeal" with the Court within a period of two months from the notification of the decision.⁵⁵² If the Court arrives at the result that the High Authority lacked, e.g., subject-matter competence and acted therefore *ultra vires*, the Court will annul its decision. To illustrate, the Court did so because the Treaty did not authorize the High Authority to require the State to inform the authority of details of the purely national road haulage contracts.⁵⁵³ Conversely, if the Court does not find any legal fault with the decision of the High Authority, it will reject the appeal of the State.⁵⁵⁴

The procedural roles of the parties are reversed under the E.E.C. Treaty. If the Commission is convinced that a member State has failed to fulfill an obligation under the Treaty, it "must" communicate its reasoned opinion to the State. If the latter does not comply with the terms established in the opinion within the period of time stated therein, the former "may" bring an action against the State in the Court. See article 169 of the E.E.C. Treaty. As one sees, the first of the acts, i.e., the opinion, is a "must," the second, namely the institution of an action, is a "may"; for it is left to the discretion of the Commission which, therefore, if it prefers not to proceed with an action, cannot be charged with a "failure to act."⁵⁵⁵ However, if the Commission fails to form an opinion as to a State's noncompliance with its obligation, an action for failure to act will lie against the Commission.⁵⁵⁶

A third significant aspect of the jurisdictional problem is the possibility of an action brought in the Court by a member State against another member State for a judgment declaring that the latter has violated obligations under the Treaty.⁵⁵⁷

However, the Treaty, in order to avoid, as far as possible, litigations between member States has set up an important condition precedent to the

551. See, e.g., Court, May 10, 1960, *Government of Federal Republic of Germany v. High Authority*, case no. 19/58, 6 Slg. 181.

552. E.C.S.C. Treaty art. 88. Bindschedler, *Legal Problems Concerning the European Community*, 217 (in German).

553. See, e.g., Court, July 15, 1960, *The Netherlands Government v. High Authority*, case no. 25/59, 6 Recueil 723.

554. See the German Government case cited in note 551 *supra*; the German Government was also condemned in the costs.

555. See the last paragraph of the text in item h *supra*.

556. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 138.

557. E.E.C. Treaty art. 170. Cf. also art. 171 as for matter of judgment.

right of a State to sue another State. The prospective plaintiff State must first inform the Commission which, acting as a kind of a conciliator, will present the other State with a reasoned opinion to which the latter may respond, offering arguments. Failure on the part of the Commission to render such an opinion within three months from the date of the receipt of the complaining State's information does not lead to a proceeding against the Commission for failure to act,⁵⁵⁸ but does authorize that State to institute the action in the Court against the other State.⁵⁵⁹

By the E.C.S.C. Treaty the jurisdiction of the Court over any dispute relating to the purpose of the Treaty can be invoked by one State against another State, by an agreement on its jurisdiction; in addition, a State may bring the action even in the absence of such an agreement where the controversy concerns the direct application of the Treaty.⁵⁶⁰

The subordination of the member States to the jurisdiction of the Court in the question of alleged noncompliance with Treaty regulations is one thing; the enforcement of the judgment is quite another. Concerning the latter problem, there is a telling difference between the two Treaties.

The E.C.S.C. Treaty establishes a precise rule. If the State, after its appeal had been rejected by the court,⁵⁶¹ has not taken steps to fulfill its obligation, the High Authority may, with the concurrence of the Council (acting by a two-thirds majority), suspend the payments of sums which it may owe to the State under the Treaty; and in addition, the High Authority may adopt certain measures which otherwise—see article 4 of the Treaty—the States are not allowed to take. Such measure are, e.g., charging of import duties, or discriminations concerning manufacturers, distributors, or purchasers, etc.⁵⁶²

By contrast, the E.E.C. Treaty lacks entirely any sanctions against the disregard of the judgment by the defendant State. It is obvious that the Court cannot resort to forced execution upon the judgment. However, the Treaty does not even provide for any measures of indirect enforcement of the judgment, such as required by the E.C.S.C. Treaty. The cavalier treatment of a member State which breached the Treaty, conspicuous, as we saw, also in committing the institution of an action to the free discretion of the Commission, shows the radically different view taken by this Treaty from the approach of the E.C.S.C. Treaty in the great divide between unrestricted sovereignty and

558. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 140: "Art. 170 is the *lex specialis* which supplants the application of the general norm of art. 175."

559. E.E.C. Treaty art. 170(4). There are a few situations in which, as for an action in the Court against the State by another State or the Commission, the above mentioned preliminary steps are dispensed with by Treaty provisions. See, e.g., art. 93 [in the case where the defendant State had granted an aid which is not compatible with the Common Market]. See also art. 225. [Other measures taken in the interest of national security but with the effect of distorting competitive conditions in the Common Market.]

560. E.C.S.C. Treaty arts. 88 and 89.

561. The rule applies of course also in the absence of an appeal because then the decision of the High Authority has become *res judicata*.

562. E.C.S.C. Treaty art 88(3). The State may appeal to the Court from a decision pronouncing such sanction. See art. 88(4).

subordination to a supranational policy commanded by the idea of Community. To avoid an understatement, we may say that the E.E.C. Treaty receded substantially from the supranational principles of the E.C.S.C. Treaty.⁵⁶³

In due consideration of space limitations, our discussion refrains from presenting here further details concerning the exclusive jurisdiction of the Court.⁵⁶⁴

IV

ENSURING UNIFORM INTERPRETATION OF TREATY LAW IN STATE PROCEEDINGS

(a) The Treaties have preserved the principal jurisdiction of the State courts. Accordingly, aside from the relatively few types of litigations subject to the exclusive jurisdiction of the Court, the municipal courts have to sit also in disputes which involve the interpretation of Treaty provisions. Let us assume that a French industrialist entered into a contract with a German business enterprise and that in an action brought by the former against the latter in a French court—the jurisdiction being based on article 14 of the French Civil Code—the defendant enterprise's defense that a contract is void according to article 65(4) of the E.C.S.C. Treaty⁵⁶⁵ because of its tie-up features, would be rejected. However, this judgment will have no res-judicata effect in a German court.⁵⁶⁶ A German court in an action on the same contract, with the parties' roles in reverse, might come to the opposite result. Why? It must not be overlooked that the Treaties failed in both the establishment of uniform bases of jurisdiction for litigations in State courts involving Community law and the mutual recognition of judgments thus rendered.⁵⁶⁷

Aware of this shortcoming, the contracting governments adopted article 220 of the E.E.C. Treaty voicing the exhortation that "the member States shall engage in negotiations with each other with a view of ensuring the simplification

563. Daig, *loc. cit.* (note 526 *supra*) 188.

564. The French constitution, like the constitutions of the other member States, provides that treaty law prevails over domestic law. Art. 55 of the French constitution, 1958, inserted the qualification that this rule shall apply if the supremacy of treaty law is also the rule in the other contracting State or States. Whether the Constitutional Council, which has the task to examine the constitutionality of a French legislative act prior to its promulgation, must be regarded as a municipal court and therefore be obligated to refer to the Court (of the Communities) when treaty law is involved, is a nice question. Cf. Ropers *loc. cit.* (note 511 *supra*), 35 JCP 1961 I 1624 (B)(1). Theoretically, the German constitutional court could find for the unconstitutionality of a law ratifying a treaty; but an attempt to attack such a law will not work in practice. For reasons see Stein and Hay *loc. cit.* (note 473 *supra*) at 397/8. The Court of the Communities has exclusive jurisdiction over litigations concerning the obligation of member States and decisions of the Board of Governors and Directors in matters of the European Investment Bank. See art. 180 E.E.C. Treaty.

565. By art. 65(1)(4) agreements and concerted practices tending to restrict the normal operation of competition within the Common Market are void. This will be discussed later.

566. Lack of reciprocity, required by § 328 no. 5 of the German Code of Civil Procedure is a reason to deny a foreign judgment recognition. For details see Chapter XII Section 2 Subsection B Division 3 *infra*.

567. Martha Weser, *Les Conflits de juridiction dans le cadre du Marché Commun*, 48 Rev. 613, 619 *et seq.* (1959).

of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards." So far, no agreement embracing the Six has been worked out in this matter and not even bilateral conventions have been concluded between all of them.⁵⁶⁸

Furthermore, it would seem that there are in member States jurisdictional rules still in effect and operation which run counter to principles of Community law. Article 7 of the E.E.C. Treaty pronounces the important principle that "within the field of application of this Treaty . . . any discrimination on the ground of nationality shall be prohibited." It has not escaped the attention of lawyers that, if we may present only two illustrations, the application of article 14 of the French Civil Code or of §23 of the German Code of Civil Procedure as bases of jurisdiction in actions against a national of a sister State⁵⁶⁹ might be violative of Community law.⁵⁷⁰

Although the removal of jurisdictional differences would certainly lessen the number of decisions which are in conflict with each other with respect to the application and interpretation of Community law, uniformity in this regard can be achieved only by unification through Conventional provisions, which would confer the ultimate authority in that domain upon one single court. Whether to some extent this result has already been reached by methods set up in the Treaties, will be seen from the following discussion.

(b) The main difficulty which the Treaties sought to overcome lies in the Janus-faced nature of Community law. It is the law that the member States have in common; but it is simultaneously also the national law of any of the member States which by ratifying the Treaties have incorporated their provisions into the national law.⁵⁷¹ As we already saw, the conferment by the Treaties upon the institutions of the Community of power to enact regulations or render decisions which prescribe not only objectives but also the means to be employed, constitutes as essential part of the Treaties. It could hardly be questioned that the ratifications of the Treaties carried with them the anticipatory recognition of the accordance of the exercise of such delegated power with the national constitutions.⁵⁷² However, the problem of accordance of those acts which are initiated by the institutions of the Communities, with the Treaties themselves, that is, the question of the validity of the acts, remains.

In order to effect uniformity throughout the member States, at least con-

568. To illustrate only, no treaty on this subject exists between France and Germany, Belgium and Italy, or France and Germany with The Netherlands.

569. As repeatedly stated in this book, by article 14 of the French Civil Code French courts have jurisdiction in personam if the plaintiff is a French citizen, against any defendant regardless of whether he is a French citizen, or a foreigner without domicile or residence in France. The German Code of Civil Procedure § 23 provides for jurisdiction in personam over a non-resident, particularly a foreigner, on the mere fact that assets of the latter are within the territory of Germany.

570. Cf. Martha Weser, *loc. cit.* (note 567 *supra*) at 622 *et seq.* and 635 *et seq.*

571. Daig, *loc. cit.* (note 526 *supra*) 194; Stein and Hay, *Legal Remedies of Enterprises in the E.E.C.*, 9 Am. J. Comp. L. 376, at 400 (1960).

572. See particularly Bebr, *loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 782 *et seq.*

JURISDICTIONAL RELATIONSHIP

cerning this question, the E.C.S.C. Treaty has clothed the Court with exclusive jurisdiction to review the validity of acts of the High Authority or of the Council. Article 41 of the E.C.S.C. Treaty enounces the principle that whenever in a litigation before a municipal court of a member State the validity of such an act, e.g., a decision of the High Authority, is contested, the municipal judge shall be obligated to stay the proceedings and to refer the issue to the Court.⁵⁷³ This duty does not depend on a motion of a party. According to the wording of article 41, the mere challenge of the validity of a decision of the High Authority or the Council is sufficient to compel the reference to the Court, even if in the view of the judge the validity of the act in question is beyond any doubt.⁵⁷⁴

There can be no other time limitation than the limitation provided by the State law which controls the litigation. The Court's decree declaring the decision of the High Authority invalid has a binding effect only upon the parties, while, as we saw in the preceding part of this Section, the effect of the Court's judgment obtained in a principal annulment proceeding, which under article 33 of the E.C.S.C. Treaty is limited in time, operates *erga omnes*. By contrast, no time limitation for the submission of an issue to the Court according to article 41 of the E.C.S.C. Treaty can be read into the provision either by its language or by the policy behind it.

Likewise, there is no hint in this article 41 that the lack of validity alleged by a party must be based on one of the four grounds which article 33 requires for an "appeal." But it is hard to think of other bases than those grounds, because of the wide range encompassed by them.

Let us assume that invalidity of a decision of the High Authority or the Council, because of its being in conflict with a provision of a State constitution,⁵⁷⁵ is alleged in a State court litigation. After the judge referred the issue to the Court, the latter might come to the conclusion that there is no such conflict, but even if there were one, it would base its decision only on the question whether the authority violated Community law, e.g., by exceeding its power. The Court

573. Cf. E.C.S.C. Treaty art. 41. As for the proceeding, see the Rules of Procedure art. 103 § 2: "The decree of the municipal court certifying the issue to the Court is served upon the parties to the (municipal) proceedings, the High Authority, the member States, and the Council." Every one of the addressees can file a declaration or arguments within two months after service. For the further proceeding see *id.* art. 44.

574. Lagrange, *The Court of the E.C.S.C.*, 70 *Revue du Droit Public*, etc. 417 at 430 (1954, in French). See also the convincing remarks of Bebr, *loc. cit.* (note 486 *supra*) 58 *Colum. L. Rev.* at 791: "To grant to such an invalidation an effect *erga omnes* would make administration chaotic and almost impossible."

575. By constitutional amendments in The Netherlands and Luxemburg in 1953 and 1957 the supremacy of the law of international treaties over the national constitutions was established. Such is not the case in the other member States. However, French courts have always refrained from passing on the conformity of a treaty with the constitution. In their view, this question must be left entirely to the executive branch of government. By Italian law, the Constitutional Court has exclusive jurisdiction over the constitutionality of treaty law which Belgian judges—incidentally—have never examined. For a discussion of the problem of the relation of the E.C.S.C. and the E.E.C. Treaties to the constitutions of the Six see Bebr, *loc. cit.* (note 486 *supra*) 58 *Colum. L. Rev.* 775-781 and *Int. L. & Comp. L.Q. Suppl.* (note 486 *supra*) at 2-7.

has taken the view that the High Authority and other institutions of the Community are to be guided by Community law without being controlled by rules of municipal law.⁵⁷⁶

It can be said that, with one exception to which we will turn in a minute, the national courts will have to determine, when the litigations before them involve questions of community law, the effects upon private law which may result from acts of Community institutions, particularly from decisions of the High Authority.⁵⁷⁷ Thus, the application of Community law in preference over national law in such litigations must be distinguished from the fact that the jurisdiction on the whole has remained in the hands of the State courts. As a rule, they have to decide on the legal consequences arising from the impact of Community law upon any contracts and other transactions involving restraint of trade and competition. However, as mentioned before, there is a very important exception to this rule.

An examination of this exception must begin by the statement that article 65 of the E.C.S.C. Treaty in its first paragraph prohibits all restrictive agreements and practices tending to interfere in any way with the normal operation of competition within the Common Market.⁵⁷⁸ This prohibition of the Treaty, which is immediately binding upon enterprises, is primarily designed to assure competitive pricing as well as freedom of movement for goods and for other factors of production.⁵⁷⁹

The High Authority has been clothed by the Treaty with the power to demand all information necessary for its decision; for it has the exclusive powers to decide what facts constitute a violation of the prohibition.⁵⁸⁰ If parties want to avoid the serious sanctions placed upon agreements thus proscribed, they may petition the Authority for an approval of an agreement which they intend to conclude. Note, furthermore, that the Treaty, in the first clause of the fourth paragraph of article 65, expressly declares that agreements which fall under the prohibition shall be null and void. The provision adds that such an agreement "may not be invoked before any court of the member States."

Two very important and interesting conclusions follow from this strict command of the Treaty. *First.* The municipal courts shall have no jurisdiction over such agreements. It is the Court of the Community which has exclusive jurisdiction. *Second.* The national courts will continue of course to apply

576. Cf. the Court in the *Stork & Co. case* (cited in note 519 *supra*). See also advocate general Roemer in the *Nold case* cited note 521 *supra*, 5 Slg. at 161 *et seq.*, and Steindorff, *The Provisions Against Restraint of Competition in the European Community Treaties and the National Law*. (Offprint from Beiträge für die Internationale Kartellrechts Konferenz) 191, 202 (1961).

577. Bebr, *loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 770.

578. The text of art. 65(1) of the E.C.S.C. Treaty is more explicit: "All agreements between enterprises, all decisions of associations of enterprises, and all concerted practices tending, directly or indirectly, to prevent, restrict, or distort the normal operation of competition within the common market are hereby forbidden."

579. Steindorff, *op. cit.* (note 576 *supra*) 192.

580. E.C.S.C. Treaty article 65(3).

JURISDICTIONAL RELATIONSHIP

the rules of national law, particularly also of the national cartel and antitrust laws, but always subject to the provision of the fourth paragraph of article 65.⁵⁸¹ Accordingly, if by a rule of the national antitrust law the agreement at issue were allowed, the national court cannot apply the rule of the national antitrust law when under article 65—the only Treaty provision of private-law character⁵⁸²—the agreement is void.

However, aside from such a conflict with Community law, the national law, for instance concerning the validity of a contract or the form prescribed for it, controls. The entertainment by a national court of an action brought for damages against an enterprise by a merchant alleging a violation of the prohibition of article 65, does not impinge upon the exclusive jurisdiction of the Court. How does the interplay between Community law and municipal law operate? If there was already a decision of the High Authority that the contract in question ran counter, e.g., in its price feature to the proscription of article 65 of the Treaty, then it is readily apparent that the decision is binding upon the national court, provided that there was no appeal taken in time by the defendant from the decision to the Court,⁵⁸³ or that, on such an appeal, the decision was confirmed by the Court.⁵⁸⁴

If there was not yet a decision of the High Authority, the national court will recognize that the exclusive jurisdiction over the legality of the contract lies with the High Authority, and will, therefore, request a determination from it.⁵⁸⁵ To illustrate, plaintiffs, German wholesale dealers in coal, demanded in a German court an injunction to enjoin the general representative of the six largest sales organizations of Ruhrcoal from continuing a new sales practice which in the plaintiffs' view was proscribed by article 65 of the E.C.S.C. Treaty. The German court turned to the High Authority and requested its decision on the matter.⁵⁸⁶ This case was settled by the defendants' yielding to the plaintiffs' demands. However, if they had contested the validity of the decision of the High Authority, the German judges would have been obligated to refer the question of validity to the Court.

Although article 41 does not say it in these words, it seems to be reasonable to support a municipal judge's abstention from a reference to the Court where it is obvious that there is not the slightest connection between the allegedly illegal practice of the defendant enterprise and plaintiff's claim. For this reason the French *Cour de cassation* approved the attitude of the courts below and declared that even if the layoff of the plaintiff and of other employees

581. Steindorff, *op. cit.* (note 576 *supra*) 204.

582. Bebr, *loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 770.

583. For such "appeal" see the discussion in the preceding Subsection III(b)(c)(d).

584. E.C.S.C. Treaty article 65(4)(2): "The High Authority shall have exclusive powers, subject to appeals to the Court . . ."

585. Steindorff, *op. cit.* (note 576 *supra*) 202 refers to decisions in which German courts have recognized the exclusive jurisdiction of the High Authority.

586. Cf. Landgericht Stuttgart August 8, 1953, 4 *Wirtschaft und Wettbewerb* 140 (1954).

resulted from an allegedly illegal type of concentration of enterprises, the termination of an employment relationship in accordance with the terms of the employment contract cannot be regarded as prohibited, since the norm prohibiting the alleged conduct of defendant is not addressed to its employer-employee relationships.⁵⁸⁷

However, what, if anything, could be done in the case of a municipal judge's refusal to refer a relevant issue to the Court? On the one hand the E.C.S.C. Treaty, unlike American constitutional law, has failed to vest the Court with any reviewing power over municipal courts in cases of the latter's infringements upon the exclusive jurisdiction of the Community.⁵⁸⁸ As stated previously, Community law is simultaneously national law.⁵⁸⁹ A violation of the jurisdictional commands imposed upon the national courts by articles 41 and 65 of the E.C.S.C. Treaty is by the law of the States a reversible error which is to be remedied by way of appeals to the highest national courts; but their judgments, whether correct or erroneous, will become *res judicata*.

It should be noted that, in general, according to article 66(1) of the E.C.S.C. Treaty concentrations of enterprises, particularly mergers or acquisitions of shares or assets, require the preliminary authorization by the High Authority which shall grant it if it is found that the transaction satisfies the specific requirements stated in the Treaty.⁵⁹⁰ If a concentration had been started without such an authorization and if the concentration does not meet the requirements for authorization, the High Authority shall, as the second paragraph of the fifth section of article 66 of the Treaty directs, render a reasoned decision denouncing the concentration as illegal. In addition, the High Authority shall order the enterprises which had entered into such an illegal transaction to divest themselves of the stockholdings or other financial interests concentrated, and to break up the combination by restoring the pre-concentration status and take any other action which the High Authority considers appropriate to re-establish the independent operation of the enterprises and to restore normal conditions of competition.

In contrast to the private-law norm of article 65 of the Treaty which declares all agreements restraining the normal operation of competition within the Common Market null and void, article 66, dealing with illegal concentrations, does not contain such a private-law norm. Furthermore, unlike article 65(4) of the Treaty, article 66 avoided determining the exclusion of national jurisdiction over questions of concentration. Prior to a decision of the High

587. (French) Cass. civ. soc. sec. December 11, 1959 J (Clunet) 1961, 121.

588. It is obvious that a refusal of a municipal judge implies a denial either of the exclusive jurisdiction of the High Authority to determine the question of a violation of article 65 or of the Court's jurisdiction to decide on the validity of the determination of the High Authority.

589. See the text preceding the reference to note 571 *supra*.

590. Cf. E.C.S.C. Treaty article 66(2). If a concentration should occur without a request being made for such an authorization, the parties are subject to substantial fines, but if the requirements set up by the Treaty are met, the concentration will be approved *ex post*. Treaty art. 66(5).

JURISDICTIONAL RELATIONSHIP

Authority holding a concentration to be illegal, the effects of such an illegal transaction must be tested by the rules of the national legal system which according to the conflict law of the national forum controls the transaction; it seems, however, very improbable that a party disputing the validity of a concentration directly affecting his interest would not have called the attention of the High Authority to the transaction in question.

The decision of the High Authority condemning the concentration is, of course, subject to the appeal to the Court, according to the provision of article 33 of the Treaty. However, article 66(5)(2), referring to article 33, adds that the appeal may not be lodged until the deconcentration measures have been ordered, unless the High Authority agrees to the lodging of a separate appeal against the decision. At this point it is well to remember that an "appeal" as provided for in article 33 must be based on one of the four grounds stated therein; but article 66 in the second paragraph of its fifth section expressly directs that "notwithstanding the provisions of article 33, the Court shall have full jurisdiction to judge whether the operation effected is a concentration within the meaning of the first section (of article 66) and of the regulations issued in execution thereof."

Regarding the subject of concentration, we see that the jurisdictional picture is somewhat confused, yet it seems to be clear that the Court has exclusive jurisdiction to pass judgment on the question whether the transaction at issue is a concentration within the meaning of Community law, and, if so, whether it is afflicted with illegality.⁵⁹¹

Certainly these two questions are not the only ones involving problems of jurisdiction. We have to bear in mind that deconcentration measures are governed by State law. The Treaty provides that if the parties do not comply with a decision ordering to take such measures, the High Authority itself shall take steps to carry into effect the decision by which the illegality of the concentration had been pronounced. It is therefore provided by article 66(5)(5) that the High Authority may even suspend the exercise of rights attached to the assets thus illegally acquired, which might amount, therefore, to a suspension of the exercise of the right to vote the shares. According to that provision the High Authority may even proceed to a forced sale of such assets either directly or through a receiver-administrator⁵⁹² who will be appointed by the competent national court.

No doubt, the operation of such measures depends on municipal law; and the question has been raised whether municipal courts have jurisdiction also over controversies arising out of the carrying out of such measures. Aside from actions brought by interested parties to recover for damage caused by an official fault relating to such a deconcentration measure,⁵⁹³ the Treaty itself

591. Bebr, *loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 772.

592. E.C.S.C. Treaty art. 66(5)(5). Krawielicki, *The Prohibition Against Monopolies in the Schuman-Plan 77 et seq.* (1952, in German).

593. E.C.S.C. Treaty art. 40(1).

is silent on the question whether the Court has jurisdiction over actions by parties whose rights or interests have been adversely affected by deconcentration measures.⁵⁹⁴ Because of the limits imposed upon the jurisdiction of the Court, it can be argued with good reasons that national courts can assert jurisdiction over disputes of that type.⁵⁹⁵

(c) The E.C.S.C. Treaty has failed to secure a uniform interpretation of Treaty law. It made the Court the supreme interpreter of Treaty law and acts of Community authorities only in two sporadic cases, namely the case of article 41 concerning the challenged validity of resolutions of the High Authority and of the Council on the one hand and, on the other, the case of article 65 prohibiting anti-competitive contracts.⁵⁹⁶ Thus, for the largest part, the provisions of the E.C.S.C. Treaty and of quasi-legislative and executive acts of the authorities are subject to the free interpretation by State courts.

By contrast, the E.E.C. Treaty created the basis for, and ensured, uniformity of the interpretation of Community law,⁵⁹⁷ by granting the Court "prejudicial jurisdiction" on this matter.⁵⁹⁸ This means, as article 177 of the E.E.C. Treaty states, the power of the court to make a preliminary decision concerning particularly⁵⁹⁹ questions of the interpretation of the E.E.C. Treaty, and of the validity and interpretation of acts of the institutions of the European Economic Community.

Thus, article 177 of the Treaty provides that "where any such question is raised before a court or tribunal of the member States, such court or tribunal 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. Where any such question is raised before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice."

The difference made by this provision between discretion ("may") and duty ("shall") of the municipal court as to the submission of such a question to the Court, finds its explanation in the hierarchical order of the municipal courts. If a lower court failed to make such a request, its attitude could be corrected by a higher court to which the case comes through appeal; for the highest court from whose decision no further appeal lies, *must* submit the request to the Court of the Communities.

The Contracting Powers have laid down in the provision of article 177 a general procedural principle for the ideological basis of which comparative

594. Bebr, *loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 773.

595. *Id.* at 773, pointing to the dangers which might result from the lack of Community jurisdiction to the objectives pursued by the Treaty.

596. Daig, *loc. cit.* (note 526 *supra*) 195.

597. Catalano, *La Comunità Economica Europea e l'Euratom* 36 (1957).

598. The French legal language uses the term "*compétence préjudicielle*," see Ropers, *loc. cit.* (note 486 *supra*) 36 JCP 1962 I 1709 (A).

599. Art. 177 of the E.E.C. Treaty extends this jurisdiction also to the interpretation of the charters of any bodies set up by an act of the Council where the charters so provide.

law offers some analogues.⁶⁰⁰ As the quoted text of article 177 shows, the principle is expressed in broad terms. Consequently, important questions still call for an answer which must, therefore, be derived from an interpretation of article 177 rather than from its text.

We may ask first of all what is the "ruling" which is requested of the Court of the Communities? In the first case which was presented to the Court under article 177—it was the famous case *Robert Bosch GmbH v. Geus*⁶⁰¹—the noted German manufacturer of refrigerators asked in the action instituted in the *Rechtsbank* (= district court) in Rotterdam to enjoin the Dutch defendant from selling in The Netherlands refrigerators sold to him by a German dealer in violation of a clause of the latter's contract with plaintiff. The clause forbade the dealer from exporting refrigerators without plaintiff's consent. Defendant put in the defense that according to article 85(1) and (2) of the E.E.C. Treaty the clause was automatically null and void.⁶⁰² In plaintiff's view those provisions of article 85 had not yet entered into effect since the regulations referred to in article 87 of the Treaty, as required for the application of article 85, had not yet been adopted. The *Rechtsbank* shared in this view and gave judgment against the defendant. On the latter's appeal the *Hof* (= Appellate Court) at The Hague decided to submit a request to the Court according to article 177 of the Treaty for a ruling.

Two questions are very important in this connection. *First*, what was the contents of the request? *Second*, what was the Court's "ruling" on the case? The request directed to the Court asked "for a determination of the question whether the prohibition of exportation imposed by the plaintiff upon its purchasers, who agreed to it in their contracts with plaintiff, was null and void under article 85(1) and (2) of the E.E.C. Treaty⁶⁰³ as far as the prohibition concerns exportation to The Netherlands."

In his *conclusions* Advocate General Legrange pointed out that if the request of the Dutch court had to be construed literally, the Court (of the Communities) would lack jurisdiction. It does not lie within the cognizance of the Court to decide on the question whether the contractual clause specified

600. According to the Austrian Constitution of 1920, art. 89(2), a court considering the applicability of a governmental regulation to be doubtful because of its illegality must stay the proceeding and submit its motion for repeal of the regulation to the Constitutional Court. The German (Bonn) Basic Law of 1949 adopted in art. 100 this idea with respect to the question of constitutionality of a statute, the validity of which is pertinent to the decision of the court. In such a case the court has to refer the constitutional question to the Constitutional Court. The British Foreign Law Ascertainment Act, 1861, provided for the remission of a case to a court of a foreign state which observes a reciprocal attitude, for ascertaining the law of such state as to the facts of the case.

601. Court, April 6, 1962 no. 13/61; 8 Slg. 99.

602. Art. 85(1) and (2) of the E.E.C. Treaty prohibits, because of their incompatibility with the Common Market, certain agreements between enterprises, any decisions by associations of enterprises, and any concerted practices "likely to affect the trade between member States . . . and resulting in prevention, restriction or distortion of competition within the Common Market, in particular those consisting in . . . price fixing or limitations or control of production and markets . . ."

603. See the preceding note.

in the request of the Dutch court falls under the prohibition of article 85 of the E.E.C. Treaty. Thus, in its view, the Court cannot pass judgment on the question of the applicability of article 85 to the concrete case; for the jurisdiction of the Court is limited to the rendition of an opinion on the "interpretation of the Treaty."⁶⁰⁴

In approving these arguments, the Court referred to the words just quoted because in the view of the Court these words, employed by article 177, point to what is the subject of the interpretation by the Court. And the Court continued to say that, accordingly, the Court can, regardless of the formulation of the request of the national court, decide only within the limits of its jurisdiction, which means it can decide only on an (abstract) question concerning the interpretation of the Treaty.⁶⁰⁵

Following this line of reasoning, the Court rendered an opinion pronouncing that, until the regulations provided for in article 87 of the E.E.C. Treaty would come into effect, the application of the nullity clause of article 85(2) of the Treaty must be deferred (except for certain exceptional situations specified by the court). Since substantive antitrust law of the Community is not within the program of this book, this casual reference to the Court's opinion may suffice.⁶⁰⁶

From what has been said, it seems clear that there is no basis for any comparison between this "prejudicial proceeding" of article 177 of the Treaty and the Anglo-American institution of certiorari which provides for submitting of concrete questions, if not of the whole record by the lower tribunal to the higher court. Nor can the proceeding under article 177 be compared with appeals to a court of last resort under the procedural laws of the member States. It is true that by these laws, the appeals—e.g. the French-Belgian-Luxemburgian *Pourvoi en cassation*, the German "*Revision*," the Italian *ricorso per cassazione* and the Dutch "*cassatie*"—are exclusively on the law. However, the courts of last resort in dealing with these appeals review the challenged decision as to whether the proper substantive or jurisdictional rule of law was applied to the specific facts⁶⁰⁷ of the case.

The Bosch Company lodged an appeal (*cassatie*) from the decision of the Dutch appellate court to the highest court of The Netherlands contesting the relevancy of Treaty law for the decision of the case; and it moved in the "Court" (of the Communities) for a stay of the proceeding there until the disposition of its appeal. The Court declined to grant the stay. In its view the

604. For this point in the *conclusions* of the Advocate General see 8 Slg. at 133-135. But see Bebr, *loc. cit.* (note 486 *supra*) Int. & Comp. L.Q. Suppl. at 14.

605. Court, April 6, 1962 (note 601 *supra*) 8 Slg. at 110.

606. At this writing, the only discussion published in English concerning the substantive law significance of the Bosch case is to be found in Angelo and Scott, *The European Common Market: New Problems in Anti-Trust Regulation* 48 Am. Bar Ass'n J. 634 (1962).

607. This points to the facts according to the findings made by the courts below. See, e.g., for French law Morel, *op. cit.* (note 12 *supra*) no. 667 p. 514; for German law Rosenberg, *op. cit.* (note 174 *supra*) § 140 III.

internal law of a member State on the one hand, and the Community law on the other, constitute two legal systems independent of one another. Accordingly, the Court's jurisdictional authority is established by the submission of a national court's request based on article 177 of the Treaty, and is not depending upon any further examination as to whether the national court's decision to submit the request to the Court has become incontestable according to the national law.⁶⁰⁸

Turning to the requirements for a request, we note first that article 177 uses the words "where such question is raised" Can a judge on his own motion make the request to the Court? An affirmative answer seems proper.⁶⁰⁹ Unlike Anglo-American common-law concepts, procedural law in the six civil-law countries does not prevent a judge from taking steps held necessary for the adjudication of the cases before him.

It may also be noted that article 177 speaks of a "court or tribunal before which such a question is raised" The language and the purpose of this article seem to remove any doubts that its command is directed not only to judicial courts, but also to administrative tribunals.

A few more interesting problems remain for examination. If the judge of the national court believes that, to quote from the language of article 177, his judgment in the pending case "depends on the preliminary decision on such a question"⁶¹⁰ and therefore decides to submit to the Court of the Communities a request for a ruling, is this Court bound by the national judge's decision? It seems that the prevailing opinion is in favor of an affirmative answer.⁶¹¹ As a result, the Court of the Communities cannot engage in an examination as to whether the question submitted is relevant to the adjudication of the litigation. The power to decide on this question remains with the national court.⁶¹²

Next, we reach the question whether a national judge is justified in abstaining from referring a preliminary question relating to the interpretation of a Treaty provision to the Court, because he cannot imagine that the provision could conceivably be given an interpretation different from his own. Several legal writers have not agreed with this justification.⁶¹³ In their view, the preservation of uniformity in the interpretation of Treaty law within the Common Market lies at the core of article 177. Without leaving room for any exception, the Treaty, in their opinion, directs that the Court alone shall have the ultimate power to interpret Treaty law. As a result, national courts shall always leave the interpretation to the Court of the Communities. However,

608. Court, April 6, 1962 quoted note 601 *supra* 8 Slg. at 110.

609. To the same effect Daig, *loc. cit.* (note 526 *supra*) 196.

610. For the kind of "questions" subject to an opinion of the Court see the text following the reference to note 599 *supra*.

611. Daig, *loc. cit.* (note 526 *supra*) 196; 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 146.

612. Stein and Hay, *loc. cit.* (note 571 *supra*) 395.

613. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 146; Bebr, *loc. cit.* (note 486 *supra*) 58 Colum. L. Rev. at 794 and Int. L. & Comp. L.Q. Suppl. at 13; but see Ropers, *loc. cit.* (note 486 *supra*) 35 JCP 1961 I 1624(I)(A).

there are a few decisions of national courts which did not request a ruling of the Court although, e.g., the application and meaning of article 85 of the E.E.C. Treaty, mentioned previously,⁶¹⁴ was an issue.⁶¹⁵

The answer requested of the Court to a prejudicial question must not be regarded as a mere advisory opinion; for it is binding upon the national court as to its decision in the pending litigation. True, no article of the Treaty expresses a command that the requesting court is obliged to follow the opinion of the Court. However, in the first place, the denial of such an obligation would affect the achievement of a uniform interpretation of Community law.⁶¹⁶ In the second place, Treaty law supplies even a technical argument by the provision of article 20 of the Protocol on the Statute of the Court. The provision assumes that the trial court will stay the proceeding because of its request directed to the Court. The interruption of the proceeding would make little sense if the basis for the decision of the case would remain, after the long stay, the same as before the submission of the request to the Court of the Communities.

It may be well to add that if the national courts violate the obligations—by failing to refer a relevant preliminary question to the Court or by disregarding the latter's opinion—appeal may be lodged with the higher State courts. Absence of an appeal or its denial, or violation of the obligations by the court which is the final instance in the pending case, lays the litigation at rest. The reasons are obvious. On the one hand the Treaty provides, as we saw, for an action in the Court for the setting aside of acts of the Community authorities on the ground of illegality; but the Treaty shrank from clothing the Court with reviewing power over the national courts or tribunals. On the other hand, in all the six States the independence of courts is very strongly guaranteed in their constitutions. It can hardly be said that among the obligations assumed by the Contracting States toward the Community an interference with a judgment of their courts which had become *res judicata*, was included. Thus, an action by another member State or by the Commission against a State for the failure of its courts to live up to the obligations mentioned before, could not be conceived by any stretch of the imagination.

In passing, it might be noted that the binding effect of the Court's ruling under article 177 is limited to the litigation in which it was requested. Since the Court renders only abstract comments on a Treaty provision, comparable

614. For the contents of article 85 see note 602 *supra*.

615. O.L.G. Dusseldorf October 21, 1958, 13 *Betriebsberater* 1110 (1958) [vertical price fixing scheme limited to the domestic market, held, not to be illegal under article 85]. See also *Rechtsbank, Zutphen* (Netherlands) July 11, 1958, 13 *Betriebsberater* 931 (1958) [division of markets of Belgium and The Netherlands in cardboard tubes, held, article 85 inapplicable since for the time being it is not yet in force]. However, note the view taken by The Hague Court in the *Bosch* case, referring the question of the effectiveness of article 85 to the Community Court. For a review of the first two cases see Steindorff in 8 *Archiv des Völkerrechts* 426-440 (1960).

616. 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) at 143; Bebr, *loc. cit.* (note 486 *supra*) *Int. and Comp. L.Q. Suppl.* at 15.

to a theoretical analysis of a legal norm, its opinion might in subsequent cases have the significance of a secondary authority.

(d) From what has been said in the preceding pages, it can be seen that the law of the European Economic Community may play an important role in litigations before the national courts or administrative tribunals or agencies, not only under the aspect of a provision of the Treaty as such, but also because of the numerous acts of the institutions of the E.E.C., particularly its chief executive, the Commission. The validity of such acts may be attacked in State proceedings. Naturally, it may be attacked by direct appeal to the Court, a subject which has been discussed in a preceding subsection.⁶¹⁷

As may be recalled, the E.C.S.C. Treaty provides in article 41 for the exclusive judicial control by the Court over an act of the High Authority or the Council regardless of the expiration of the time limit for a direct attack,⁶¹⁸ whenever in a litigation before a municipal court the validity of such an act is contested. The E.E.C. Treaty goes even further.

From the previous quotation of article 177 of this Treaty⁶¹⁹ it could be seen that, when a "question of the *validity* or the interpretation of an act of an institution of the European Economic Community"⁶²⁰ is raised in a proceeding before a municipal authority, the latter has, if it considers the question relevant for its decision, to refer it to the Court. As in the case of the control provided for in article 41 of the E.C.S.C. Treaty, so in the case controlled by article 177 of the E.E.C. Treaty, the validity of an act of a Community Authority may be questioned although the limitation period for a direct attack under article 173 of the Treaty has expired.

The provision of article 177 is one of first importance; for the article provides supreme judicial control by the Court over the interpretation of Community law, particularly Community anti-trust law. This calls for a few additional remarks.

In contrast to the E.C.S.C. Treaty,⁶²¹ the E.E.C. Treaty does not give its chief executive, the Commission, the exclusive power to declare as null and void agreements which are "bad" ententes.⁶²² Thus in a litigation, a national judge or an administrative authority may decide on a question concerning such ententes, subject of course to the exercise of the prejudicial jurisdiction of the Court under article 177 of the Treaty. Accordingly, judicial and other authorities

617. See Subsection III(b-f) *supra*.

618. See in this Subsection IV, part b, the text following reference to note 574 *supra*.

619. See the text following the reference to note 599 *supra*.

620. Cf. article 4(3) of the E.E.C. Treaty: Assembly, Council, and Commission. Daig, *loc. cit.* (note 526 *supra*) 197; 2 Groeben and Boeckh, *op. cit.* (note 479 *supra*) 145.

621. Article 65(4) of the E.C.S.C. Treaty: "The High Authority shall have exclusive powers . . . to rule on the conformity of such agreements . . . with the provision of this article." As for a survey of the contents of this article see the text accompanying the notes 578-581 *supra*.

622. Such bad ententes are particularly agreements and concerted practices of the kind defined in article 85(1) of the E.E.C. Treaty, being declared null and void, in article 85(2). For the contents of article 85(1) see note 602 *supra*.

of member States can exercise jurisdiction concerning article 85 dealing with such ententes until the Commission becomes interested in such a matter.

Needless to say that the Commission can, at any time, at the request of a member State or ex-officio investigate ententes and trade practices from the standpoint of violation of article 85, or inquire whether monopolistic business positions or practices run counter to the prohibition stated in article 86.⁶²³ If the Commission finds that there were violations of those Community rules or prohibitions, it has the power not only to take proper measures to bring them to an end, but it may, if such a violation continues, render a decision confirming the existence of the violation; all acts of the Commission are of course subject to a direct appeal to the Court.

Thus, as soon as the Commission takes jurisdiction of a case, the member State concerned is ousted of jurisdiction. As we saw, the question whether there was a violation of article 85 or 86 of the Treaty may come up in a proceeding before a national court or agency and the validity of the act of the Commission, even if it had not been appealed from in time, will be examined by the (Community) Court in exercise of its prejudicial jurisdiction according to article 177.

All this displays a picture of an almost confusing concurrence of jurisdictions. However, there is one matter which is exclusively in the jurisdiction of the Commission. Article 85 in section 3 of the E.E.C. Treaty recognizes exceptions from the prohibitions and nullity provisions of the first two sections by providing for the validation of "good" ententes. Article 87 of the Treaty refers to general regulations implementing the rules of articles 85 and 86 to the enactment of which the Council of Ministers of the European Economic Community is authorized by the Treaty. The first such Regulation, No. 17, with the effective date of March 13, 1962, prescribes that no party may invoke the exceptions of article 85 section 3 unless the entente in question has been notified to the Commission. Then, according to article 9(1) of the Regulation, the Commission has "full competence," subject, of course, to the control of the Court, to declare the first two sections of article 85, dealing with bad ententes, inapplicable according to the dispensation provisions of the third section of article 85.

623. Cf. E.E.C. Treaty, article 89(1); Angelo and Scott, *loc. cit.* (note 606 *supra*) at 638.