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The Common Market has in the last nine months had the greatest shock to its existence, and it appears to have survived. The fundamental assumptions on which it is built have been rudely challenged. It is, therefore, fitting to scrutinize the basis of the European Economic Community with considerable care.

In Britain we often speak of going into Europe. To this some reply that Britain is already there. Of course Britain is geographically in Europe, and she participates in a number of European organizations, as, for example, the Council of Europe, and the (mainly European) Organization for Economic Co-operation and Development (OECD), and she is of course the leading member of the European Free Trade Association (EFTA). She is however not in Europe in the sense that she does not belong to the only body in Europe that really matters, the European Economic Community.

In their work of drawing up the Treaty of Rome[1] the architects of the Treaty set out to do something which was designed to produce a change in Europe which was to be radical and lasting. There was a determined effort to put an end to the feuds which had for centuries existed between the nation states of Europe, and to establish machinery to enable those states to work together for their common good.[2] It was an attempt to contain the conflicts which had ravaged Europe in the past and which would undoubtedly continue to chafe in the future within a peaceful institutional system. The result has been the establishment of a new legal order in Europe.

This term, the "new legal order," was first used by the Court of Justice in the First Tariff Commission case;[3] I use the expression

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[1] Treaty establishing the European Economic Community, signed March 25, 1957, ratified by the Member States of Belgium, Germany, France, Italy, Luxembourg and The Netherlands during that year and effective as of January 1, 1958. (Hereinafter cited as Treaty).

[2] For a political background to the Treaty, see CAMPS, BRITAIN AND THE EUROPEAN COMMUNITY 1955-1963 (1964); DIEBOLD, THE SCHUMAN PLAN, A STUDY IN ECONOMIC CO-OPERATION 1950-1959 (1959).

[3] N. V. Algemene Transport—en Espeditie Onderneming Van Gend en Loos v. Nederlandse Belastingadministratie, case 26-62, 9 Recueil 1, 2 Com. Mkt. L. Rep. 105 (1963). See also Comment, 1 COM. MKT. L. REV. 91 (1964).

The court declared, 2 Com. Mkt. L. Rep. at 129:

> the Community constitutes a new legal order in international law, for whose benefit

in its widest possible sense. This new legal order which springs from the Treaty of Rome, and which brings the citizens of the Community within the protection of the Treaty, also applies to the relations between the member states. The constitutional position of the member countries has been radically altered by the terms of the Treaty, and their relationship is no longer one which exists between fully sovereign countries. They have all—and equally—subscribed to build the Community on what has been described as a basis of "supranationality."

The three fundamental ways in which this supranational element shows itself in the Community are to be seen in the powers of the institutions. First, the Commission is established as an independent body with a motive power of its own. Second, the Council of Ministers is given the right to make certain decisions affecting the member states by a specially qualified majority vote; and third, the Court of Justice has compulsory jurisdiction over the member states in respect of the performance of the Treaty. These three principles are the basis on which the future of Europe—and all its hopes—are built. It is of particular significance that it is the first two—the independence of the Commission, and the principle of majority voting—that have been specifically challenged recently,[4] and therefore are most worthy of examination. It is therefore my present intention to examine these principles.

I. THE POWERS OF THE COMMISSION

The European Commission is one of the novel concepts of the Treaty. The Commission itself consists of nine individuals who are responsible for all the decisions of the Commission, and a staff which is now some two and a half thousand persons in number.[5] The President is Walter Hallstein, formerly the distinguished Secretary of State to Dr. Adenauer. The Vice Presidents are M. Marjolin, a Frenchman, Dr. Mansholt, formerly Dutch Minister of Agriculture, and the third Vice President is an Italian. All of them have performed outstanding services to their own countries, and most of them have taken part in national administrations; they come from the political

the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. Community law, therefore, apart from legislation by the member states, not only imposes obligations on individuals but also confers on them legal rights.

[4] DeGaulle, Press Conference, Sept. 9, 1965, excerpted in European Community No. 86, 8 (Oct. 1965).

[5] In 1964 the establishment numbered 2,555. 8th GENERAL REPORT OF THE E.E.C. COMMISSION, p. 397.

side of national life rather than from the national ministries. Their duties are primarily to adopt a European posture. They must be persons whose "independence can be guaranteed," and they are specifically required to act "completely independently in the performance of their duties, in the general interest of the Community." They are required not to seek or accept instructions from any government, and the governments bind themselves to see that this provision is observed.[6] It may therefore be said that their loyalty is entirely European, although of course this does not mean that they give up their own nationalities, or have any less the thoughts and emotions of nationals of a member state merely because they are members of the Commission.

Their general powers are contained in article 155 of the Treaty. Under this article the Commission has to see that the provisions of the Treaty are observed, and in this respect it has been called the "watchdog" of the Community. It has the power to bring member states before the Court if it considers that the terms of the Treaty are not being complied with. Under article 169 the Commission has the duty in such a case to give a reasoned opinion to the member state concerned, and if the latter does not remedy the situation, the Commission has the right, in the exercise of its discretion, to bring the matter before the Court of Justice.

Its second main function is to exercise the power of decision when this is expressly conferred upon it, and to participate in the preparation of acts of the Council together with the European Parliament. It must then finally implement such matters as are conferred upon it by the Council. It is this legislative partnership with the Council that is of supreme importance.

The third task of the Commission is to formulate recommendations and opinions wherever it is required to do so by the Treaty, but it also has the power to formulate them whenever the Commission considers them to be necessary, so that even though recommendations and opinions have no formal legal effect it gives the Commission a power of comment at will on all matters arising out of the Treaty.

One of the important functions of the Commission is the gathering of information and the formulation of plans on the European level. Such matters are necessary for it properly to carry out its functions. The significance of the staff employed by the Commission is that

[6] Treaty, art. 157.

it is not merely the competent body, but also the only body which is capable of drawing up these plans on a European basis. It thus has an advantage over the Council, which has only a relatively small secretariat (some 300 in number), and over the national administrations which do not have access to information beyond their own country. This places the Commission in a favored position in being able better than any other body to put forward proposals which are in the interest of the Community as a whole.

The Commission is essentially a collegiate body, and takes decisions by majority vote of the Commissioners, provided that a quorum is present.[7] When one speaks of decisions, this means legal acts, having the force of law which are liable to affect the rights of the member states or the rights of individuals or both. When deciding such an act there is a limitation imposed by law upon the Commission, for this must be the decision of the Commission alone. In the case of a national cabinet, decisions may be taken by individual ministers and most of those decisions will be taken on the minister's behalf by one of his officials. Although not a party to it, ministerial responsibility makes him liable for the consequences, and he must accept it as if it were his own decision. This never applies in the case of acts of the European institutions, for such acts cannot be delegated to any other body or arrived at by any other procedure than that laid down in the Treaty and the rules made under it.[8] This ensures that the act in question is given proper consideration by the Commission and approved by a number of its members. This is all the more important as it is the duty of the Commission to arrive at a solution which disregards narrow national interests and has regard to the interests of the member countries as a whole.

II. THE COUNCIL OF MINISTERS

The second feature of the Community relates to the taking of decisions by the Council. The Council of Ministers represents the member states, and decisions are taken by their representatives on a much more national basis, for these representatives are the senior ministers of the governments concerned, and they are answerable to their own cabinets and to their own parliaments. It is not therefore

[7] Treaty, art. 162.
[8] See Société nouvelle des usines de Pontlieve-Acieres du Temple (S.N.U.P.A.T.) v. High Authority, cases 32-58, 33-58, 5 Recueil 275 (1959).

to be expected that the individual members of the Council would take the same views as the members of the Commission. As they would predictably take up positions based on national interest, the procedure of the Community was evolved so that these national views would not be a road-block to decision-making. It is the disadvantage of every diplomatic conference and every inter-governmental organization that decisions have to be taken unanimously, or at the least by the unanimous vote of those whom the measure affects. This right of sovereignty of states was abrogated by the Treaty of Rome, and the supranational principle instituted which in certain cases permitted a decision to be taken by majority vote.

It is important to emphasize that such a means of taking a decision only applies when it is expressly provided for in the Treaty. Also, such a decision can generally not be taken without there being first a proposal of the Commission which is to be approved. If the proposal of the Commission is amended, then the amendment must be approved by the Council unanimously.[9] This ensures that the regulation, directive or decision proposed is broadly one which commends itself to the interests of Europe as a whole, as it would not otherwise receive the blessing of the Commission. In addition the system of majority voting is such[10] that it requires only one major power, France, Germany or Italy, in combination with a smaller power, Belgium or The Netherlands, to oppose the measure, and the proposal is blocked. Nor can there be any railroading over the interests of any one country, because this would not receive the support of the Commission. Nor is it possible to put any one country into a state of dissatisfaction so that it votes permanently against the majority, for this would give every other country a virtual veto. It is the experience of the Council that the number of occasions when the majority vote is actually exercised is small, and the issues involved are comparatively minor. The system acts, however, as a goad to induce the member states to agree unanimously rather than to face the unpleasant prospect of a majority vote against them. Thus it may be said that the system of majority voting is not a system designed to enforce the will of the majority over the minority, but rather it is a means of arriving at a fair decision.

The system of deciding matters by a weighted majority is not new. It has in fact, been used in some international organizations since

[9] Treaty, art. 149, unless the amendment is made by the Commission, in which case it becomes a new proposal.

[10] The weighted majority is set out in Treaty, art. 148.

1914. These included the International Institute of Agriculture, the International Office of Public Health, and the International Hydrographic Bureau. This system of majority voting is used today in three classes of organizations. The first are those international organizations of the United Nations connected with finance, the International Monetary Fund, and the World Bank for Reconstruction and Development. In these, the voting power of each member is determined by the quota or subscription contributed by it. The second class consists of the councils of international commodity agreements where the voting power of each member is determined by the amount of its trade in that commodity. The third class consists of the European Communities. Professor Jenks, who has many years of experience of international organization, has said:

> Weighted voting is most readily attainable in an organisation the functions of which are sufficiently circumscribed and well defined to afford some simple basis for the selection of criteria of relative importance capable of securing general acceptance. Where an organisation has a wide range of responsibilities, the factors to be taken into account in assessing the relative interest of its Members either in its work as a whole or in particular decisions are likely to be too varied and imponderable and the relative weight to be attached to the different factors is likely to be the subject of acute controversy.[11]

His argument is that weighted voting is not suitable whenever there is a wide range of different topics to be discussed, and he argued this in a recent article.[12]

Professor Jenks claimed that the unanimity principle is outdated, but that there is no entirely satisfactory method of making decisions to supersede it. The essence of decision, he argues, is to be found in a real consensus of opinion, and a decision by majority voting is no substitute for a negotiated agreement. In every case, it is necessary that the decision should be negotiated so that a consensus is arrived at. This applies just as much inside the Community as it does elsewhere. On the other hand, it is probably essential to have some means, if necessary, of arriving at a definite decision and it clearly would not be effective to supplant the qualified majority by a veto

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[11] *Some Constitutional Problems of International Organizations*, 22 BRIT. YB. INT'L. L. 41, 42 (1945).

[12] Jenks, *Unanimity, The Veto Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations*, CAMBRIDGE ESSAYS IN HONOR OF LORD MCNAIR (1965).

system. The system of a qualified majority was included in the treaties, not because of any kind of federalist dogma or theory, but because it was recognized as a pragmatic necessity. Those who were working in the O.E.E.C., as it then was, came to the conclusion that while the method of unanimity was adequate in the enlargement of quotas which mainly involved bilateral bargaining, it became wholly ineffective as a means of reaching decisions affecting all the members, such as a general reduction of tariffs. The same conclusions are to be drawn from the work of GATT and the Council of Europe. It was, therefore, essential to have a method in reserve, even if it was not used very much, and this was the system of majority voting. This will be discussed at greater length later in this paper in connection with the Community crisis with France and the Luxembourg meeting of the Council of Ministers.

III. The Court of Justice

The third aspect of the supranational character of the Communities, which I wish to emphasize, is the establishment of the strict rule of law within the Community, and the compulsory jurisdiction of the Court of Justice over the member states. The significance of this is sometimes overlooked and it is, I think, instructive to examine those cases where the member states have been brought before the Court. There are not many of them. In each case the Commission, which is charged with the execution of the Treaty, brought proceedings against the member state under article 169, after the Commission had presented a reasoned opinion with which the state concerned did not comply. The first case[13] was brought against the Italian Government for postponing the import of certain products of pig meat. The next was also brought against the Italian Government,[14] and concerned the question of the exact tariff which was to be applied by the Italian Government on the importation of radio valves from the member states. A third case,[15] against Luxembourg and Belgium, involved the import duties on gingerbread. The question was whether a special import duty levied on the grant of an import license for gingerbread was permitted. Italy was involved in a case concerning restrictions on

[13] Commission of the EEC v. Italian Gov't., case 7-61, 7 Recueil 633, 1 Com. Mkt. L. Rep. 39 (1962).

[14] Commission of the EEC v. Italian Gov't., case 10-61, 8 Recueil 1, 1 Com. Mkt. L. Rep. 187 (1962).

[15] Commission of the EEC v. Luxembourg and Belgium Gov'ts, cases 2-62, 3-62, 8 Recueil 813, 2 Com. Mkt. L. Rep. 199 (1963).

imports,[16] and in another case,[17] action was brought again against Luxembourg and Belgium in respect of the import of milk products, consisting of milk powder, condensed milk, and certain cheeses coming from the other member states. A case against Italy on export rebates[18] was recently decided and there is presently pending a case against the French government,[19] in respect of the import of DIOFAN from Germany into France. Further actions were brought by the German government against orders of the Commission in respect of the import duties on sweet oranges[20] and the tariff quota on wine.[21] There are also other cases pending by Germany in respect of the import of mutton[22] and all farm products subject to a special license.[23]

The significance of these cases is that they are all concerned with the duties or the right of entry in connection with imports and thus with the establishment of the customs union. This does not mean, of course, that there have been no other infringements of the Treaty by the member states. However, the Commission places most importance on the establishment of the customs union, and has decided that the terms of the Treaty, in this respect, must be enforced to the letter. Here, we have a situation which is very different from some of the other organizations which regulate tariff rates, such as OECD, GATT, and EFTA. In all these organizations there is no means for the judicial determination of the infringements of the Treaty, and in practice, the secretariat does not even know that there has been an infringement because it has no means of information unless a complaint is made by another member state. This, I think, explains why, although there is a somewhat complicated machinery in the EFTA Convention for the diplomatic settlement of disputes,[24] this has never been fully used. It is, however, impossible to believe that these tariff regulations have been observed implicitly, particularly where there

[16] This was a claim by the Italian government that the Commission was not allowed to grant an authorization to France under art. 226 of the EEC Treaty to restrict the import of refrigerators from Italy. Italian Gov't v. Commission of the EEC, case 13-63, 9 Recueil 335, 2 Com. Mkt. L. Rep. 289 (1963).

[17] Commission of the EEC v. Luxembourg and Belgian Gov'ts, cases 90-63, 91-63, 10 Recueil 1217 (1964).

[18] Commission of the EEC v. Italian Gov't, case 45-64, 11 Recueil 1057 (1963).

[19] Case 38-65.

[20] German Gov't v. Commission of the EEC, case 34-62, 9 Recueil 269, 2 Com. Mkt. L. Rep. 369 (1963).

[21] German Gov't v. Commission of the EEC, case 24-62, 9 Recueil 129, 2 Com. Mkt. L. Rep. 347 (1963).

[22] Case 52-65.

[23] Case 55-65.

[24] See LAMBRINIDIS, THE STRUCTURE, FUNCTION, AND LAW OF A FREE TRADE AREA: THE EUROPEAN FREE TRADE ASSOCIATION 202-38 (1965).

is no organization to police them. Here is a clear example of the effectiveness of the Commission, and the need for a court of law, if the obligations of states are to be properly carried out. One ought to emphasize that in all these cases, the points of law have not been of any great importance, and the respective governments have been, generally, defeated. They have, however, accepted the decisions with good grace, and have never failed to carry out the orders of the court. This is certainly one of the most important aspects of the new legal order that is being created in Europe.

IV. The European Parliament

The fourth of the major organs of the Community is the European Parliament. One of the most perplexing problems in the Community is the relationship between the Commission, the Council, and the European Parliament. It would be difficult to apply the doctrine of separation of powers, particularly as this doctrine, however much it has been preached in Europe, is rarely practised there. Every European government, including the British, is in full control of its parliament, and can determine the progress of legislation. We do not expect, therefore, to find in Europe any separation between the executive and the legislative power. Although the national parliaments control legislation in the member states, the European Parliament has no legislative function at all. It is purely consultative with the single exception of the rather curious power to dismiss the Commission as a body, by a vote of censure carried by a two-thirds majority.[25] This provision must, however, be regarded as ineffective, because the Commission is no longer the stumbling block in the progress of the Community. This provision was originally designed for the Coal and Steel Community[26] where the High Authority had, in theory, considerably greater powers of initiative than the Commission under the Rome Treaty. The second difficulty is that even if a vote of censure was carried, the members of the Commission would continue in office until they were replaced.[27] This replacement must be by the unanimous agreement of the governments of the member states, and, therefore, unless there was unanimity—which would be very remarkable if any serious crisis arose in the Community—the Commission would continue in office.[28] As things have turned out, relations between the

[25] Treaty, art. 144.
[26] E.C.S.C. Treaty, 261 U.N.T.S. 140, art. 24.
[27] Treaty, art. 144.
[28] Treaty, art. 158.

Commission and the Parliament have been very good. There has been a continuous dialogue and the various committees of the Parliament meet, usually in Brussels, in order that they may discuss their business with the Commission officials. There is, therefore, very close co-operation between the two. It does not necessarily follow, however, that in the cases where it is required under the Treaty, or even when not obligatory, that when the Commission has invited the opinion of the Parliament, this opinion has always been followed. On many occasions it has, but on others the Commission has chosen to ignore the opinion of Parliament, and has done so with impunity. Nor has the Commission always been anxious to have discussions in the Parliament. An example of this arose over the Greece negotiations when the Parliament was only consulted after the Treaty had been drawn up and was ready for signature. Nevertheless, it must, I think, be said that on the whole, the Commission has taken the European Parliament into its confidence, and that it has been considerably assisted by the views which Parliament has put forward, particularly in relation to the political developments of the Community.

The real difficulty lies in the powers of the Council. Although the Commission has certain executive powers conferred upon it, which it can exercise independently, either by terms of the Treaty, or by subsequent regulations, the general policy is firmly in the hands of the Council. Although the Council cannot always decide independently of the Commission, it is undoubtedly a fact that the temper of the Council determines the policy of the Community, both in the executive and the legislative field. One might be tempted to describe the Commission as an executive without a cabinet, the cabinet powers being exercised by the Council, yet neither body being capable of acting alone. In this connection, it is, I think, unfortunate that the meetings of the Council are secret, and there is no publication of the views expressed, or the way in which the members of the Council vote. This means that the participants at the Council meetings, who are national ministers of cabinet rank, are somewhat embarrassed when they return to their own parliaments to give an account of their activities in Brussels. While they may say how they voted on particular Council decisions, they may not say how others voted. The national parliaments to whom these ministers are ultimately responsible, have, of course, their own representatives in the European Parliament, and it is perhaps between the Council and the European Parlia-

ment that the greatest conflict within the Community has arisen. Both the parliamentarians and the Council are concerned with political decisions, and it is here that what is described as *"la relation malade"* has arisen. Between the Council and the Parliament there has been a lack of co-operation and consultation, which has put these bodies on bad terms with each other. It is, therefore, difficult to see, at any time in the future, how the powers of the Parliament will be extended, unless the Council has greater confidence in it. There are provisions in the Treaty which contemplate elections for the European Parliament by direct universal sufferage,[29] and there is every reason why direct elections should take place. If the Community is to dispose of the large sums accruing to it, out of its own resources in the agricultural fund, a principle to which most would subscribe is that there should be "no taxation without representation." This is a principle which most parliaments in Europe are now prepared to accept, and this means that there is a need for parliamentary control of the Community budget. When, however, the votes in the Parliament have to be counted, the question of *how* these representatives are appointed becomes important. It will no longer be sufficient, as is now the case where only the general consensus of opinion is required, for these representatives to be nominated by their own parliaments or governments. There will have to be some more precise method of appointment, to which the only democratic solution would be a form of election, either from their own parliaments, or directly by the citizens of the Community, and it is the last alternative which is generally preferred. It is, therefore, clear that there is a serious political crisis in the Community, and although it cannot be expected that direct elections take place in the immediate future, nevertheless, it is reasonable to assume that this is a requirement which cannot be completely dismissed. This was the reason why the Commission included plans for the future of the European Parliament in its ill-fated proposals of June last year.

V. The Flexibility of the Treaty

Having described the essential elements which are responsible for the effectiveness of the Community structure, one must then examine what means the Community has for adapting itself to the conditions of a rapidly changing world. No treaty can survive which lays down

[29] Treaty, art. 138(3).

rules which cannot be altered except in the most exceptional circumstances, and the success or failure of an institution very often depends on the flexibility of its structure. It is, I think, particularly relevant to refer to the United Nations, where the two most striking developments are to my mind the increase in the role of the United Nations Secretariat, and the competence of the General Assembly under the "Uniting for Peace" resolution.[30] In this way the United Nations was able to progress rapidly in circumstances which had never been contemplated by the contracting parties when the Charter was enacted. It is, therefore, desirable to see what features of the Community are responsible for providing it with a remarkable dynamism, in spite of the very considerable elements of dissent which it has so far been able to contain. The first point to emphasize is that the Treaty provides not only a constitution, but also machinery for legislation—a basic framework called a *loi-cadre* under which legislation can be adapted or repealed as necessary.

The Treaty, itself, says very little about agriculture except to lay down the general principles that there should be a fair standard of living for the agricultural community, markets should be stabilized, delivery of supplies should be guaranteed at reasonable prices.[31] This will be, of course, a paradise for all, not only for the farmers, but also for the consumer. What the Treaty omits to say is precisely how this is to be achieved. It says only that the organization should consist either of (a) common rules as regards competition, (b) compulsory co-ordination of the national marketing organizations, or (c) European marketing organizations.[32]

The whole policy for agriculture when the Treaty was signed had still to be worked out, and indeed it has been worked out under the very able direction of Sicco Mansholt, the member of the Commission responsible for agriculture. The policy for agriculture, adopting a system of levies between the member states until the end of the transitional period of the agricultural policy, with permanent levies against third countries in respect of imports to the Community, is entirely a post-treaty development. So too, are the co-ordination committees which are responsible for the management of each product, and although the question of the agricultural orientation and guarantee

[30] See Uniting for Peace Resolution of Nov. 2, 1950, reported at 9 U. N. BULL. 498 (1950).
[31] Treaty, art. 39.
[32] Treaty, art. 40(2).

funds was mentioned in the Treaty,[33] few further provisions were laid down. The result is that by using the Community machinery, the whole of the agricultural policy has been developed and established. It may be amended or repealed in the same way and, therefore, the Community will be free to make such alterations in its agricultural policy, as may be advisable if other European countries enter the Community.

There are two other broad policies which are to be determined in this way under the Treaty, namely the Common Transport Policy and the Common Commercial Policy. These policies are both to be agreed upon by qualified majority vote after the end of the second stage.[34] The main concepts of the Common Transport Policy, namely the system of the equalization of infrastructure costs, the licensing of undertakings and the system of bracket or forked rates for tariffs are all developments since the Treaty was signed. These ideas are embodied in proposals of the Commission and have only now received the sanction of the Council.[35] Commercial Policy is proving the most intractable problem of all. This is perhaps not surprising as a Community foreign trade policy is pregnant with political differences which cannot at present be resolved. This is also true of the whole system of the notification of agreements under the anti-trust provision of article 85 of the Treaty which was entirely developed by the Community method, after the Treaty had come into force.

VI. Regulations and Directives

The way in which "European legislation," if that is the right name for it, can be enacted, is provided for by article 189. The most effective method of legislation is by regulations which have general application among the member states and individuals, as if they were European statutes.

There are great advantages in a regulation, for a regulation is part of Community law, and will be enforced by the Community. This can be done through the operation of article 169 against the member state where the breaches are taking place. Furthermore, it is also subject to the system of interpretation of Community law by the Court of Justice under article 177, which gives power to the Court, not only to interpret the Treaty, but also to interpret the acts of the

[33] Treaty, art. 40(4).
[34] Treaty, arts. 75, 111, 113.
[35] Agreed by the Council on June 22, 1965.

institutions. This enables the regulation to have a uniform application over the whole of the Community. The main difficulty is that where there are already laws in existence, the enactment of a Community regulation may produce a conflict between the Community rule and the national rule. This conflict is undesirable, and it may involve the susceptibilities of the member governments. Thus it is accordingly provided in article 189 that the Community may enact directives which are binding "in respect of the result to be achieved upon every member State but the form and manner of enforcing them shall be a matter for the national authorities." This means that wherever the directive is used or has to be used, the member states have the task of complying with the directive, and putting it into the form of a national law which will be binding upon the citizens of that state. The reason for this directive approach is quite obvious. It is because national legislation may take a number of different forms, and if one takes, for example, company law, the whole theory and structure of company legislation may be completely different in different countries, as it is for example in France and Germany, and it would be impossible to enact a regulation relating to company law which simply overrode national legislation. Any legislation would have to be suitably adapted by the member state concerned to its own particular style of legislation. The principle of the directive exists to protect the national laws already in force in the member states, and it is to be noticed that in the very important provisions in the Treaty for the approximation of laws the Council's actions must be unanimous.[36] Thus, the ever widening field of harmonization of laws—a process which is as indispensable for the growth of a real Common Market as is the dismantling of the internal tariff barriers themselves—may only be carried out through the medium of the directive.

In the case of directives, however, not only will the form of the legislation be different in each member state, but the national legislation will be separately and independently interpreted and applied by the national courts with the result there may be substantial divergences in the operation of a directive in the different member states. This could lead to a very unfortunate result, for it is precisely in the establishment of those laws which refer to standards, such as those which affect the quality of imported goods with respect to the safety or health or general convenience of the public that uniformity is most

[36] Treaty, arts. 100-102.

critically needed. If there are to be provisions relating to the coloring matter for foodstuffs[37] or the preservatives in foodstuffs,[38] these provisions are valueless unless they are identical in all the member states, yet under the Community system such provisions may be introduced only by directives, as in fact, they have been. It is interesting to note that one of the complaints the French government levelled against the Commission, (under head four of the "decalogue") was that the Commission has been proposing directives which contain so much detail that the only liberty left to member states is to choose the form of the legislation in which they are to be embodied. The French Government regarded this as a usurpation of the national jurisdiction, which ought to be abandoned. It seems to me, however, that the fault lies not so much in the Commission, but in the rigidity of the Treaty provision, that harmonization of laws may only be carried out by means of directives, for it is precisely in this area that the detail must be identical. It would, therefore, seem that it would be much more appropriate, when the Community is dealing with such matters as standards relating to goods, that there should be power in the Community to legislate by means of regulation.

A further objection to the directive is that the national parliaments are being called upon to pass legislation without, in effect, having any discretion, or irrespective of whether or not they agree with it. If a parliament were to refuse to implement a directive of the Community, the government concerned would be responsible for an infringement of the Treaty, and should be proceeded against, under article 169, although how a government can control its members of parliament is something that many governments would be only too pleased to discover. It would be more logical simply to take power away from the parliaments altogether, by allowing the Community to preempt their competence by passing Community regulations which would not require the consent of the national parliaments.

VII. The Crisis of June 30, 1965

Agricultural policy has always been of extreme interest to the French, and for this reason the Community has made a great effort to comply with French desires by pushing forward the agricultural policy as fast as possible. In this it has encountered the obstruction of Germany. In Germany, prices are high, and in France comparatively low, so that any integration of Community agriculture will

[37] Oct. 10, 1962, Official Gazette, 2645/62. [38] Nov. 5, 1963, Official Gazette.

give France a large market in Germany, and if she exports outside the Community, France will be entitled to heavy deficiency payments from the other countries. It could be said indeed that part of the price that the other five had to pay for the continuing support of France was the promotion of a satisfactory agricultural policy.

The agricultural policy began in January 1962, when the first regulations on the subject were made.[39] At this time the Financial Regulation[40] on the subject of agriculture, which came into force on July 1, 1962, was laid down to extend for only three years and would then have to be replaced by a new one. The Regulation therefore was due to expire on June 30, 1965, and this was the deadline for the renewal.

The Council meeting of December 15, 1964, was an extremely important one, for it resolved the problem of the wheat price for the Community, against which there had been considerable opposition from Germany. The Council agreed that the common price would come into effect on July 1, 1967, and would be fixed in units of account. This meant that there would, thereafter, be no further need for the system of levies presently applied in intra-Community trade, and of course it would enable negotiations on the Kennedy Round to proceed on a realistic basis. This agreement of the Council was essentially a compromise, but it was regarded as a decisive step in the establishment of the common agricultural policy. The Council invited the Commission to submit, before April 1, 1965, proposals for financing the common agricultural policy for the period 1965-1970, and for implementing article 2 of Regulation No. 25, which is already part of Community law.[41] Article 2 reads as follows:

> Revenue from levies charged on imports from third countries shall be the property of the Community and shall be appropriated to Community expenditure; the budget resources of the Community shall comprise such revenue together with all other revenues decided in accordance with the rules of the Treaty as well as contributions of member States in accordance with Article 200[42] of the Treaty. The Council shall in due course initiate the procedure laid down in Article 201 of the Treaty so as to implement the above provisions.

Article 2 provides that the revenue from levies charged on imports from third countries shall be appropriated to Community expenditures. This, having regard to the relatively high wheat price that was

[39] Reg. Nos. 19-25.
[40] Reg. No. 25.
[41] Council Minutes, EEC Bulletin, Feb. 1965, pp. 11-19.
[42] This article sets out the scale of contributions of each member state to the Community budget.

fixed, is reckoned to give the Community an enormous income of the order of four thousand million dollars, which would have to be distributed by the Community institutions. Article 2 also refers to article 201 of the Treaty which contemplates the replacement of the financial contributions to the Community from member states by revenue accruing from the common tariff or other resources available to the Community. The article provides that the Commission shall submit proposals to this end to the Council. At the same time there was pressure coming from the European Parliament, as well as from some of the parliaments of the member states, who thought the control of expenditure in accordance with general parliamentary practice should be under the control of the European Parliament to some extent. This, of course, also raised the question eventually of direct elections to that Parliament.

The Commission, having received the mandate from the Council to prepare proposals, prepared proposals for financing the common agricultural policy for 1965-1970. At the same time it tied on two further proposals, the first relating to the financing of the common agricultural policy after the single market stage had been reached, *i.e.*, in 1967, and secondly, for the arrangements for the distribution of the joint revenues of the Community which involved strengthening the role of the European Parliament.[43] The Commission thus produced a package proposal which undoubtedly had a high political content and, of course, the Commission must have been aware that the French government was completely opposed to the strengthening of the European Parliament, where, in fact, the Gaullists were present, but were either actively hostile or abstaining in respect of most of the work. It was also generally believed that on this occasion, at any rate, the Commission was not unanimous. A further point is that these proposals were not communicated privately to the Council members as is the usual custom, but they were discussed by President Hallstein at the session of the European Parliament.[44] The European Parliament then debated the Commission's proposals which were generally approved,[45] although it is to be noted that during the debate the pro-

[43] The Commission's proposals, submitted to the Council on March 31, 1965, are published in the supplement to EEC Bulletin, May, 1965.

[44] Held in Strasbourg, March 22-26, 1965. For the proceedings during this period, see European Parliament, MONTHLY BULLETIN OF EUROPEAN DOCUMENTATION, April, 1965.

[45] Held May 11, 1965. For the proceedings, see European Parliament, MONTHLY BULLETIN OF EUROPEAN DOCUMENTATION, June, 1965.

posals were opposed by the Gaullist faction, on the grounds that the Commission was not entitled to include the amendments to the powers of the European Parliament in proposals for the financing of the common agricultural policy, and the Gaullists abstained when the vote on the resolution was taken.[46] It was clear that conflict was in the air. Nevertheless, when the Council of Ministers met on June 28, there was no suggestion that it would be impossible for some compromise to be arrived at. The discussions continued for three days, and it is to be noted that on June 30 the French parliamentary assembly approved[47] the ratification of the Treaty on the merger of the executives of the Community, and indeed there is no indication that M. Couve de Murville did not intend to reach a compromise. By the evening of June 30, the French foreign minister had already achieved his major object, namely to separate the proposals of the Commission, and thus divorce the question of financing the immediate agricultural program (only necessary for the next twelve months) from the question of increased parliamentary powers. There was, therefore, no reason why the regulations for the immediate agricultural year, which started the next day, should not have been agreed upon, except that the German and Dutch parliaments had insisted upon the extension of the powers of the European Parliament, and these ministers in the Council were unable to act without the specific approval of their cabinets.

The normal way out of this dilemma would have been to "stop the clock," as was done on December 31, 1961, at the suggestion of the French government, when the clock was stopped for fourteen days. The present session, however, broke off at about 10:30 p.m., after which M. Couve de Murville was on the telephone to Paris. The result of that telephone call, when the session resumed, was that M. Couve de Murville indicated that unless agreement was reached by midnight, he would adjourn the session, which he did. The French thereupon complained that the other members of the Council had been in breach of their agreement to agree upon new financial regulations by June 30, and this failure was in no way the fault of the French government. The French, thereafter, abstained from attending Council meetings, although they accepted a form of written procedure, which had been devised for emergencies. The French did, however, attend other committees, but a sharp line was drawn between the

[46] See EEC Bulletin, May 1965, p. 49.
[47] The act of ratification has not yet been delivered by the French government.

administration of continuing matters already agreed upon (*gestion*) and any new policies (*novation*). The French did not participate in the latter discussions. The Commission immediately sought to justify itself in a memorandum in which it suggested a formula which might be agreed upon. The French, however, were in no mood for compromise, and everyone awaited the famous press conference of General de Gaulle on September 9. When his words were examined, it is clear that in many respects the General appreciated what the Community has achieved, for he said:

> As far as the economy is concerned, we believe it is true that the systematic organization of the respective activities of the countries lying round the Rhine and the Alps corresponds to the facts that they are close neighbors, that their production is at the same time analogous and complementary, and that it is in keeping with the needs of our times to form units on a broader basis than that of the individual European states. . . .[48]

He also said that the Commission refrained from excessive encroachments upon the only valid powers which are the individual states. He also maintained that France had consistently proposed plans for political progress which he described as organized cooperation between the states, evolving no doubt towards a confederation which would permit other countries such as England and Spain to join in. However, the Commission "suddenly abandoned its political discretion" and formulated plans for handling an enormous budget of its own, which would not be supervised by the member states, who represent the taxpayers. He also complained that by the majority voting system, slated to come into force in the Council on January 1, 1966, France would be exposed to the possibility of being overruled in any vital economic matter.

The situation was aggravated by a speech made by M. Couve de Murville to the French National Assembly on October 20, when he spoke of "general revision" of the Treaty. But a reunion of the Five was firm and unanimous in a statement made after a Council meeting on October 26, held without French participation. The Five solemnly affirmed the necessity of continuing to implement the treaties of Paris and Rome in accordance with the principles contained therein. In order to achieve the progressive merger of their national economies in both the industrial and agricultural sectors, they called upon the French to resume negotiations, and invited them to a special meeting

[48] DeGaulle, Press Conference, Sept. 9, 1965, excerpted in European Community No. 86, 8 (Oct. 1965).

of the Council of Ministers, at which the Commission would not be present.[49] The day to day work of the Community continued, but it was impossible to make any progress with new proposals, and the Community was seen to be grinding slowly to a halt.

The next event of consequence was the French presidential election which was held in December. During a short but feverish campaign, five candidates opposed General de Gaulle and succeeded in reducing de Gaulle's share of the poll to forty-four per cent of the total vote. A significant element of the campaign was that all five opponents, from left to the extreme right, were putting forward positive European policies for France. This was particularly true of M. Lecanuet. He was President of the M.R.P.; he had the blessing of M. Jean Monnet; and he succeeded in stealing three million votes which would probably have gone to General de Gaulle. This result forced General de Gaulle into an official ballot with M. Mitterand at which de Gaulle polled fifty-five per cent of the total. This result was a strong demonstration by the French that they continued to support European policies, and an assurance that after the departure of de Gaulle, which was the only thing to be reckoned with in the future, there might be reason to suppose that the French would support a full European policy and operate the European treaties in a true and loyal spirit.

After his election, General de Gaulle accepted the invitation of the Five to meet in Luxembourg without the Commission on January 17, 1966. Before this meeting, the French put up a series of stiff demands. First, they proposed an elimination of the system of majority voting in the Council whenever the vital interests of any particular country were affected, and, of course, each country would have to be the sole judge as to when its vital interests were involved. Secondly, the "style" of the Commission would have to be modified. The French also put forward a tight program for the adoption of the budget of the Community, the fusion of the three Commissions, the financial regulation of agriculture, and an agreement by April 1966, on the second move of national tariffs towards the common customs tariff. When the fusion treaty was ratified, there would be a new Commission, consisting of, at first, fourteen members, and it was quite clear that President Hallstein and one or two other members of the Commission, who were *persona non grata* to the French, would not be re-elected.

At the first meeting on January 17 and 18, the ministers reached a

[49] The declaration is set out in EEC Bulletin, Dec. 1965, p. 14.

deadlock. They were unwilling to consider the question of majority voting, which was the principal subject discussed, and the meeting adjourned with the intention of resuming at the end of the month. Discussions were resumed on January 29 and 30, and a formula was found for dealing with decisions where the Treaty provided that they should be taken by majority vote. Where very important interests of one or more of the member states are involved, the Council will endeavour to reach unanimous agreement within a reasonable time. The French considered that the discussion in such a case must always go on until unanimous agreement was reached. The Six noted that there was a divergence of views, but they all, nevertheless, considered that this divergence did not prevent the Community's work being resumed in accordance with the normal procedure. The position, therefore, is that there may be trouble in the future, but on the whole it is not very likely. The Six agreed with some of the points presented by the French with regard to the style of the Commission and particularly that it should co-operate more closely with the governments of the member states, and that it should make its proposals known to the Council before announcing them elsewhere. It was also provided that the Commission should not be entitled to receive, on its own, the credentials of heads of missions accredited to the Community, but that they should be received jointly by the President of the Council, as well as the President of the Commission.[50]

The question of majority voting is undoubtedly one of the most important elements of the Treaty of Rome, and as noted previously, one of the three supranational features that is essential if the Treaty is to remain effective. It is impossible for the Treaty to survive unless the Community is able to command the continuing consent of the member states. Once any member state feels that its vital interests are being overridden, then it will be impossible, as the experience with France has shown, for the Community to continue, let alone make any progress. It is, therefore, not a practical proposition to take any decisions which affect these vital interests against the wishes of the state concerned, and in fact, this has never been done. Out of about twelve cases where a decision was taken by the Council by qualified majority, it is possible to give details of seven. Three of these involved decisions on tariff quotas under article 25. Another case was the decision taken under article 38 to expand Annex

[50] For details, see European Community, Feb. 1966.

II which contains the list of agricultural products.[51] Then there was the decision laying down general principles for a common policy of vocational training. There was the amendment to the statute of service for officials of the Community of November 10, 1964.[52] The last case was more important and it concerned the regulation on group exemptions by the Commission from article 85(1).[53] It was opposed by Italy, which has since lodged an appeal against the validity of this regulation to the Court of Justice. Looking at these examples, it would not seem that there is anything very serious in any of them. The point about majority voting is that it provides machinery for use in the last resort as a means of coming to a decision and it is doubtful if it will be necessary to seek to apply it any more in the future than has been done in the past.

VIII. THE FUTURE OF THE COMMUNITIES

In assessing the effect of the French move against the Community, the first result is that the legal terms of the treaties still stand, which represents success by the Five. On the other hand there are still many things which will have to be decided by common agreement in the future, and France will have opportunities for further obstruction if she wishes to use them. The present situation appears to be that France is happily back to work in Brussels and that business with the Commission and the Council is normal again. It would, however, be premature to speak of any renewal of the Community spirit, and one of the results which was always to be feared was the raising of terms by the other countries. If the French could play at nationalism, so could the others, and there is some concern that this will happen in the future, particularly in regard to agricultural policy. Meanwhile there is a tendency to move forward only from one package deal to another. Thus there may be a general ratification of the Treaty for the merger of the European Executives by the national parliaments, but these ratifications are expected to be held up by the national governments until the composition of the new Commission is agreed upon. This may provide a basis for the continuation of President Hallstein, even if only for a limited period.

It is difficult to say whether the independence of the Commission

[51] Regulation No. 7, adopted Dec. 18, 1959. Compare 1 CCH COMMON MKT. REP. ¶ 995 (unofficial translation).

[52] Reg. No. 182/64.

[53] Reg. No. 19/65, adopted March, 1965. Compare 1 CCH COMMON MKT. REP. ¶ 2718 (unofficial translation).

or the principle of majority Council voting is the more important. The experts seem agreed that the powers of the Commission are the more important. In the result both have happily survived. The real loser has been the European Parliament. Although the Commission proposed that there should be a small increase in its powers, the Parliament finds no place in the final Luxembourg communiqué. The struggle for some democracy within the Community will go on, but it is no nearer a solution.

As long as there is so much political dissension as to the future role of the Community, it will be impossible for any great progress to be made. The Community may perhaps be able to continue the work of consolidation of the results already achieved. There is much to do in the field of harmonization of laws, and the new policy of the Commission to encourage the growth of firms and mergers[54] may be an added stimulus to an early decision on a Community turnover tax and perhaps some integrated company laws.

The next main objective in internal policy is the fusion of the three Communities themselves, and not only may this permit a common energy policy to be developed, but it may also remove from the Treaty some of its rigidity. The Rome Treaty is an imperfect document, even treated from the economic standpoint alone.

An example of this rigidity is to be found in the decisions of the Commission. Commission decisions which may have legal consequences must be decided by a quorum of the nine man Commission. Not only does the Commission have to make decisions on all regulations and directives, but even such matters as decisions that call for information from individual firms and which may lead to fines if the requests of the Commission are not complied with, must be taken by the Commission. This principle, referred to earlier, was established in the *S.N.U.P.A.T.* case,[55] where in connection with the perequation fund for steel scrap in the Coal and Steel Community, it was determined that the Commission was not entitled to delegate its powers to any other body. This has caused difficulty in the case of the agricultural policy, where even the C.I.F. prices for wheat and other agricultural products have to be decided almost daily by the Commission, while, in fact, the agricultural policy is in the hands of a number of management committees. The machinery adopted is

[54] EEC Commission doc. SEC (65) 3500, Dec. 1, 1965.
[55] Société nouvelle des usines de Pontlieve-Acieres du Temple (S.N.U.P.A.T.) v. High Authority, cases 32-58, 33-58, 5 Recueil 275 (1959).

that the management committee makes a recommendation which if not adopted within one month by the Commission is automatically referred by decision to the Council. The proposal is put forward by the management committee, subject to agreement by the Commission, enabling the formal decision to be made by the Commission.

Another respect in which the Treaty is defective concerns monetary policy which has been described as the "missing chapter" of the Treaty. Under the terms of the Treaty, the member states are called upon to co-operate in working out their monetary and financial policies, but there is no machinery provided for the development of a Community policy that will be established by majority voting in the Council. At the time the Treaty was entered into, the attitudes of the member states were such that it was not possible to agree upon the establishment of a common monetary policy, and there is, therefore, no means under the present Treaty by which such a policy can be adopted, for there is no provision for the taking of decisions by majority voting, unless it is expressly provided for in the Treaty.

Another difficulty relates to an energy policy. As matters stand, all three Communities are concerned with some aspect of energy. Coal is under the E.C.S.C., atomic power under EURATOM, natural gas and oil under the EEC. Furthermore, there are considerable divergences between the rules relating to coal and steel, and the rules applicable under the other treaties. There has been an *ad hoc* committee from all three Communities to consider an energy policy. It will not, however, be easy to introduce a Community policy for energy, as this will involve major changes in the economic structure of the member states. If, as is recommended, energy costs are to be kept low, then a number of coal mines in the Ruhr will have to be closed down, and this is already producing resistance from the Germans. However, one of the objectives of the merger of the Communities will be to establish a common energy policy, and it may be that in the future Treaty, which combines the three Communities, there will be powers to develop Community policy in any field within the competence of the Community. I think, here, one may notice a very great convenience in the United States' practice of having all matters which relate to interstate commerce dealt with by the federal government.

Having discussed the new legal order in Europe, it would not be right to leave the subject without some reference to the rest of Europe

and, indeed, the rest of the world. Many will agree that Europe without France or the Community without France is unthinkable; so too, is Europe without Britain, and no organization will be entitled to call itself European unless it gives Britain the opportunity to participate. During the course of the negotiations in 1961 and 1962, it was made clear that the British were anxious to subscribe to the terms of the Treaty of Rome, provided that there were certain safeguards in respect of: (a) the Commonwealth countries, (b) her EFTA partners, and (c) her own domestic policies.[56] These conditions would probably have been satisfied in 1963, had there been a political will on the part of France and the other member countries that Britain should join. In the intervening years, however, some of the difficulties have eased. The Commonwealth link has distinctly loosened, and the fact that among the African Commonwealth countries, Nigeria has entered into negotiations, separately, with the EEC indicates that many no longer rely on British support in respect of their trade. The trade pattern in both Canada and Australia is also changing and the problems that remain are relatively small. As far as EFTA is concerned, it is now clear that if Britain were to join the Community, she would not join alone. Norway, Denmark and Ireland would negotiate to enter, at the same time, and there is no doubt that the three neutral countries, Austria (which has already begun), Sweden and Switzerland would negotiate their own terms of association. Portugal would no doubt come within the same category as Turkey and Greece, provided that it was politically acceptable to the Community. England's policies have also undergone a change, and even agriculture is no longer the great obstacle that it was; government subsidies are declining and the Conservative party at any rate, is ready to accept a form of agricultural levies, which would bring British agricultural policy much more into line with that of the Community. There is also reason to believe that the days of a cheap world market in food are numbered.

On the other hand, there are very pressing reasons in the industrial and monetary field which make it much more necessary for Britain to join the Community if she is to survive as an effective influence in the world. A home market which is limited to the population of the EFTA countries is not large enough to provide for the research and development necessary in the modern technological age, and it is essential that she should have access to a wider market. In mone-

[56] Resolution of House of Commons, Aug. 2, 1961.

tary matters, it is essential that the European countries should underpin the sterling balance of payments. The recent crisis has shown—and one can say that this crisis has been a continuing one for a decade or so —that it is almost impossible for Britain to survive in the modern world as long as she has to maintain a favorable trade balance, and at the same time support a world currency. In fact, Britain's balance of payments policy is not her own. She is entirely dependent on the assistance of the Group of Ten, and the International Monetary Fund, and it is in her own interest that there should be a thorough-going monetary policy in an enlarged Community which would put an end to the chronic British crisis. On the other hand, the balance of payments may become important in relations with the rest of the sterling area.

With regard to the industry generally, the experience of France may perhaps be an example to Britain. When France was considering joining the Community, M. Mendès France said France could not enter a common market because she was not competitive enough. First she must become competitive and then she could go in.[57] In fact, the opposite was the case. A highly protected industry was forced into a Common Market, and very rapidly this industry became competitive as a result. It is very likely that the effect of joining the Common Market would be to make Britain considerably more competitive than she is today, and thus she might achieve the rate of economic growth enjoyed by the Community countries. In this way the dissentions and weaknesses of Europe would be eliminated and she would be enabled to play her rightful part as one of the forces of the free world.

[57] See CAMPS, *op. cit. supra* note 2, at 77.