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THE PROCEDURE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

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I. INTRODUCTION

The Court of Justice of the European Communities has inspired much legal writing, including many books and articles in English.[1] Particular attention has been paid to its jurisdiction[2] and general organization,[3] much less to its procedure. But Professor Sereni has pointed out that differences in the domestic procedural laws of states appearing before an international court may cause difficulties in the work of the international tribunal itself.[4] It therefore may be of interest to review briefly some aspects of the procedure of a court which is perhaps not an international tribunal in the strict sense of the word,[5] but in which sovereign states, supranational organizations

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[1] For bibliographical references concerning the European Communities in general and the Court of Justice of the European Communities in particular, see, *e.g.*, *Selected Literature on the European Common Market*, 14 THE RECORD 400 (1959) and 17 THE RECORD 263 (1962); 2 CCH COM. MKT. L. REP. ¶ 9901 (1965). For a critical evaluation see Wheeler, *A Critique of Handbooks on Common Market Law*, 56 LAW LIB. J. 120 (1963).

[2] The Court's jurisdiction is studied in detail in BEBR, JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES (1962). See also VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (2 vols. 1965); *cf.* Mashaw, *Federal Issues in and About the Jurisdiction of the Court of Justice of the European Communities*, 40 TULANE L. REV. 21 (1965).

[3] See, *e.g.*, FELD, THE COURT OF THE EUROPEAN COMMUNITIES 14-33 (1964); Feld, *The Judges of the Court of Justice of the European Communities*, 9 VILL. L. REV. 37 (1963).

[4] See SERENI, PRINCIPI GENERALI DI DIRITTO E PROCESSO INTERNAZIONALE (1955).

[5] There has been much discussion whether the Court of Justice of the European Communities is basically an international tribunal analogous to the International Court of Justice, a kind of federal supreme court of a newly emerging federation,

and private individuals appear and plead far more frequently than in the International Court of Justice. The brief discussion of the Court's organization and jurisdiction which will preface the discussion of procedure in the narrow sense is intended mainly as background.

II. The Court—Organization and History

A. History of the Court

The Court of Justice of the European Communities is the successor of the Court of Justice of the European Coal and Steel Community created by the Treaty of Paris of 1951. The basic rules concerning that court's jurisdiction were laid down in the treaty. An annexed protocol contained the statute of the court with additional provisions relating to its organization and procedure.[6] These were not very detailed. Instead, the court was authorized and directed to promulgate rules of procedure.[7] The new court opened officially on December 4, 1952, in Luxemburg with the swearing in of its seven judges. Its first business was the drafting of rules of procedure, which were promulgated on March 4, 1953.[8] The court was then ready to begin its judicial functions. About a year later, the court published additional rules concerning the rights and duties of attorneys and agents appearing

or a supranational organ *sui generis*. These attempts at classification seem to have little practical importance. Indeed, Judge Hammes, presently the President of the Court, once spoke of a "mania" in that regard. Hammes, La Cour de Justice des Communautés Européennes, mimeographed text of lecture delivered in Luxemburg, 1959, p. 4. See generally Delvaux, La Cour de Justice de la Communauté Européenne du Charbon et de L'Acier 11 (1956); Migliazza, La Corte Di Giustizia Delle Communità Europee 1-39 (1961); Richemont, Communauté Européenne du Charbon et de L'Acier, La Cour de Justice 367 (1954); Donner, *De aard van de Rechtspraak van het Hof van Justitie der Europese Gemeenschappen*, [1960] Sociaal-Economische Wetgeving 73.

[6] Treaty establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140.

[7] Protocol on the Statute of the Court of Justice of the European Coal and Steel Community annexed to treaty establishing the European Coal and Steel Community, *supra* note 6, art. 44.

[8] See Riese, *Die Verfahrensordnung des Gerichtshofes des Europaeischen Gemeinschaft fuer Kohle und Stahl*, 6 Neue Juristische Wochenschrift 521 (1953) (hereinafter abbreviated N.J.W.) for a discussion of the role played by various members of the Court and of the models (such as the Rules of the International Court of Justice and national civil and administrative procedures) which were followed. The original rules of the Court were published in the Journal Officiel de la Communauté Européenne du Charbon et de L'Acier, March 7, 1953, pp. 37-55. Hereinafter this publication, and for the years 1958 and following (Journal Officiel des Communautés Européennes), shall be abbreviated J. O. The German edition of the Official Gazette of the European Communities shall be cited as Amtsblatt. The treaty of Paris establishing the European Coal and Steel Community, 261 U.N.T.S. 140 (1951), will hereinafter be referred to as the Coal and Steel Treaty and the annexed statute of the Court as the Coal and Steel Statute.

before the court, recusant witnesses and letters rogatory.[9] The original rules had ignored costs, and this matter was taken care of in a further set of rules promulgated shortly thereafter.[10]

In 1957, the nations which had participated in the European Coal and Steel Community signed the two treaties creating the European Economic Community ("Common Market") and the European Atomic Energy Community ("Euratom"). Each treaty provided for the creation of a court of justice to serve as judicial arm of its community.[11] Annexed to each treaty was a protocol containing the statute of the court. A further convention on certain institutions common to the European Communities provided that a single court should perform the functions of the separate courts mentioned in the various treaties.[12] It did not give that court a distinctive name, however. In accordance with the convention, the Court of Justice of the European Coal and Steel Community came to an end in 1958 and was replaced by, or rather continued as, the Court of Justice for the three communities. There was some change in judicial personnel. Pending cases were continued.

One of the first activities of the new Court following the appointment of its members seems to have been the selection of a name. It chose the name "Court of Justice of the European Communities," though no official announcement to that effect was ever published in the Official Gazette of the European Communities.[13] The Court then prepared a

[9] These rules were adopted by the Court on March 31, 1954, and published in J. O., April 7, 1954, p. 302. They were published separately because they had to be approved by the Council of Ministers of the Coal and Steel Community, while no such approval was necessary for the ordinary rules. Coal and Steel Statute, art. 44.

[10] The rules as to costs were adopted on May 19, 1954 and published in J. O., May 26, 1954, p. 373. *Cf.* Roemer, *Die Kostenordnung des Gerichtshofes fuer Kohle und Stahl*, 8 N.J.W. 617 (1955).

[11] Convention establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, art. 4; Convention establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167, art. 3. The treaty establishing the European Economic Community, ratified by the member states of Belgium, Germany, France, Italy, Luxemburg and The Netherlands in 1957 and effective January 1, 1958, shall hereinafter be cited as Treaty, and the annexed statute of the Court as Statute. The Convention establishing the European Atomic Energy Community shall hereinafter be cited as the Euratom Treaty and the annexed Statute as the Euratom Statute. It might be noted at this point that the treaty establishing the European Defense Community had also made the Court of Justice of the European Coal and Steel Community the judicial arm of the Defense Community, but that treaty never achieved ratification. RICHEMONT, *op. cit. supra* note 5, at 3.

[12] Convention relating to certain institutions common to the European Communities, annexed to Treaty, arts. 3, 4.

[13] The name Court of Justice of the European Communities seems to have been adopted at a session of the Court (in chambers) on October 8, 1958. The J. O. of October 19, 1958, p. 453, published an announcement that the "Court of Justice of the European Communities" had entered upon its official duties on October 7, 1958, when its members took their oath and that the old rules were to be continued

new set of rules, which were promulgated on March 3, 1959.[14] The rules of the old Coal and Steel court were abrogated. The new rules had to be submitted to the Council of Ministers for approval;[15] the Rome treaties of 1957 did not continue the Court's power to make rules without outside supervision.[16] The rules did not deal with three matters for which, in the nature of things, the cooperation of the member states of the communities was particularily necessary, namely letters rogatory, legal aid and the punishment of perjurious witnesses and experts. After consultation with the governments of the member states and council approval, supplemental rules concerning these matters were enacted on March 9, 1962.[17] Hence, the legal provisions relating to the procedure of the Court of Justice of the European Communities must be gleaned from a rather multifarious array of texts: the Coal and Steel, Common Market and Euratom treaties, the statutes annexed to them, the protocol on common institutions of the three communities, and the Court's rules of 1959 as well as the supplemental rules of 1962. Furthermore, additional conventions as well as rules and regulations enacted by various community organs affect the Court. The Brussels agreement of April 8, 1965, which provides for the merging of the Executives of the European Communities—though not of the Communities themselves—but has not yet gone into effect, does not simplify that situation very much. If affects Court procedure only incidentally.[18]

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pending the enactment of new ones. The announcement made no direct reference to the adoption of the name "Court of Justice of the European Communities," which seems to have been suggested by Dr. Daig, one of the attachés of the Court. See Daig, *Die Gerichtsbarkeit in der Europaeischen Wirtschaftsgemeinschaft und Europaeischen Atomgemeinschaft,* 83 ARCHIV FUER OEFFENTLICHES RECHT 132, 135 (1958).

[14] J. O., March 21, 1959, p. 349; *cf.* J. O., Jan. 18, 1960, p. 17. Hereinafter these rules will be cited as Rules of Procedure. The new rules do not affect rights either acquired or lost under the old rules. Elz. v. Haute Autorité de la C.E.C.A., case 34-59, 6 Recueil de la Jurisprudence de la Cour 215 (1960) (Hereinafter cited Recueil).

[15] Treaty, art. 188 and Euratom Treaty, art. 160 provide in identical language that the Court of Justice promulgates its rules of procedure which are subject to unanimous approval by the Council of Ministers.

[16] See note 9 *supra.*

[17] J. O., May, 1962, p. 113. *Cf.* Rasquin, *Le Règlement additionnel de procédure de la Cour de Justice des Communautés Européennes,* 77 JOURNAL DES TRIBUNAUX 345 (1962).

[18] See generally Houben, *The Merger of the Executives of the European Communities,* 3 COM. MKT. L. REV. 37 (1965) (with text of merger treaty). Unless otherwise noted, this discussion will deal with the procedure of the Court as presently in force. The various statutory provisions, rules and regulations affecting the organization, jurisdiction and procedure of the Court of Justice of the European Communities have been collected in 1963 in a volume called RECUEIL DE TEXTES (TEXTSAMMLUNG) available in all four Community languages and edited by Mr. Everson, Deputy Registrar and Mr. Sperl, Librarian of the court.

B. Court Organization

The Court of Justice of the European Communities consists of seven judges appointed for terms of six years by unanimous agreement of the member states.[19] In practice, each member nation has the right to propose one judge (one nation can propose two judges), and the proposals made by a member state concerning the appointment of "its" judge are not seriously challenged by the other nations.[20] The membership of the Court is subject to partial renewal every three years. The members of the Court elect one of their colleagues as presiding judge for a period of three years. All judges of the Court must now be law-trained and qualified to hold highest judicial office in their home state, or be otherwise possessed of outstanding qualifications.[21] The rules for the appointment of judges have been criticized on the ground that the short, but renewable terms give the member states too much power over "their" judges. In fact, however, no complaints about improper conduct by judges seem to have been voiced.[22] Furthermore, rather substantial salaries (at least by European standards) and sizable severance benefits payable to a judge not reappointed at the end of his term may tend to increase judicial

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[19] Coal and Steel Treaty, art. 32; Euratom Treaty, art. 137; Treaty, art. 165. The Council of Ministers may, by unanimous vote, increase the number of judges if the Court so requests. So far, no such request has been made. See generally Adler, *The EEC Court of Justice*, 7 CANADIAN BAR J. 102 (1964).

[20] The treaties do not require judges to be nationals of member nations and the appointment of one "outsider" seems to have been considered possibly desirable at one time. In practice, however, the judges have always been nationals of the member states, and the same is true of the other court officials. As of this writing, Italy is the only member state represented by two nationals on the bench of the court; however, one of the two advocates-general is German and the other French, while the Registrar is Belgian and the Deputy Registrar, Dutch. A substantial change in this system seems unlikely. See, *e.g.*, Eichler, *Zur Stellung des Richters in ueberstaatlichen Gemeinschaften*, 6 N.J.W. 1034, 1044 (1953); Tizzano, *La Corte di Giustizia*, 3 QUADRI, MONACO, TRABUCCHI, COMMENTARIO CEE 1200-01 (1965).

[21] Coal and Steel Treaty, art. 32b; Euratom Treaty, art. 129; Treaty, art. 167. It is not entirely clear what "qualifications for the highest judicial office" implies. In many European countries there are several coordinate supreme courts dealing with different subject matters, and qualifications for appointment to these courts are not necessarily uniform. The rules concerning the qualifications of judges seem to be mainly hortatory. *Cf.* BAECHLE, DIE RECHTSSTELLUNG DES RICHTERS AM GERICHTSHOF DER EUROPAISCHEN GEMEINSCHAFTEN 30, 31 (1961).

[22] In addition, some people would have preferred that members of the Court be chosen only among career judges (in the European sense), because these would have a more judicial temperament than the present judges, many of whom have previously been government officials, law teachers, etc. Additionally, career judges were thought to be more independent, less inclined to favor any special interest group. *Cf.* BAECHLE, *op. cit. supra* note 21, at 33-35; Riese, *Erfahrungen aus der Praxis des Gerichtshofes der Europaeischen Gemeinschaft fuer Kohle und Stahl*, [1958] DEUTSCHE RICHTERZEITUNG 270, 271. Even the rule providing for partial renewal of the Court every three years has been questioned. See Daig, *supra* note 13 at 148 n.46.

self-reliance.[23] The rule prohibiting the disclosure of opinions voiced by judges in conference and the absence of dissenting opinions makes it difficult for outsiders to blame any particular member of the Court for a decision reached by the Court and is an additional guarantee of judicial independence.[24]

Also on the staff of the Court are two so-called advocates-general (*avocats généraux, Generalanwaelte*). Their role is similar to that of the *commissaires du gouvernement* before the highest French administrative tribunal, the *Conseil d'Etat:* one of them prepares an elaborate submission (*conclusions, Schlussantraege*) for each case; in it he surveys the facts of the case and the applicable law and suggests a judgment to the Court. The advocate-general represents only the law as such and his own conscience.[25] He is by no means the representative of the interests of the European Communities.[26] The Court is not bound to decide in accordance with the advocate-general's submission, but frequently does so.

Each judge and advocate-general is assisted by one *attaché,* who performs functions quite similar to those performed by the law clerk of an American judge. However, the *attachés* enjoy permanent appointments.[27]

The Registrar of the Court is in charge of the Court records and must be present at each hearing. In addition, he is the chief ad-

[23] A regulation of the Council of Ministers of the Coal and Steel Community, Common Market and Euratom published in Amtsblatt, July 19, 1962, p. 1713, provides for the following monthly salaries: President of Court, 85,000 B. F.; judges and advocates-general, 68,750 B. F.; Registrar, 61,600 B. F. To these base amounts must be added a 5% family allowance for heads of family and a 15% residence allowance. Furthermore an allowance of 1000 B. F. per child entitled to support may be paid. (100 B. F. equal about $2.) There is an additional allowance for entertainment expenses. For a period of three years after the expiration of their appointment at the Court, former members of the Court may receive a kind of readjustment allowance varying between 40% and 50% of their base salary. Upon reaching age 65, members of the Court are entitled to a pension varying with their length of service; it may reach 50% of their salary. These salaries and benefits, while not unusually large when compared with American judicial salaries, are very substantial by European standards. The independence of the members of the Court is further strengthened by rather far-reaching immunities. Coal and Steel Statute, art. 3; Statute, art. 3; Euratom Statute, art. 3. *Cf.* BAECHLE, *op. cit. supra* note 21, at 111-22.

[24] *Cf.* BAECHLE, *op. cit. supra* note 21, at 83-86; 1 COLIN, LE GOUVERNEMENT DES JUGES DANS LES COMMUNAUTÉS EUROPÉENNES 54 (Thèse Nancy 1963).

[25] Coal and Steel Treaty, art. 32a; Euratom Treaty, art. 138; Treaty, art. 166. The qualifications for the advocates-general are the same as for the judges. Their term of office is six years, but the terms are staggered so that one advocate-general is to be replaced or reappointed every three years. As to their salaries and fringe benefits, see note 23 *supra.*

[26] *Cf.* Daig, *supra* note 13, at 148 n.45.

[27] The attachés are considered as regular employees of the court. Each judge has an attaché of his own nationality. They are usually expert linguists and hence even more valuable to the judges of the Court than law clerks are in the United

ministrative officer of the Court:[28] unlike national courts in Europe, which are administratively part of an executive department, the Ministry of Justice, the Court of Justice of the European Communities administers itself. Since the Court must conduct its proceedings in all the four official languages of the Communities, Dutch, French, German, and Italian, it has a language department which translates all documents received or issued by the Court and operates the simultaneous translation service which makes it possible to follow oral proceedings of the Court in any of the Community languages.[29] Since legal materials cannot be translated properly except by persons well versed in comparative law who are also language experts, the staff of the language department is quite highly qualified. The use of such highly qualified people for a relatively unglamorous activity seems to create occasional problems in human relations. The members of the Court have a large library and documentation service at their disposal. Altogether, about one hundred persons are employed by the Court, counting also messengers, Court attendants, et cetera.[30] The Court publishes its own law reports[31] and various other materials.[32] All of

States. *Cf.* FELD, *op. cit. supra* note 3, at 26; Riese, *supra* note 22, at 271. Coal and Steel Statute, art. 16; Statute, art. 12; and Euratom Statute, art. 12 authorizes the Council of Ministers, at the request of the Court, to appoint assistant reporters who, apparently, were intended to fulfill functions somewhat similar to those of the attachés, but on a more formalized basis. So far, the Court has not requested their appointment. It might be noted here that each judge and advocate-general is assigned one personal secretary, in addition to his attaché, and also a driver. National courts in Europe do not usually make such elaborate provisions for their members.

[28] Coal and Steel Treaty, art. 32c; Treaty, art. 168; Euratom Treaty, art. 140; Rules of Procedure arts. 11, 20, 22. As chief administrative officer, the Registrar is also in charge of the Court's entire staff (excepting, of course, the judges and advocates-general). Coal and Steel Statute, art. 16; Statute, art. 11; Euratom Statute, art. 11. On June 23, 1960, the Court issued a set of "Instructions to the Registrar" detailing his duties, Amtsblatt, Nov. 18, 1960, p. 1417, which were modified April 6, 1962. Amtsblatt, May 5, 1962, p. 1115 (hereinafter cited as Instructions to Registrar).

[29] Rules of Procedure, art. 21. The translation service consists now of about 12 translators and a substantial secretarial staff.

[30] The total budgeted expenses of the Court for 1963 were $1,265,440, most of it (except for about $80,000) being allocated for salaries, fringe benefits, travel expenses and related items. The expenses are shared by the three European Communities.

[31] From volume six on, the Court's law reports have been issued in pamphlet form several times a year, each pamphlet including a number of cases. The pamphlets are paginated continuously, so that they can be bound at the end of the year, at which time a title page and general index are supplied to subscribers. During the early part of 1965, this system was modified and each decision was printed in a separately paginated pamphlet. This turned out to be impractical and a return to the prior practice was soon effectuated. The reports contain the judgments of the Court as well as the submissions of the advocates-general. In this paper, the French edition (Recueil de la Jurisprudence de la Cour) has been used.

[32] These include a Bibliography on European Integration and the Collection of texts mentioned at note 18 *supra*.

these are available in all four community languages.

The Court is divided into two panels of three judges,[33] one of whom is the presiding judge of the panel. Each advocate-general is assigned to one of the panels.[34] Cases brought by member states or Community institutions, as well as cases transferred from a national court for a preliminary ruling, must be heard by the full Court, rather than a panel. Under the treaties other matters may be assigned to a panel;[35] in fact only proceedings brought by employees of one of the Community institutions against their employer are heard by a panel; all other cases are heard by the full Court.[36]

When a case is heard by the full Court, five judges constitute a quorum but an uneven number of judges must sit; in fact, all seven judges are usually present.[37]

C. Case Load of Court

The number of cases handled by the Court of Justice of the European Communities is not large, compared with the case load of some courts in the member states—though these usually have far larger staffs. However, it is much more substantial than that of other international tribunals, as appendix I indicates.[38]

At present about a year seems to elapse between the time the first pleading is filed and the final decision of a case. A small backlog of cases has built up mainly as a result of many suits filed by Community employees around 1963 when the introduction of new personnel rules

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[33] The treaties authorize panels of three of five judges; in fact, two panels of three judges have been constituted. Treaty, art. 165, Statute, art. 15; Euratom Treaty, art. 137, Statute, art. 15; Coal and Steel Treaty, art. 32, Statute, art. 18; Rules of Procedure, art. 24. The panel presidents are elected for one year terms by the Court. Rules of Procedure, art. 6.

[34] Rules of Procedure, art. 10.

[35] Treaty, art. 165; Euratom Treaty, art. 137; Coal and Steel Treaty, art. 32.

[36] Rules of Procedure, art. 95. Suits by employees of the Councils of Ministers, European Parliament and Common Market Commission are assigned to the second panel, those of the other institutions to the first panel. Decision of the Court of Justice of the European Communities of Oct. 9, 1963, J. O., Oct. 29, 1963, p. 2598. The panels also may deal with certain matters arising incidentally during the course of a suit (proof, costs). These will be discussed below. The panels may transfer suits handled by them to the full Court. Rules of Procedure, art. 95 § 2. This is done if a question of principle is involved. See, *e.g.*, Raponi v. Commission de la C.E.E., case 27-63, 10 Recueil 289 (1963).

[37] If one of the judges is absent when the full Court sits, the junior judge present must withdraw so as to have an uneven number of judges. The panels must always sit with three judges; if one of the regular panel members is unavailable, a judge from the other panel must join the panel on a temporary basis. Statute, art. 15; Euratom Statute, art. 15; Coal and Steel Statute, art. 18; Rules of Procedure, art. 26.

[38] Table taken from a volume of unpublished statistics kindly made available to this writer by Mr. Everson, Deputy Registrar of the Court.

caused some dissatisfaction among employees not granted permanent tenure. This backlog undoubtedly will disappear within the near future.

D. Language Rules

It would perhaps have been possible to authorize everybody appearing before the Court of Justice of the European Communities to use any of the four official languages of the Communities, Dutch (Flemish), French, German, and Italian. However, to facilitate the work of the Court's translation service, all parties to a suit must use one single language, referred to as the procedural language.[39] All papers filed by parties (pleadings, memoranda) must be in that language which must also be used for oral argument. Original documents not in the procedural language must be accompanied by translation, though a partial translation is sufficient in the case of very bulky documents, unless the Court otherwise orders.[40] Similarly, judgments and orders of the court are issued in the procedural language, and all entries in the Court records are made in that language.[41] Judgments and Court orders are later always translated into all four official community languages, but only the text in the procedural language is binding.[42]

Judges and advocates-general in addressing parties during a hearing, and the reporting judge for his report are not bound to use the procedural language.[43]

The rules governing the choice of the procedural language seem based on the idea that the Community institutions know all four official languages, while private individuals are not necessarily in the same position.[44] Hence, the choice of the procedural language is ordinarily left to the plaintiff who is much more frequently a private individual or firm than a Community institution. The plaintiff is, of course, limited to one of the Community languages. When the defendant is a member state or a national of a member state, the official language of that state is the procedural language unless the parties have agreed otherwise, or the Court has authorized the use of a different

[39] Riese, *supra* note 8, at 23.

[40] Rules of Procedure, art. 29. Witnesses and experts are obviously not bound to testify in the procedural language, or even one of the four official languages. The Registrar's office must provide translations in such a case.

[41] Instructions to Registrar, arts. 7, 15.

[42] Rules of Procedure, art. 31.

[43] Rules of Procedure, art. 29.

[44] Riese, *Das Sprachenproblem in der Praxis des Gerichtshofes der Europaeischen Gemeinschaften*, 2 VOM DEUTSCHEN ZUM EUROPAEISCHEN RECHT, FESTSCHRIFT FUER HANS DOELLE 507, 508 (1963).

language. In cases transferred to the Court from a national court for a preliminary ruling, the procedure before the Court of Justice of the European Communities is conducted in the language of the national court.[45] Plaintiffs of varying nationalities bringing a joint action must agree on the procedural language. If the Court orders a joinder of cases already pending for which several procedural languages are used, the parties may apparently continue to use the languages used by them before the joinder unless the Court orders something different. A party seeking to intervene may chose a procedural language for the proceeding in which permission to intervene is sought, but after permission to intervene has been granted, it must use the procedural language adopted for the main case.[46]

The Court's instructions to the Registrar state that papers not in the procedural language must be rejected.[47] Nevertheless, the language rules seem to be handled with some liberality. Thus, counsel for the German government, which had intervened in a suit in which Dutch was the procedural language, was allowed to argue in German, though he was requried to submit his writings in Dutch.[48] The Court seems reluctant to invalidate prior proceedings on the ground that the language rules were not followed, though, on timely request, it is apparently ready to direct a party submitting documents not translated into a procedural language to do so, and to stay the proceedings in the meantime.[49]

The Court has justified its liberal attitude towards the language rules by saying that it is conclusively presumed to know all four Community languages.[50] In practice, not all the judges and advocates-

[45] If the defendant is a nation having two official languages (in practice, this applies only to Belgium), or a national of such a nation, the plaintiff may chose one of these languages. Rules of Procedure, art. 29. It should be noted in this connection that in Belgium the terms Flemish and Dutch are considered as interchangeable. *Cf.* VAN REEPINGHEN ET ORIANNE, LA PROCÉDURE DEVANT LA COUR 45 JUSTICE DES COMMUNAUTÉS EUROPÉENNES 85, 86 (1961) [hereinafter cited as VAN REEPINGHEN ET ORIANNE].

[46] Riese, *supra* note 44, at 508-09. *Cf.* De Gezamenlijke Steenkolenmijnen in Limburg v. Haute Autorité de la C.E.C.A., case 30-59, 7 Recueil 1 (1961).

[47] Instructions to Registrar, art. 4, § 2.

[48] De Gezamenlijke Steenkolenmijnen in Limburg v. Haute Autorité de la C.E.C.A., case 30-59, 7 Recueil 1 (1961).

[49] Acciaieria Ferriera di Roma v. Haute Autorité de la C.E.C.A., case 1-60, 6 Recueil 351 (1960) (Revision procedure may not be used to invalidate a judgment on the ground that documents submitted by defendant were not translated into procedural language, when plaintiff's counsel made a passing reference to that point in his oral argument but did not request a stay).

[50] Acciaieria Ferriera di Roma v. Haute Autorité de la C.E.C.A., *supra* note 49. The Court also said in that decision that the rules concerning languages did not involve strong public policy *(ordre public)*. *Cf.* Barge v. Haute Autorité de la C.E.C.A., case 14-64, 11 Recueil 1 (1965).

general speak all Community languages. However, all seem to speak French fairly well. Hence, French has become the unofficial working language of the Court. The judges' conferences, to which translators are not admitted, are always conducted in French, and draft opinions are first circulated in French before they are put into the procedural language. To make their thoughts clearer, however, some judges will sometimes state their position first in their own language before restating it in French. Thus language differences seem to have created no major problems. Unavoidably, there is some loss of meaning, or at least flavor, if rapid argument by counsel is subjected to a process of simultaneous translation, and the same is true in the case of the translation of written documents, since legal terms in the four languages do not always correspond exactly. Some plaintiffs seek to alleviate the resulting difficulties by choosing French as the procedural language, though this is not their national tongue.[51]

E. Professional Legal Assistance

Except when requesting legal aid,[52] parties appearing before the Court of Justice of the European Communities must do so by counsel. Member states and Community institutions act through an "agent" appointed by them for each case. An agent may perform all the services performed by an attorney in the case of a private party. He may, but need not be assisted by an attorney.[53] No rules restrict member states and Community institutions in the choice of the persons they appoint as agents. Now, Community institutions always select a person on the staff of their joint legal service who is ordinarily of the same nationality as the plaintiff.[54]

Private individuals and firms must use the service of an attorney

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[51] BAECHLE, *op. cit. supra* note 21, at 50-53 (noting that the influence of a judge will necessarily depend on his language ability; Riese, *supra* note 44, at 510-14. Rules of Procedure, art. 27 § 4 authorizes every member of the Court to request that every question to be voted on be first written down in the (official) language chosen by him. This prerogative never seems to have been used.

[52] Rules of Procedure, art. 76, § 2.

[53] Statute, and Euratom Statute, art. 17; Coal and Steel Statute, art. 20. *Cf.* Coal and Steel Statute, art. 28, Statute, and Euratom Statute, art. 29 and Rules of Procedure, art. 85: only agents or attorneys may argue during oral procedure.

[54] While there is a joint legal service for the three Communities, some specialization persists; the members of the staff that will appear in Coal and Steel Community matters have their offices in Luxemburg, while those acting in Common Market and Euratom matters have their offices in Brussels. Attorneys assist agents rather infrequently. See generally Gerbrandy, *De Regeling van de procedure big het Hof van Justitie van de Europese Gemeenschappen*, 1 SOCIAAL-ECONOMISCHE WETGEVING EUROPA 87, 91 (1960); Salomonson, *Europese kanttekening bij de Beneluxontwerpen*, 40 ADVOCATENBLAD 7, 12-13 (1960).

admitted to practice in one of the member states.[55] The attorney need not be of the same nationality as the party for which he acts. Indeed, a few attorneys in France, Belgium and Luxemburg seem to have made a specialty of practicing before the Court of Justice of the European Communities, attracting clients residing in other states also.[56] Some problems may arise in connection with practitioners from countries having a legal profession split into several branches, such as France. Only French *avocats,* who argue in all the regular courts, and *avocats au Conseil d'Etat et à la Cour de Cassation,* who argue in these two high French tribunals seem to be "attorneys" within the meaning of the statutes of the Court of Justice of the European Communities, not, however, *avoués* who handle the written phases of court procedure. French *avocats* appearing before the Court of Justice of the European Communities handle all phases of the procedure before that Court, in spite of their restriction to oral argument in France.[57] Law teachers may represent parties if they are authorized to practice in the courts of their home state.[58]

Agents and attorneys enjoy a number of immunities. They are exempt from prosecution for anything they have said or done in relation to a pending case or the parties. Their documents and papers are not subject to search or seizure; they must be allowed to travel if necessary for the performance of their duties, and if their country controls foreign exchange, they must be allocated foreign currency needed for necessary travel.[59] The Court may lift any of these immunities or privileges if that will not interfere with the performance of the attorney's duties.[60] It must be assumed that the rules relating to these privileges and immunities are binding upon the home state

[55] See authorities cited at note 53 *supra.* Attorneys must file a certificate from their proper professional authorities showing that they are members of the bar in good standing. That certificate is annexed to the first pleading submitted by the party employing them. Rules of Procedure, art. 38 § 3.

[56] This is less true of German attorneys because the bar in Germany is more localized.

[57] In France, the preparation of pleadings is in the hands of the *avoués,* who are said to "represent" their clients, while the *avocats* merely "assist" them. Hence it has been argued that French *avocats* should not sign pleadings filed with the Court of Justice of the European Communities. RICHEMONT, *op. cit. supra* note 5, at 146, 169. However, Rules of Procedure, art. 37 prescribes expressly that all pleadings must be signed by the agent or attorney. It would seem to override pertinent national laws and customs.

[58] See authorities cited at note 53 *supra.* The rule seems to apply only to countries such as Germany, where law teachers may appear in court generally, not for instance to France where law teachers are occasionally used by the government as agents before the International Court of Justice. Salomonson, *supra* note 54, at 7. *But see* RICHEMONT, *op. cit. supra* note 5, at 144.

[59] Rules of Procedure, art. 32.

[60] Rules of Procedure, art. 34.

of attorneys and agents as well as upon the Grand Duchy of Luxemburg, where the Court is sitting, though the contrary opinion has also been expressed.[61]

Whether a person is an attorney admitted to practice must be determined according to his national law, which also governs the effect of a disciplinary penalty pronounced against him by the disciplinary authorities of his home state.[62] The Court of Justice itself has only limited disciplinary powers. After a hearing, it may exclude an agent or attorney from a case if, by his conduct towards a judge, an advocate-general, or the Registrar, he violates the dignity of the Court.[63] On occasion, the Court has informally and without a hearing censured an attorney for intemperate statements made in a pleading submitted to the Court.[64] There is no rule prescribing that the professional authorities of the attorney's home state must be notified by the Court in such a case.

Customarily, a copy of the power of attorney given the party's attorney, or a copy of the letter of appointment given an agent is joined to the first pleading filed by each side. However, in line with the general practice in member states, a formal power of attorney is not essential to the validity of proceedings before the Court, though it should be presented if the attorney's power to act is contested.[65] Corporations must show that the corporate officer who appointed the attorney was authorized to do so.[66]

III. JURISDICTION OF THE COURT

Because a rich literature concerning the jurisdiction of the Court of Justice of the European Communities is available in English,[67] only a

[61] Mathijsen, *Het aanvullend Reglement van het Hof van Justitie van de E.G.K.S.*, 31 NEDERLANDS JURISTENBLAD 859, 860-61 (1953). The Registrar must transmit a copy of the calendar to the Minister of Foreign Affairs of Luxemburg so that the Luxemburg authorities may be aware of the presence of persons entitled to various immunities. Instructions to the Registrar, art. 10. That rule would tend to support Mr. Mathijsen's argument.

[62] I. Nold, K. G. v. Haute Autorité, case 18-57, 5 Recueil 89 (1959) (procedure in Court of Justice of European Communities initiated by German attorney subject to *Vertretungsverbot*, which under his local law makes it punishable for him to represent clients, but does not render his acts void is valid; case makes clear that in federal states law to be consulted to determine whether attorney is entitled to act is law of federal state where he exercises his profession).

[63] Rules of Procedure, art. 35. A stay must be granted in such a case to permit the appointment of a new attorney.

[64] Acciaieria Ferriera di Roma v. Haute Autorité de la C.E.C.A., case 1-60, 6 Recueil 351 (1960).

[65] Barge v. Haute Autorité de la C.E.C.A., case 14-64, 11-4 Recueil 1 (1965).

[66] Rules of Procedure, art. 38, § 5.

[67] See notes 1 and 2 *supra*. As to the Coal and Steel Treaty, see also SCHEINGOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION (1965).

very brief and oversimplified summary of this topic is given here. The basic function of the Court is the review of decisions, both individual (quasi-judicial) and general (quasi-legislative) issued by the executive organs of the European Communities: High Authority of the Coal and Steel Community, Commissions of the Economic Community and Euratom, and Councils of Ministers of the Communities. Individual (quasi-judicial) decisions can be attacked on four grounds: lack of jurisdiction on the part of the community organ having issued the decision, violation of substantial procedural requirements, violation of one of the treaties or of an implementing rule, and *détournement de pouvoir* (use of a granted power for an improper purpose). Review can be sought by Community organs (other than the one having issued the decision), member states and individuals or corporations. Under the Coal and Steel Treaty, however, private individuals and corporations may seek a review of decisions only if they are enterprises engaged either in coal or steel production (or, to some extent wholesaling), or associations of such enterprises. Community institutions and member states can bring direct proceedings to have general (quasi-legislative) decisions declared invalid. Others may do so only to a very limited extent. Under the Coal and Steel treaty they must show that there has been *détournement de pouvoir* concerning them, under the Common Market and Euratom treaties they must show that what appears to be a general decision in fact concerns them directly and individually.[68]

The Court may also hear proceedings against Community organs based on their failure to act where they had a duty to do so.[69]

The Court of Justice is competent in tort actions against the Communities.[70] It has no general contractual competence, unless such a

[68] In fact, the basic grant of power to the Court is contained in Coal and Steel Treaty, art. 31, Treaty, art. 164 and Euratom Treaty, art. 136, which provide that the Court shall insure the observance of law in the interpretation and application of the respective treaties. But this seems to be mainly a statement of policy, since the actual bases of jurisdiction are given in subsequent articles. It has been argued that these articles have a negative implication: except when a treaty provides otherwise, the Court may not review the exercise of discretion, unless there is an abuse of discretion, which amounts to a violation of law. Diag, *supra* note 13, at 150. The basic rules as to the review of decisions are found in Coal and Steel Treaty, art. 33 (and *cf.* art. 80 for a definition of enterprises); Treaty, art. 173; Euratom Treaty, art. 146.

[69] Coal and Steel Treaty, art. 35; Treaty, art. 175; Euratom Treaty, art. 148. The pertinent Community organ (High Authority Commission) must first be invited to act.

[70] Coal and Steel Treaty, art. 40; Treaty, arts. 178, 215; Euratom Treaty, arts. 151, 188. There are some differences between the rules applicable to the Rome and Paris treaties. *Cf.* Lagrange, *The Non-contractual Liability of the Community in the E.C.S.C. and in the E.E.C.*, 3 COM. MKT. L. REV. 10 (1965).

competence is conferred upon it by an appropriate clause in a contract entered into by one of the Community organs.[71]

Most important in terms of the numbers of cases brought has been the Court's right to hear disputes involving community organs and their employees.[72]

In a sense, the Court is also an international tribunal. It may hear disputes between member states of the European Communities concerning the Community treaties.[73] It is likewise competent to hear suits through which member states are to be compelled to abide by their treaty obligations.[74]

Increasingly significant, national courts before which cases involving the meaning of the European treaties or of regulations enacted by Community organs are pending may, and sometimes must, stay their proceedings and certify the question raised to the Court in Luxemburg for a preliminary ruling.[75]

In some cases the Court must render what is more or less an advisory opinion.[76] It also has a number of very specialized duties in connection with the Euratom treaty[77] and some auxiliary Community institutions such as the European Investment Bank.[78] Finally, it must authorize acts of execution (such as attachments) affecting Community property.[79]

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[71] Treaty, art. 181; Euratom Treaty, art. 153; Coal and Steel Treaty, art. 42. Such clauses are sometimes mandatory: see Announcement of the High Authority concerning research grants relating to coal, iron and steel, Amtsblatt, May 9, 1963, p. 1433, art. 14.

[72] Treaty, art. 179; Euratom Treaty, art. 152; Regulation No. 31 of the Council of Ministers concerning the status of salaried employees and the conditions of work of other employees of December 18, 1961, Amtsblatt, June 14, 1962, p. 1385, art. 91 (hereinafter cited as personnel statute). There is no corresponding provision in the Coal and Steel Treaty, but the personnel statute applies to all three Communities.

[73] In any case involving an alleged violation of a treaty obligation by a member state and as to any matter related to the treaty by special submission. Coal and Steel Treaty, art. 89; Treaty, arts. 170, 182; *cf.* art. 225; Euratom Treaty, arts. 142, 154. Disputes relating to the treaties are not to be submitted to a method of settlement not provided in the treaties. Coal and Steel Treaty, art. 87; Treaty, art. 219; Euratom Treaty, art. 193.

[74] Treaty, art. 93; Euratom Treaty, art. 82.

[75] Treaty, art. 177; Euratom Treaty, art. 150; Coal and Steel Treaty, art. 41.

[76] *E.g.*, so-called small revision of the Coal and Steel Treaty, Coal and Steel Treaty, art. 95; conformity of international agreements entered into by European Economic Community with Rome Treaty, Treaty, art. 228. *Cf.* Euratom Treaty, art. 103.

[77] *E.g.*, Euratom Treaty, arts. 12, 21 (compulsory patent licenses); art. 18 (review of decisions of arbitration board concerning licenses); arts. 81, 82 (control of fissionable materials).

[78] *E.g.*, Treaty, art. 180; Protocol on the Statute of the European Investment Bank (annexed to the Treaty), art. 29.

[79] Protocol on Privileges and Immunities of the European Community, European Atomic Energy Community and European Coal and Steel Community, art. 1.

The Presiding Judge of the Court may grant a stay of an administrative decision issued by a Community organ, as well as other provisional relief.[80]

The powers of the Court are not the same in all the types of proceedings mentioned. Particularly in suits by employees, damage actions and suits to review fines imposed by Community organs it has a so-called *pleine juridiction.*[81] This means that it may change or modify the decision of the Community organ involved, can review the exercise of discretion of such an organ and will feel less bound by the parties' pleadings.[82] In most other cases (said, following French administrative law, to involve suits for *excès de pouvoir*) the Court may only approve the administrative decision under attack, or declare it void and remit the matter to the Community organ which issued it for further proceedings.[83] Deference will be paid to the Community organs' discretionary findings, though the Court is not ordinarily prevented from examining the evidence relied on by the Community body.[84] The 1965 Brussels agreement for the merger of the executives of the three European Communities will remove existing differences in the jurisdiction of the Court of Justice under the Coal and Steel treaty on one hand and the Common Market and Euratom treaties on the other hand.[85]

Appendix II will give some idea of the various types of business handled by the Court under its jurisdictional powers. The large number of cases brought by employees has led to the suggestion for the creation of an administrative tribunal for these matters, with a possible appellate jurisdiction in the Court of Justice of the European Communities.

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[80] Statute, art. 36; Euratom Statute, art. 37; Coal and Steel Statute, art. 33. *Cf.* Treaty, arts. 185, 186, 192; Euratom Treaty, arts. 157, 158; Coal and Steel Treaty, art. 39.

[81] Personnel statute, art. 91 (suits by employees); Treaty, art. 172, Euratom Treaty, art. 144, Coal and Steel Treaty, art. 36 (review of decisions imposing fines); *cf.* note 70 *supra.*

[82] *E.g.,* Acciaierie Laminatoi Magliano Alphi v. Haute Autorité, case 8-56, 3 Recueil 179 (1957); Schmitz v. Communauté Economique Européenne, case 18-63, 10 Recueil 163 (1964).

[83] *Cf.* SCHWARTZ, FRENCH ADMINISTRATION LAW AND THE COMMON-LAW WORLD 195, 196 (1954); Lagrange, *Les Actions en Justice dans le Régime des Communautés Européennes,* 10 SOCIAAL-ECONOMISCHE WETGEVING 81 (1962).

[84] Coal and Steel Treaty, art. 33, provides that the Court may not re-examine the evaluation of economic facts or situations on which the High Authority has based its decision or recommendation, unless the High Authority is accused of having committed a *détournement de pouvoir* or of having clearly misapplied the treaty or a rule relating to its application. There is no corresponding provision in the Rome treaties.

[85] Treaty establishing a Single Council and a Single Commission of the European Communities, signed at Brussels, April 8, 1965, arts. 26, 30. See Houben, *The Merger of the Executives of the European Communities,* 3 COM. MKT. L. REV. 37 (1965).

IV. GENERAL ASPECTS OF THE PROCEDURE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

A. Chracteristics of the Procedure before the Court

The Procedure before the Court of Justice of the European Communities is even farther removed in concept from the traditional common-law procedure than civil procedure in Europe generally.[86] There is no trial. Determination of facts and law is spread over a considerable period of time.[87] According to the statutes of the Court, the procedure consists of two phases, a written phase and an oral phase.[88] In practice, a third phase devoted to prooftaking may be inserted between these two. During the written phase, parties exchange writings in the nature of pleadings which contain their claims; written evidence in the possession of the parties is submitted at that time.[89] The Court then decides in closed session whether to call for the production of non-documentary evidence, such as witnesses or experts, or to begin the oral procedures at once.[90] Finally comes the oral procedure, in other words the hearing during which parties' counsel argue at length about the facts and the law.[91]

The procedure is clearly contradictory. Each side has the right to answer the other, both in the oral and written procedure. No side may rely on documents not made available to the opponent. Furthermore, the Court will ordinarily deal only with claims and allegations raised by the parties.[92] It raises issues on its own motion only in special circumstances.[93] On the other hand, the court plays a large role in directing the procedure. Papers are served through the Registrar. The Court may set or modify time limits for their submission.

[86] *Cf.* Cohn, *Aspects of the Procedure Before the Court of Justice of the European Communities*, [1962] THE SOLICITOR 309.

[87] Or, as civil-law scholars would put it, the principle of "concentration" does not apply. Nor does the principle of "immediacy." Proof may be taken before a single judge of a panel (though this is done infrequently). MIGLIAZZA, LA CORTE DI GIUSTIZIA DELLE COMMUNITA EUROPEE 176 (1961).

[88] Statute, and Euratom Statute, art. 18; Coal and Steel Statute, art. 21.

[89] See text *infra*, part V A.

[90] See text *infra*, part VI A.

[91] See text *infra*, part VII A. Proof phase and hearing phase may overlap, since witnesses or experts may be heard during the oral procedure, and the Court occasionally calls for additional evidence during the hearing.

[92] Gori et Sizaret, *Commentaire au règlement de procédure de la Cour de Justice des Communautés Européennes*, COLLECTION JUPITER, TRAITÉ DE ROME, COMMENTAIRES ET RÉGLEMENTS ₱ 15.820 (1959) (hereinafter cited as Gori et Sizaret); Riese, *Die Verfahrensordnung des Gerichtshofes des Europaeischen Gemeinschaft fuer Kohle und Stahl*, 6 N.J.W. 522 (1953). *Cf.* Societe nouvelle des usines de Pontlieu-Aciéries du Temple v. Haute Autorité de la C.E.C.A., case 42-59, 7 Recueil 101 (1960) (party cannot use document it is willing to show to court but not to opponent).

[93] See *infra* part B of this section.

The Court determines whether the parties' requests for the hearing of witnesses, the conduct of an *expertise* or another method of proof shall be complied with and may even seek out evidence on its own motion.[94]

In one respect the Court's procedure is somewhat analogous to our own: especially in actions to obtain the invalidation of administrative decisions specified conditions must be fulfilled, such as the existence of *détournement de pouvoir*, lack of jurisdiction, et cetera, before suit can be brought. The procedure is therefore based more or less on causes of actions in the common-law sense. The facts constituting the various bases for suit must be alleged in the pleadings and proved. A suit in which, *e.g., détournement de pouvoir* is alleged, but without sufficient particularization of the facts constituting it in the first pleading is subject to dismissal.[95]

B. The Court's Power to Act on Its Own Motion

Generally speaking the Court will deal only with issues which have been properly raised by the parties. But sometimes, if strong public policy is involved, it raises issues on its own motion.[96] Thus it will examine the adequacy of plaintiff's original pleading on its own motion because an obscure or ambiguous pleading prevents proper further proceedings.[97] In one case it has also checked whether the High Authority supplied an adequate opinion justifying a decision taken by it, since the absence of such an opinion would make it much more difficult for the parties concerned to attack the decision and much more difficult for the Court to determine whether the action taken by the High Authority was lawful.[98] In an earlier matter it did not take such a course of action, however.[99] In a situation in which the High Authority may act only after having asked for advice of the

[94] Gori et Sizaret, at ¶ 15.820; Riese, *supra* note 92. *Cf.* Van Hemelrijk, *Het reglement van het Hof van Justitie der Europese Gemeenschappen*, 23 RECHTSKUNDIG WEEKBLAD 1437 (1960).

[95] Migliazza, *Problemi Generali Relativi al Processo innanzi alla Corte di Giustizia delle Communita Sopranazionali Europee*, 26 STUDI URBINATI 181, 188 (1958).

[96] BECKER, DER EINFLUSS DES FRANZOESISCHEN VERWALTUNGSRECHTES AUF DEN RECHTSSCHUTZ IN DEN EUROPAEISCHEN GEMEINSCHAFTEN 136 (1963). This is entirely a matter of case law, except that Rules of Procedure, art. 92, provides that the Court may always examine on its own motion whether the "non-waivable conditions for a suit" are present.

[97] Société Fives Lille Cail v. Haute Autorité de la C. E. C. A., case 2-61, 7 Recueil 559 (1961).

[98] I. Nold, K.G. v. Haute Autorité, case 18-57, 5 Recueil 89 (1959).

[99] Gouvernement de la République Italienne v. Haute Autorité, case 2-54, 1 Recueil 73 (1954).

"Consultative Committee" the Court will likewise investigate on its own motion whether this essential procedural requirement has been observed.[100] Professor Bebr, who has discussed this matter in great detail, feels there are additional issues the Court examines on its own motion, such as whether it has jurisdiction, whether the administrative decision brought to it for review is in fact a binding decision subject to review, whether the Community organ whose decision is being reviewed had jurisdiction and perhaps whether there has been a treaty violation.[101] In other situations the Court is not generally willing to act outside the scope of the pleadings.[102] Even costs are consistently refused to the prevailing party unless it has asked for them in its original petition.[103] It is worthy of some note that in several instances in which the Court stated that it acted on its own motion, it did in fact comply with a request by one of the parties, which had not been made in due time and was thus not properly before the Court.[104] Hence the Court's power to deal with matters on its own motion is in fact a means which can be used to overcome the prohibition against the raising of new matters after the original petition and answer have been filed.

V. PARTIES

A. Capacity, Proper Parties

Because of the specialized jurisdiction of the Court of Justice of the European Communities, member states and Community institutions are generally defendants, while private individuals and business firms are usually plantiffs. It may therefore be useful to discuss capacity to sue separately for these two groups.

Problems do not usually arise as to member states. Clearly they

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[100] *Ibid.*

[101] See generally Bebr, *Amtsermittlung und Nachpruefungsbefugnis im Lichts der Rechtsprechung des Gerichtshofes der Europaeischen Gemeinschaften*, ZEHN JAHRE RECHTSPRECHUNG DES GERICHTSHOFES DER EUROPAEISCHEN GEMEINSCHAFTEN 78 (1965).

[102] See, *e.g.*, VAN REEPINGHEN ET ORIANNE at 34. *But see* Fiddelaar v. Commission de la C. E. E., case 44-59, 6 Recueil 1077 (1960) (employee demanded review of decision dismissing him, and long after original pleadings had been filed he also asked for damages for wrongful dismissal. The Court said this was too late, but in a case involving *pleine jurisdiction* the court could grant damages even in the absence of a specific prayer for relief to that effect in the original petition).

[103] *E.g.*, Société anonyme Usines Emile Henricot v. Haute Autorité de la C. E. C. A., case 23-63, 9 Recueil 439 (1963); Acciaierie Ferriere e Fonderie di Modena v. Haute Autorité de la C. E. C. A., case 16-61, 8 Recueil 547 (1962).

[104] See the cases cited notes 98 and 102 *supra; cf.* Société Fives Lille Cail v. Haute Autorité de la C. E. C. A., case 2-61, 7 Recueil 559 (1961).

have capacity to sue and be sued before the Court. However, it is usual to designate as party not the country as such, but its government. While the treaties do not mention constituent states of countries having a federal form of government, it might be noted that in one case, several German Laender participated in the litigation.[105]

Only the three European Communities, not their institutions or organs (High Authority, Commissions, Councils of Ministers) have legal personality. But as the institutions represent the three Communities,[106] they must be mentioned as parties defendant, not the Communities as such. However, the Court will correct a mere misnomer.[107] Suits may be brought against institutions common to the three Communities, including the Court.[108]

In the case of private parties, capacity to sue seems to be governed by the party's national law.[109] Problems have, however, arisen with Associations designed to represent the interests of their members—such as trade associations or associations of employees. Because of the wording of the Coal and Steel treaty they may have the right to sue under that treaty even if they have no such right under their national law.[110] For associations formed under Community law, such as the Staff Committee, the Court has devised its own test for pro-

[105] Gouvernement de la République Féderale d'Allemagne v. Haute Autorité de la C. E .C. A., case 3-58, 6 Recueil 117 (1960).

[106] Lagrange, *La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier*, [1954] REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 417-18. As to the legal personality of the communities, see Coal and Steel Treaty, art. 6; Treaty, art. 210; Euratom Treaty, art. 184.

[107] The rule mentioned has been applied especially in suits by employees. In such a case the official appointing authority (High Authority, Commission, etc.) must be named as defendant. Boursin v. Haute Autorite de la C. E. C. A., case 102-63, 10 Recueil 347 (1964); Raponi v. Commission de la C. E. E., case 27-63, 10 Recueil 247 (1964); Schmitz v. Communauté Economique Européne, case 18-63, 10 Recueil 163 (1964).

[108] If the Court is a party defendant, its Registrar represents it as agent, and the Deputy Registrar acts as Registrar for that particular suit. Collotti v. Cour de Justice des Communautés Européennes, case 70-63, 10 Recueil 861 (1964). An employee of the secretariat of the Councils of Ministers, which in fact but not in form is an institution common to all three Communities, must bring his action separately against the Council of each Community. Mueller v. Conseil de la C. E. E. et Conseil de la C. E. E. A., case 28-64, 11 Recueil 307 (1965).

[109] Thus German law determines whether the silent partners of a limited partnership in liquidation because of the resignation of the only active partner may sue. I. Nold, K. G. v. Haute Autorité, case 18-57, 5 Recueil 89 (1959). The same is probably true as to a corporation created by the merger of two other firms. Mannesmann A. G. v. Haute Autorité, case 4-59, 6 Recueil 241 (1960); *cf.*, as to the right of a deceased, Barge v. Haute Autorité de la C. E. C. A., case 18-62, 9 Recueil 525 (1963).

[110] See Coal and Steel Treaty, arts. 33, 48, granting associations of enterprises a right to sue. *Cf.*, as to the Treaty, which has no provision, Conféderation nationale des producteurs de fruits et légumes v. Conseil de la C. E. E., case 16-62, 8 Recueil 938 (1962).

cedural capacity: to have such capacity, an association need not be formally incorporated, but it needs at least limited autonomy and responsibility. The Staff Committee whose duties were merely to advise the institutions as to matters affecting their employees was therefore not recognized as having capacity.[111]

B. The Requirement of "Interest"

No provision in the European treaties expressly provides that only actual cases or controversies may be brought before the Court of Justice of the European Communities. However, from various treaty provisions and the general law of the member states authors universally derive the conclusion that parties must have a present "interest" in order to be allowed to sue. This seems to mean that a party must be able to point to some benefit it expects to derive from the litigation.[112] The Court also proceeds on the assumption that a plaintiff needs an "interest"[113] but is quite liberal in defining that term. Thus, under the Coal and Steel treaty an enterprise may attack a decision concerning a different firm if it will affect that firm's competitive potential.[114] A trade organization has sufficient interest if the interests of its members are affected.[115] A corporation may attack a decision addressed to a defunct corporation to which it has succeeded, even though that decision could not have been executed against it at the time.[116] Indeed, in the case of administrative decision addressed to a party having standing to attack it, its interest in doing so will usually be presumed.[117] Member states and Community institutions need not ordinarily show an "interest" to be able to sue.[118]

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[111] Lassalle v. Parlement Européen, case 15-63, 10 Recueil 98 (1963).

[112] VAN REEPINGHEN ET ORIANNE, 34, 35; Gori et Sizaret, at ¶15.821c. See also notes 116-18 *infra*.

[113] Thus a damage action may not be brought at a time when it is still quite unclear whether plaintiff will be damaged at all. Acciaieria Ferriera di Roma (Feram) v. Haute Autorité de la C. E. C. A., case 9-64, 11 Recueil 401 (1965).

[114] De Gezamenlijke Steenkolenmijnen in Limburg v. Haute Autorité de la C. E. C. A., case 30-59, 7 Recueil 1 (1961) (Dutch mines may attack decision of High Authority concerning premium paid to German government).

[115] Conféderation nationale des producteurs de fruits et légumes v. Conseil de la C. E. E., case 16-62, 8 Recueil 938 (1962) (central organization of French Chambers of Agriculture).

[116] Mannesmann A. G. v. Haute Autorité de la C. E. C. A., case 4-59, 6 Recueil 241 (1960) (Plaintiff has interest because the decision attacked could be modified by High Authority to substitute it as addressee). For a general listing of cases on the matter, see Lagrange, Fonctionnement et Rôle de la Cour de Justice des Communautés Européennes 21-24 (mimeo lecture Paris, Institut de Driot Comparé n. d.).

[117] MIGLIAZZA, LA CORTE DI GIUSTIZIA DELLE COMMUNITÀ EUROPEE 2-17 (1961).

[118] *E.g.*, Daig, *Die Gerichtsbarkeit in der Europaeischen Wirtschafts Gemeinschaft und Atomgemeinschaft*, 83 ARCHIV FUER OEFFENTLICHES RECHT 132, 167 (1958).

C. Standing (Qualité)

The jurisdiction of the Court of Justice of the European Communities is not general, but limited to specified classes of cases. Therefore, general procedural capacity is not necessarily enough; a person bringing an action must also have standing as to the particular proceeding involved.[119] Most importantly, under the Coal and Steel treaty, except for member states and the Council, decisions of the High Authority may be attacked by enterprises engaged in the production of coal or steel within the Community, or Associations of such enterprises. In cartel matters, however, wholesalers may also act.[120] But consumers have no right of action, except in cartel matters,[121] no matter how much they may be affected by High Authority acts, nor is a stockholder in an enterprise in any better position.[122] On the other hand, an enterprise engaged in the production of steel has standing to sue, even if the litigation involves coal, and *vice versa*.[123] There is no restriction on the persons who may bring damage actions under the Coal and Steel treaty.[124]

The Common Market and Euratom treaties do not restrict the number of persons who may attack individual (quasi-judicial) decisions of Community organs directed to them; any person so affected may seek relief from the Court. However, decisions which are of a general nature (quasi-legislative decisions) and individual decisions directed to others may be attacked only by persons individually and directly concerned.[125] This seems to mean that the plaintiff must be concerned in a manner different from others in the same general class. Thus an importer of grain cannot contest a decision addressed to his government concerning a levy to be imposed upon imported grain, even if he is the largest, and perhaps not even if he is the only

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[119] MIGLIAZZA, *op. cit. supra* note 117, at 213.

[120] Coal and Steel Treaty, arts. 33, 35, 80. Associations of enterprises may sue even if they also have an independent commercial purpose. Société Rhénane d'exploitation et de manutention "Sorema" v. Haute Autorité de la C. E. C. A., case 67-63, 10 Recueil 293 (1964).

[121] Coal and Steel Treaty, art. 63.

[122] Schlieker v. Haute Autorité de la C. E. C. A., case 12-63, 9 Recueil 173 (1963).

[123] Groupement des Industries Sidérurgiques Luxembourgeoises v. Haute Autorité, case 7-54, 2 Recueil 53 (1956).

[124] Coal and Steel Treaty, art. 40; *but see* art. 34(1) (damage due to improper decision of High Authority may be claimed only by enterprise). On the definition of enterprise under the Coal and Steel Treaty see also Hammes, La Cour de Justice des Communautés Européennes, 38-40 (mimeo lecture Luxemburg 1959); BECKER, *op cit. supra* note 96, at 67-69; RICHEMONT, COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, LA COUR DE JUSTICE 476-80 (1954).

[125] Treaty, art. 173; Euratom Treaty, art. 146.

importer.[126] But in another case a decision by the Commission directed to the German government concerned only the very few grain importers who had obtained import licenses on one particular day. It was held that they were individually and directly concerned and hence had standing to sue.[127] Similarly, article 91 of the Personnel statute provides that the Court must decide all disputes between the Communities and the persons mentioned in the Personnel statute. It has been held, however, that an applicant for a position, though not a person mentioned in the statute, has standing to attack a decision affecting him.[128]

VI. THE WRITTEN PROCEDURE

A. General Rules

The first phase of the procedure before the Court, the written procedure, consists of an exchange of four writings, the original petition, by which the action is started, the answer to that petition, a reply and a rebutter, though the last two may be waived.[129] The written procedure is quite essential: as has been mentioned, the Court will not ordinarily deal with matters not mentioned in the written procedure.[130] To that extent the parties' writings perform the issue-delimiting function of pleadings and will therefore be referred to as pleadings here. But unlike American pleadings, they also contain detailed discussions of the legal contentions of the parties and proof offers. So they are quite long, twenty typed pages is not unusual. Each party must annex all documents on which it relies to its pleadings.[131] Hence the pleadings also serve to bring the evidence and the legal arguments of the parties before the Court and are thus not a mere means of preparing a later trial (which does not exist before the Court), but an essential part of the Court's fact and law-finding process, somewhat in the manner of American briefs.

Certain rules are common to all four pleadings: they must be signed

[126] Getreide-Import Gesellschaft v. Commission de la C. E. E., case 38-64, 11 Recueil 263 (1965); *cf.* Société anonyme belge "Glucoseries réunies" v. Commission de la C. E. E., case 1-64, 10 Recueil 811 (1964) (only Belgian exporter of glucose to France lacks standing to attack decision concerning glucose imports addressed to French government).

[127] Alfred Toepfer v. Commission de la C. E. E., case 106-63, 11 Recueil 525 (1965). See generally Daig, *supra* note 118, 168-73.

[128] Vandevyvere v. Parlement européen, case 23-64, 11 Recueil 205 (1965).

[129] Statute and Euratom Statute, art. 18; Coal and Steel Statute, art. 21; Rules of Procedure, art. 41.

[130] See test at part III B *supra.*

[131] *Cf.* Rules of Procedure, arts. 37, 38.

by the party's agent or counsel and must be submitted to the Registrar in one original and two copies for the Court, and as many additional copies as there are parties on the other side. Any documents relied on must be annexed in a folder which contains a list of them. If documents are very bulky, it is sufficient to file one copy in the Registrar's office and annex only excerpts to the copies of the pleadings. Otherwise, complete copies of all documents should be annexed to all copies of the pleadings.[132] All pleadings received must be entered by the Registrar upon its official register. This constitutes formal proof of their receipt.[133] The Registrar then serves the copies destined for the other parties by sending them (with a covering letter) by registered mail, return receipt requested if the party must be served outside of Luxemburg; if the party concerned resides in Luxemburg or has appointed a person authorized to accept service of papers there (as is usually the case), service is made by sending a messenger with the pleading and two copies of a covering letter, one of which the recipient (or his agent for service of process) is asked to return as a receipt.[134]

B. The Petition

Plaintiff starts his suit by filing his first pleading, the petition, with the Registrar.[135] There is not separate summons. The statutes and rules regulate to some extent the formal contents of the petition. Thus it must contain the name and address of the plaintiff, the name of defendant and an indication of the capacity in which the person having signed it (attorney, agent) acts. The administrative decision to be reviewed must be given in full; if the suit is brought on the

[132] Rules of Procedure, art. 37. As to the rule that pleadings must be signed by an attorney (or agent) see also Officine Elettromeccaniche Ing. A. Merlini v. Haute Autorité de la C. E. C. A., case 108-63, 11-1 Recueil 1 (1965) (plaintiff's attorney submitted a memorandum addressed to him by plaintiff in lieu of a formal reply, stating in a covering letter that he had no time to prepare a formal reply; held, such a memorandum may not be considered). The language rules must, of course be compiled with. See text at part II D *supra*.

[133] Rules of Procedure, art. 15; Instructions to Registrar, arts. 12-16.

[134] Rules of Procedure, arts. 16, 79; Instructions to Registrar, art. 3. As to the appointment of an agent for receipt of process, see also text keyed to note 136 *infra*. In Luxemburg, service is effectuated quite informally. The messenger drops the envelope with the pleading and two copies of the covering letter in the recipient's mailbox. No attempt at personal service is made. If one copy of the covering letter is not returned to the court within a reasonable time (which is very rare), a registered letter, return receipt requested, is sent.

[135] Statute and Euratom Statute, art. 19, and Coal and Steel Statute, art. 22, provide that the petition is addressed to the Registrar. In practice, it is usual to use the heading: "To the Presiding Judge and the Judges of the Court of Justice of the European Communities ..." VAN REEPINGHEN ET ORIANNE 36.

ground that a Community organ did not act when it should have, documentary evidence must be annexed to show when such action was requested. In addition, as mentioned, all documents relied on must be annexed. There must also be a listing of all proof offers (examination of witnesses or experts, etc.) suggested by the party. The plaintiff must appoint a person in Luxemburg to receive service of all further papers in the suit, and indicate in his petition what person he has appointed. It is usual to annex to the petition the letter of acceptance of the person so appointed. Corporate plaintiffs must also include a copy of their by-laws and a document showing the power of attorney given the corporation's lawyer was issued by a duly qualified officer. Finally, a document showing that the attorney having prepared the petition is a member in good standing of the bar in one of the Community countries must be joined with all the papers. It is the duty of the Registrar to examine whether the plaintiff has appointed an agent for service of process in Luxemburg and whether all the required documents have been annexed. If the petition is defective in that respect, he must so inform the plaintiff (or rather his counsel) and give him a reasonable time to supply the missing items. If the items are not supplied within a reasonable time, he should inform the President of the Court. The Court may dismiss the petition in such a case but this never seems to have happened.[136]

There are few rules governing the substantive contents of the petition. It must contain a prayer for relief, the "object of the suit" and the "bases of the suit."[137] Little difficulty has been encountered in defining the prayer for relief. This includes the plaintiff's demand that he be given damages, that an administrative decision aggrieving him be declared void, that he be awarded costs. If the plaintiff wishes to rely on a measure of proof for which Court permission is required (such as an examination of witnesses), a request to that effect must be contained in the prayer. This is usually done in an alternative form—the Court is asked to find for plaintiff on the basis of the documentary evidence presented, but if it should not wish to do so, then it should order an examination of witnesses, etc. Unfortunately, however, the terms object of the suit *(Streitgegenstand, objec du litige)* and bases of the suit *(Klagegruende, moyens)* though used

[136] Statute and Euratom Statute, art. 19; Coal and Steel Statute, art. 22; Rules of Procedure, arts. 37, 38; Instructions to Registrar, art. 5; Gori et Sizaret at ¶ 15.822.

[137] Statute and Euratom Statute, art. 19; Coal and Steel Statute, art. 22.

in the procedural writings of all the member states, have no entirely uniform content there.[138] Hence, the rules as to the substantive contents of the petition have been developed mainly through case law. Especially in proceedings to have the decision of a Community organ declared void, the treaties provide strict conditions which must be complied with; an attack is possible only if there is a lack of jurisdiction, violation of treaty, *détournement de pouvoir*, et cetera. Hence the petition must make it clear that prima facie, the plaintiff comes within at least one of these conditions.[139] He need not necessarily indicate the treaty article on which he relies (though this is customary),[140] nor is it absolutely essential to state in so many words that the action is based on *détournement de pouvoir* or the like. However, the petition must make it clear in some manner on which ground it is based and it must contain sufficient facts and reasoning to make it appear that the plaintiff comes within the scope of the ground used by him.[141] Thus the Court has defined *détournement de pouvoir* as either an intentional use of powers for a purpose not intended or "a lack of foresight or prudence of a serious nature equivalent to a lack of recognition of the legal purpose (of the power granted), leading to a pursuit of goals other than those for which the granted powers were given." If the plaintiff wishes to rely on *détournement de pouvoir*, he must therefore show that he comes within the terms of this definition.[142] Likewise, if fault is alleged, there must be some substantiation of the facts amounting to fault,[143] and when substantial damages are requested for wrongful dismissal, a mere statement that this sum is proper in view of plaintiff's age, past services and professional standing is insufficient.[144] The discussion in the petition may be rather brief,[145] but pleading a matter by merely incorporating

[138] For a comparative discussion see Gerbrandy, *De regeling van de procedure bij het Hof van Justitie van de Europese Gemeenschappen*, 1 SOCIAAL-ECONOMISCHE WETGEVING EUROPA 87, 92-94 (No. 4 1960).

[139] *Cf.* MIGLIAZZA, *op. cit. supra* note 117, at 243.

[140] Società Industriale Acciaierie San Michele v. Haute Autorité de la C. E. C. A., case 2-63, 9 Recueil 661 (1963) (no need to refer to art. 36 of Coal and Steel Treaty since petition makes it clear it is for review of pecuniary sanctions of High Authority and this is only possible relevant article); Algera v. Assemblée Commune, case 7-56, 3 Recueil 81, (1957).

[141] Société Fives Lille Cail v. Haute Autorité, case 2-61, 7 Recueil 559 (1961).

[142] *E.g.*, Chambre syndicale de la sidérurgie française v. Haute Autorité de la C. E. C. A., case 3-64, 11 Recueil 567 (1965).

[143] Meroni & Co. v. Haute Autorité de la C. E. C. A., case 46-59, 8 Recueil 783 (1962).

[144] Luhleich v. Commission de la C. E. E. A., case 68-63, 11 Recueil 727 (1965). The court is more lenient if nominal damages only are demanded.

[145] Forges de Clabecq, S. A. v. Haute Autorité de la C. E. C. A., case 14-63, 9 Recueil 719 (1963) (sufficient, in attacking High Authority decision imposing

by reference a pleading in a different but similar case handled by the same attorney is not possible.[146]

In practice, the format of the petition seems to vary somewhat depending upon the nationality of the attorney submitting it. Generally, it starts with the purely formal recitals required by the rules, followed by a part entitled "the facts" in which a chronological account of the events leading up to the litigation is given. The next part is usually entitled "the law." It will ordinarily contain a discussion of each separate basis for suit (such as violation of treaty, *détournement de pouvoir*, et cetera) and explain why plaintiff is entitled to prevail under each of these grounds. There is no requirement that each of these grounds be separately numbered, but this is frequently done. In the end follows the prayer for relief, though some attorneys seem to start out their petition with the prayer for relief. It is possible for several plaintiffs to submit one collective petition.[147] French attorneys customarily submit pleadings consisting of numerous subordinate clauses introduced by the word *Attendu* (Whereas), but this somewhat awkward form of pleading is not required, nor used universally.

As has been noted previously, as soon as each petition arrives, it must be entered by the Registrar upon his register. At that time an index number is assigned to the case which is used to identify it on all later occasions. The index number consists of two figures separated by a dash, one indicating the number of the case within the current year and the other the year (1-66, 2-66, et cetera). The Registrar then serves a copy of the petition upon the defendant unless he considers it incomplete and requests the plaintiff to complete it, in which case it will be served when completed.[148]

If the petition does not concern an employee matter, and the case

levy under scrap equalization scheme to say it is in violation of treaty and applicable regulations because it imposes a levy for scrap bought before the effective date of the pertinent regulation). But see Société des fonderies de Pont-à-Mousson v. Haute Autorité, case 14-59, 5 Recueil 445 (1959) (party alleging scrap levy hurt competitive position must give some figures on decline in business due to tax).

[146] Prakash v. Commission de la C. E. E. A., case 19-63, 11 Recueil 677 (1965); Société des Charbonnages de Beeringen v. Haute Autorité, case 6-55, 2 Recueil 323 (1956).

[147] Alternative requests may include a request that decision aggrieving the plaintiff be declared void or that he receive damages. Several plaintiffs may submit one collective petition if they attack the same decision. See VAN REEPINGHEN ET ORIANNE at 36-37.

[148] In addition, the Registrar must see to it that a notice that the suit has been brought appears in the official Gazette of the Communities. The notice gives the date the suit was brought and contains the names of the parties, the object to the litigation and the prayer for relief. It is intended to enable any interested parties to intervene. See Rules of Procedure, arts. 15, 16, 39; Instructions to Registrar, arts. 3, 12-16. *Cf.* note 136 *supra*.

is therefore one for decision by the full Court, the President of the Court then receives the petition, assigns the case to one of the panels to handle any proof proceedings and selects a reporting judge to take charge of the case. In practice, assigning the case to one of the panels for proof proceedings has very little significance, because proof proceedings are usually conducted by the full Court. However, the reporting judge must always be selected from the panel to which the case has been assigned[149] and in addition the case is automatically assigned to the advocate-general attached to the panel when it is assigned to a particular panel.[150]

C. The Answer

Within one month from the day he has received a copy of the petition, the defendant must file an answer in the Registrar's office.[151] This time period is increased for defendants outside Luxemburg.[152] In computing it, the day on which the defendant has received the petition is not counted,[153] but the answer must be filed on the last available day.[154] It may be sent to the Registrar by mail, or in any other way, but in determining timeliness only the day of arrival in the Registrar's office, not the day of mailing, controls. The President of the Court may extend the defendant's time to answer.[155]

The formal requirements for the answer are substantially the same as those for the petition.[156] Under the Coal and Steel Statute, a Community organ which is a defendant must annex to its answer not

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[149] Rules of Procedure, art. 24; *cf.* art. 44, § 2. See also Tizzano, *La Corte di Giustizia*, 3 QUADRI, MONACO, TRABUCCHI, COMMENTARIO CEE at 1202-03.

[150] *Cf.* text accompanying note 34 *supra.*

[151] Rules of Procedure, art. 40, § 1.

[152] Rules of Procedure, art. 81; Decision of the court relating to time periods of March 3, 1959, Amtsblatt, Jan. 18, 1960, p 46. It provides the following additional time periods: for parties residing in Belgium, two days; in Germany, continental France and Holland, six days; Italy, ten days; the rest of Europe, fifteen days; and all other areas, one month. These additional time periods are available not only for the service of the answer, but apply in all situations in which there is a time limit of some sort.

[153] Rules of Procedure, art. 80. If the last day is a Sunday or legal holiday, filing on the first working day is proper.

[154] In other words, the time periods before the Court are not *franc,* as generally in French civil procedure. *Cf.* Van Hemelrijk, *Het reglement van het Hof van Justitie van de Europese Gemeenschappen,* [1960] RECHTSKUNDIG WEEKBLAD cols. 1437, 39. The rule applies to all time periods.

[155] Rules of Procedure, art. 40. The request to the President of the Court is made by simple letter. It seems to be granted as a matter of routine. As to the rule that date of arrival, not date of mailing controls, see Soc. Industriale Metallurgica di Napoli v. Haute Autorité de la C. E. C. A., case 36-58, 5 Recueil 331 (1959).

[156] Rules of Procedure, art. 40.

only the documents on which it relies but all documents in its file pertaining to the case.[157] In the case of litigation involving employees, the personnel file must be submitted to the Court.[158]

If the defendant fails to submit an answer in due time, a default judgment may be obtained, which is subject to a special procedure for reopening.[159] So far, the Court has never had to render a judgment by default.

The rules as to the substantive contents of the answer are even sketchier than those concerning the petition. It must contain the factual and legal grounds on which it is based, the prayers for relief of the defendant and, in an appropriate case, his proof offers.[160] There is no longer a requirement that defendant must deny each factual allegation of plaintiff.[161]

In practice, the answer will obviously contain a refutation of plaintiff's factual and legal arguments, usually point by point, in the same order in which they have been presented by defendant. However, defendant may also wish to raise affirmative defenses such as lack of jurisdiction and the like. If he includes such points together with his points on the merits, all matters will ordinarily be dealt with together in the Court's final judgment. If the defendant wishes to avoid litigating the merits, he may submit a pleading containing only his procedural defenses *(exceptions, prozesshindernde Einreden)*. After having given plaintiff a chance to reply to these defenses, the Court will then hold a hearing and render a decision on the matter. If the defense is well founded, the case can thus come to a quick conclusion. However, the Court is not bound to render a separate decision on procedural defenses. It may reserve decision until the time of the decision on the merits and direct the parties to proceed accordingly.[162] The Court will do this if the merits and procedural defenses are closely related, as they often are.[163] In the case of non-waivable defenses, the Court may act on its own motion. Further proceedings are similar to those taken when procedural defenses are raised by defendant.[164]

Unfortunately, the Rules of Procedure contain no definition of

[157] Coal and Steel Statute, art. 23.
[158] Personnel statute, art. 26, § 7.
[159] Statute, art. 38, Euratom Statute, art. 39; Coal and Steel Statute, art. 35.
[160] Rules of Procedure, art. 40.
[161] See Rules of Procedure of 1953, J. O., March 7, 1953, pp. 37-55.
[162] Rules of Procedure, art. 91.
[163] *E.g.*, Alfred Toepfer v. Commission de la C. E. E., case 106-63, 11 Recueil 525 (1965). *Cf.* Plaumann & Co. v. Commission de la C. E. E. case 25-62, 9 Recueil 197 (1963).
[164] Rules of Procedure, art. 92.

procedural defenses *(exceptions, prozesshindernde Einreden)* and, indeed, use somewhat inconsistent terminology. Nor is the distinction between various types of procedural defenses and defenses on the merits always very clear in the law of the member states.[165] Presumably, procedural defenses which may be raised separately include at least lack of jurisdiction in the Court, defective pleading, running of the period of limitations, absence of a matter which may be reviewed by the Court and lack of legal capacity, standing or "interest" in the plaintiff.[166] To what extent these may be raised by the Court on its own motion has been discussed elsewhere.[167] In suits before the Court of Justice of the European Communities the parties are usually anxious to obtain a decision on the merits in order to have their legal relations clarified. Hence purely formalistic defenses (*e.g.*, failure to include all required documents with the petition) are rarely raised by defendants.[168] Affirmative defenses raised are usually closely related to the merits (such as lack of standing to act under the pertinent treaty), though in addition defendants rarely fail to raise the running of the pertinent limitation period.

D. Reply and Rebutter; Possibility to Raise New Matters

Following the receipt of the answer, plaintiff may file a reply and defendant subsequently a rebutter. The time for filing these papers is set by the President of the Court by order.[169] As to the form of these documents the general rules apply. Obviously, the reply is used by the plaintiff to refute the points and arguments presented in defendant's answer, and the rebutter to refute the reply.

Reply and rebutter are designed primarily as a means of affording the parties an opportunity to delineate their original position in greater detail especially as to points emphasized by the other side. These two

[165] Thus Rules of Procedure, art. 91, speaks of *exceptions, prozesshindernde Einreden,* while art. 92, mentioning situations in which the Court may act on its own motion, speaks of *fins de non-recevoir, Prozessvoraussetzungen.* Procedural authors in the member states have frequently attempted to define these terms in their own national law, but they remain hazy. Thus it is not quite clear to what extent the Court meant to impose different rules by the different terminology in arts. 91 and 92. See generally VAN REEPINGHEN ET ORIANNE 48, 49; MIGLIAZZA, *op. cit. supra* note 117, at 176, 253; Gerbrandy, supra note 138, at 99-100. Under the Rules of Procedure of 1953, procedural defenses were waived unless raised immediately but, as noted above, defendants may now combine procedural defenses and defenses on the merits.

[166] De Soto, *Prozessvoraussetzungen,* ZEHN JAHRE RECHTSPRECHUNG DES GERICHTSHOFES DER EUROPAEISCHEN GEMEINSCHAFTEN 48, 51-56 (1965).

[167] See text at part III B *supra.*

[168] De Soto, *supra* note 166, at 50.

[169] Rules of Procedure, art. 41. *Cf.* note 129 *supra.*

pleadings may be used only to a limited extent to change the parties' original positions. According to the Rules of Procedure, reply and rebutter may contain new proof offers, if there is a reason for the late presentation of these,[170] but new *moyens (Klagegruende)* may be raised only if they are based on factual or legal elements which came to light after the start of proceedings.[171] Unfortunately, there is no very clear definition of the term *moyens (Klagegruende)*. In this context it seems to refer to the various bases (such as violation of treaty, lack of jurisdiction, *détournement de pouvoir*) for bringing a case before the Court.[172] Thus, when the High Authority, faced with a petition for the review of one of its decisions argues that in fact there was no decision, the plaintiff may not state in his reply that in such a case his suit is intended to compel the High Authority to act.[173] Similarly, a person seeking damages for his wrongful dismissal may not claim in the reply that he is also entitled to reimbursement for laboratory equipment purchased at his own expense.[174] On the other hand, existing *moyens* may be supported by new arguments, and the Court has been rather liberal in defining what an argument, as opposed to a *moyen,* is.[175] Further, the Court sometimes avoids the rule prohibiting the raising of new points by holding that a point was raised "impliedly" in an earlier pleading.[176]

The prohibition against the raising of new points is irrelevant whenever the Court is empowered to raise a matter on its own motion. In such a case the Court can say that *it* raises the point the party is foreclosed from asserting. This is true especially in matters affected

[170] See text keyed to note 182 *infra.*

[171] Rules of Procedure, art. 42 § 2. As to what are newly arising matters, see Ley v. Commission de la C. E. E., case 12-64, 11 Recueil 143 (1965) (Commission, in defending action by employee relied on art. 29 of personnel statute, arguing that it gave it wide discretionary powers; this argument held to enable plaintiff to argue for first time in reply Commission had violated certain provisions of art. 29).

[172] As noted earlier, the term *moyens (Klagegruende)* is nowhere defined in the Rules of Procedure, nor does this term have a uniform meaning throughout the Community countries, or even within one country. See VAN REEPINGHEN ET ORIANNE 38, 39; Gerbrandy, *supra* note 138.

[173] De Gezamenlijke Steenkolenmijnen in Limburg v. Haute Autorité, case 17-57, 5 Recueil 9 (1959).

[174] Luhleich v. Commission de la C.E.E.A., case 68-63, 11 Recueil 727 (1965). *Cf.* Rauch v. Commission de la C. E. E., case 16-64, 11 Recueil 179 (1965) (raising alleged additional error in procedure of appointing body in reply not possible).

[175] *E.g.*, Compagnie des Hauts Fournaux de la Chasse v. Haute Autorité case 2-57, 4 Recueil 129 (1958) (in petition and reply where plaintiff argued there was *détournement de pouvoir, held:* somewhat different arguments as to what constituted *détournement de pouvoir* possible in these two pleadings).

[176] Degreef v. Communauté Economique Européenne, case 80-63, 10 Recueil 767 (1964); see also Plaumann & Co. v. Commission de la C. E. E., case 25-62, 9 Recueil 197 (1963).

by public policy,[177] but in cases involving *pleine juridiction* the Court assumes that it has a rather far-reaching power to act on its own motion in relation to damages also.[178]

It is standard practice for parties to include in their petition or answer a clause that they reserve the right to raise additional points if necessitated by claims made by the other side. This seems a superfluous statement. A reservation of the right to raise *any* additional points is presumably ineffective.[179]

VII. Evidence

A. General Rules Concerning Evidence

As noted there is no trial in our sense before the Court of Justice of the European Communities. The statutes and rules of procedure provide the following methods of proof: documentary evidence, submission of questions and demands for information to parties and Community institutions and member states by the Court, the hearing of witnesses, investigations by experts, and the visitation of the locality involved in the litigation by the Court.[180] Parties submit documentary evidence by annexing it to their pleadings.[181] If a party wishes to offer any other kind of evidence, or to obtain an order compelling the other side to submit documents it has not disclosed, the party must include a clause containing such a proof offer in the prayer for relief contained in its first pleading; it may be contained in the reply or rebutter if there is a valid excuse for the late submission.[182] As a practical matter, proof offers are usually phrased in the form of an alternative prayer for relief. Since the plaintiff frequently ignores when he files his petition what facts will be contested, the proof offers in the petition are often phrased in very general terms, and made more precise in the reply.[183]

After the exchange of pleadings is completed, the Court (or panel,

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[177] *E.g.*, Gouvernement de la République Italienne v. Haute Autorité, 2-54, 1 Recueil 73 (1954). *Cf.* part III B *supra*.

[178] *E.g.*, Fiddelaar v. Commission de la C. E. E., case 44-59, 6 Recueil 1077 (1960).

[179] *Cf.* Vandevyvere v. Parlement européen, case 23-64, 11 Recueil 205 (1965).

[180] Statute, art. 21; Euratom Statute, art. 22; Coal and Steel Statute, art. 23; Rules of Procedure, art. 45.

[181] See note 131 *supra*.

[182] Rules of Procedure, arts. 38, 40, 42. *Cf.* Gouvernement de la République Italienne v. Haute Autorité, case 2-54, 1 Recueil 73 (1954) (request that Court order High Authority to submit documents acceptable, though late, because plaintiff could assume High Authority would comply with Rules of Procedure, art. 23, and submit its file spontaneously).

[183] Gerbrandy, *supra* note 138, at 97.

in an employee matter) has a preliminary conference on the case. It is not open to the parties or public. The reporting judge presents a report, and the advocate-general his submissions. The Court then decides whether there should be any proof measures and renders an order accordingly.[184] The order contains no reasons. Formal proof measures, such as the examination of witnesses or the appointment of an expert are ordered rather infrequently, but requests for information from the parties, or for documents are more numerous. If a proof measure, such as the examination of a witness, is ordered it is ordinarily carried out by the full Court, although it may be delegated to a panel or even the reporting judge.[185] The Court's order concerning proof which comes after the exchange of the pleadings is in no way conclusive. The rules provide that the Court may order additional proof at the time of the formal hearing.[186] Thus an attorney whose proof offers have been rejected initially can still present argument concerning them and hope to change the Court's mind. As a practical matter, the presentation of proof may be a drawn-out process even if no new evidence is ordered presented at the hearing. It frequently happens that the original order of the Court asks the parties to submit certain documents; after they have arrived, the Court may decide to submit requests for information to the parties. Or the Court may order the examination of witnesses, and then request information from the parties.[187] Then only will the formal hearing take place.

In deciding whether to comply with a proof offer, the Court does not seem to be guided by formal rules of evidence[188]—though this is not very easy to determine because the original order dealing with proof is without opinion, and remains unpublished. But apparently the Court will reject proof offers if the proposed evidence appears superfluous because the documentary (or other) evidence already in the file is sufficient to decide the case or because the proposed evidence

[184] The rules provide that the reporting judge is to present his report within the time limit fixed by the President; in practice, he presents it whenever he is ready. The report should deal only with the question of proof measures; in fact it will be almost impossible to avoid some preliminary discussion of the merits. See Rules of Procedure, art. 44. *Cf.* Gerbrandy, *supra* note 138, at 89.

[185] Rules of Procedure, art. 44 § 2; *cf.* art 45, § 3.

[186] Rules of Procedure, art. 60.

[187] There are numerous instances. See, *e.g.*, Barge v. Haute Autorité de la C. E. C. A., case 18-62, 9 Recueil 525 (1963); Officine Ellettromeccaniche Ing. A. Merlini v. Haute Autorité de la C. E. C. A., case 108-63, 11 Recueil 1 (1965).

[188] Except as noted in the second part of his paragraph, there seem to be no real exclusionary rules (such as hearsay) and few rules concerning the weight of evidence. See the sections on documentary evidence and witnesses *infra*. *Cf.* Gori et Sizaret ¶15.825; MIGLIAZZA, LA CORTE DI GIUSTIZIA DELLE COMMUNITA EUROPEE 179 (1961).

deals with a part of the case which must, in any event, be rejected for another reason.[189]

Sometimes the Court's decision turns on questions of burden of proof. In accordance with general rules, the Court holds that the party who has the affirmative of an issue (thus usually the plaintiff) has the burden of proof.[190] When the party having the burden of proof and apparently able to prove its case at least in a preliminary way by annexing documents to its pleadings fails to do so, the Court is often disinclined to permit it to prove its case by the use of more formalized procedures.[191]

However, in view of the absence of a trial and of a motion to dismiss for failure to state a prima facie case, burden of proof does not have the importance it has with us. Furthermore, the Court is not bound by the proof offers of the parties. While it will not investigate facts not mentioned by at least one of the parties, nor ordinarily look into a matter on which both sides agree, it may reject proof offers by the parties and seek to obtain proof in a different way.[192] In one case in which the value of a diploma issued by a private school in Belgium was in issue, the Court rejected a proof offer concerning the examination of witnesses and, instead, directed its Registrar to request Belgian educational authorities for information on this point.[193] On occasion the Court has taken judicial notice of facts.[194]

B. Documentary Evidence

Documentary evidence in the possession of a party is submitted by being annexed to the pleadings.[195] The rules concerning translations and copies must, of course, be observed.[196] If some excuse for the

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[189] Fonzi v. Commission de la C. E. E. A., case 27-64, 11 Recueil 615 (1965); Société anonyme Usines Emile Henricot v. Haute Autorité de la C. E. C. A., case 23-63, 9 Recueil 439 (1963).

[190] Gori et Sizaret ¶ 15.825; MIGLIAZZA, *op. cit. supra* note 188, at 180.

[191] Barge v. Haute Autorité de la C. E. C. A., case 14-64, 11 Recueil 1 (1965) (no proof by witnesses allowed as to scrap produced by plaintiff himself, since he failed to annex books of account or the like to petition); *cf.* Société nouvelle des usines de Pontlieu-Aciéries du Temple v. Haute Autorité de la C. E. C. A., case 42-59, 7 Recueil 101 (1960).

[192] MIGLIAZZA, *op. cit. supra* note 188, at 239; Gori et Sizaret ¶ 15.825; Korsch, *Comments on Bebr,* ZEHN JAHRE RECHTSPRECHUNG DES GERICHTSHOFES DER EUROPAEISCHEN GEMEINSCHAFTEN 129-31 (1965).

[193] Van Nuffel v. Commission de la C. E. E. A., case 93-63, 10 Recueil 961 (1964).

[194] Plaumann & Co. v. Commission de la C. E. E., case 25-62, 9 Recueil 261 (1962).

[195] Rules of Procedure, art. 37.

[196] Apparently, a party should submit as many copies of documents as it submits pleadings, unless bulky documents are involved, in which case only one copy need

delay exists, it seems possible to submit documents after the exchange of pleadings is terminated.[197] There are no limitations on the types of written evidence that can be presented in this manner. Even self-serving memoranda prepared by a party, or a letter submitted by a person unable to testify because of absence were admitted, though they were apparently not considered as having full probative value.[198] All documents submitted to the Court are, of course, made available to the other side.[199]

Generally speaking, the Court of Justice of the European Communities is not bound by any formal rules concerning the weight to be given to certain types of evidence. However, in the law of some of the member states, notably France, official and notarial documents *(actes authentiques)* are almost conclusive as to matters within the personal knowledge of the official preparing them. As to these matters their conclusive effect can be overcome only in a lengthy procedure known as *inscription de faux*.[200] It is not clear whether such a rule exists before the Court of Justice of the European Communities. The rules of procedure prescribe that entries in the Court's register and minutes of hearings and of witnesses' testimony are to be considered as *actes authentiques (oeffentliche Urkunden)*,[201] but this statement does not necessarily amount to an incorporation by implied reference of the French law on the subject. Even less does it follow that documents which have a higher probative value in one of the member states must necessarily be given the same effect by the Court. The 1953 rules provided that a separate decision could be obtained from the Court if the genuineness of a document was in doubt.[202] This seemed, in a sense, to create a procedure somewhat similar to the French *inscription de faux,* but the current rules contain no

be presented, but it has also been argued that the parties need not submit any copies of documents. VAN REEPINGHEN ET ORIANNE 41.

[197] See Barge v. Haute Autorité de la C. E. C. A., case 18-62, 9 Recueil 525 (1963).

[198] Prakash v. Commission de la C. E. E. A., case 19-63, 11 Recueil 677 (1965).

[199] As noted before, the Registrar will send each party the pleadings and copies of annexed documents. If a party submitting a pleading has not made copies available, the Registrar must prepare and verify the required number of copies, unless the original documents are voluminous; then the Registrar can simply inform the parties the documents are available for their inspection at his office. *Cf.* Rules of Procedure, art. 37; Instructions to Registrar, art. 3; VAN REEPINGHEN ET ORIANNE 41, and authorities there cited. A party will not be allowed to show a document to the Court, while refusing to make it available to the other side. Société nouvelle des usines de Pontlieu-Aciéries du Temple v. Haute Autorité de la C. E. C. A., case 42-59, 7 Recueil 101 (1960).

[200] See, *e.g.*, FRENCH CIVIL CODE, arts. 1317-1320.

[201] Rules of Procedure, arts. 15, § 3; 47, § 6; 53, § 1; 62, § 1.

[202] Rules of Procedure of 1953, *supra* note 161, art. 33, § 7.

analogous provision. The significance of the change is open to doubt.[203]

Discovery of documents not in the possession of the party wishing to rely on them is available to some extent. As noted before, under the Coal and Steel Statute, the High Authority is under an obligation to annex to its answer the file of documents relating to the administrative decision in question,[204] and the same must be done by any defendant in a personnel case.[205] In addition, the Court can order the production of documents as one of the proof measures.[206] The procedure is not a true discovery procedure in the American sense: documents ordered produced go into the case file, whether the person having asked for their production likes them or not. The production of documents has been ordered in a large number of cases.[207]

It is unclear to what extent a party may refuse to produce documents on the ground of privilege. The Coal and Steel Treaty provides that the High Authority must keep information as to the costs and business relations of firms under its supervision confidential.[208] Presumably, therefore, it may not divulge these even upon court order. Furthermore, minutes of the various Community organs, especially of the Council of Ministers, which is basically a political organ, are frequently not intended for outsiders; their publication might prove embarrassing to member governments and impede free and full discussion. The Court has indicated that it will accommodate Community organs claiming that the production of certain documents would hurt Community operations and has accepted documents from which confidential passages were excised.[209]

The Court has no power to physically compel the production of

[203] French authors generally incline towards the belief that such a rule exists before the Court. *Cf.* Gori et Sizaret ¶ 15.825; DELVAUX, LA COUR DE JUSTICE DE LA COMMUNAUTÉ EUROPÉENE DU CHARBON ET DE L'ACIER 11 (1956); VAN REEPINGHEN ET ORIANNE 50.

[204] Coal and Steel Statute, art. 23.

[205] Personnel statute, art. 26.

[206] Statute, art. 21; Euratom Statute, art. 22; Coal and Steel Statute, art. 24. Can the President of the Court be asked to order the production of documents as part of his powers to grant provisional relief? See Prakash v. Commission de la C. E. E. A., case 68-63, 11 Recueil 723 (1963) (no, but because a similar request was included in the petition).

[207] Usually it is the plaintiff who asks for the production of documents in the possession of the defendant Community body. See, *e.g.*, Gouvernement de la République Italienne v. Haute Autorité, case 2-54, 1 Recueil 73 (1954). But documents in the hands of plaintiffs are also ordered produced at times. *E.g.*, Barge v. Haute Autorité de la C. E. C. A., case 18-62, 9 Recueil 525 (1963) (bills showing plaintiff's consumption of electric power, to enable High Authority to determine amount of scrap used by plaintiff).

[208] Coal and Steel Treaty, art. 47.

[209] Raponi v. Commission de la C. E. E., case 27-63, 10 Recueil 247 (1964); Gouvernement de la République Italienne v. Haute Autorité, case 2-54, 1 Recueil 73 (1954).

documents. If a party ordered to produce documents fails to do so, the Court can merely note this fact in its decision[210]—and draw from it inferences as to the weakness of the case of the party refusing production.

C. Questions and Requests for Information Addressed to Parties

The Court may seek information from the parties. This can be done in a variety of ways. In its order following the end of the written procedure, the Court may direct one or both parties to answer questions. The Court can ask either for written answers, or request the parties to appear in Court during a hearing and answer questions orally. If written answers are given, copies of the answers filed with the Registrar are, of course, given to the other side. In the case of oral answers, both sides must be present in Court. Parties are not sworn. While parties presumably may not ask each other questions directly, they could ask the Court to pose additional questions. Furthermore, the Court can request information not only at the time of its order following the written procedure, but at any later date, and frequently does, if it believes this will serve a useful purpose. Indeed, even after the end of counsels' final argument the Court may reopen the case and ask for further information from the parties. In such a case it will ordinarily give the parties an opportunity to comment on the evidence supplied.[211]

The Court usually has one of two purposes in asking questions: in some instances it seeks additional information on the case. In other instances it merely wants clarification of the parties' position and possibly a narrowing of the issues. It should be noted that members of the Court as well as the advocates-general may ask oral questions of counsel during their argument and often do.[212]

D. Witnesses

Witnesses[213] are heard in a procedure rather similar to the French

[210] Statute, art. 21; Euratom Statute, art. 22; Coal and Steel Statute, art. 24.

[211] Statute, arts. 21, 29; Coal and Steel Statute, arts. 24, 28; Euratom Statute, arts. 22, 28; VAN REEPINGHEN ET ORIANNE at 43, 44. For an example of a case involving written answers, see Officine Elettromeccaniche Ing. A. Merlini v. Haute Autorité de la C. E. C. A., case 108-63, 11 Recueil 1 (1965); for oral questions see, *e.g.*, Gouvernement de la République Fédérale d'Allemagne v. Commission de la C. E. E., case 24-62, 9 Recueil 129 (1963); for a case involving a reopening after oral argument for the purpose of answering questions, see Meroni & Co. v. Haute Autorité de la C. E. C. A., case 46-59, 8 Recueil 183 (1962).

[212] See note 243 *infra*.

[213] Witnesses do *not* include parties. Parties can be examined only pursuant to the procedure mentioned in the preceding section.

enquête, and only pursuant to a Court order referring to specific facts. As noted, the court is unwilling to permit testimony by witnesses unless the party seeking that testimony has made at least a preliminary showing through documentary evidence that its contention is probably correct.[214] In fact, the members of the Court seem to feel that witnesses are a slow and somewhat unreliable means for arriving at the truth.

If the Court approves a party's request for the examination of witnesses, it inserts a provision to that effect in the order issued following the written procedure. Unless the parties have already done so in their pleadings, they must submit to the Registrar's office a list of the witnesses they want to be heard, and of the points on which they want these witnesses examined. The Court then renders a new order incorporating these points. It need not cite all the witnesses mentioned by the parties and can cite witnesses on its own motion. Witnesses may be heard either before the full Court, or a panel, or the reporting judge, but in practice the full Court usually hears them. The order of the Court, which is served upon all parties and the witnesses, serves as a subpoena. The Court may fine recalcitrant witnesses up to $250.[215]

Witnesses are ordinarily heard at the beginning of a session devoted to oral argument. They are warned that they will have to swear to the truthfulness of their deposition and then questioned by the judge presiding as to their identity and as to the facts mentioned in the Court order. Generally, the witness will first be asked to tell in narrative form what he knows and then will be asked specific questions. Parties and their counsel may, of course, be present but can ask questions only through the intermediary of the judge. After his testimony is completed, the witness is sworn. The witness' testimony is taken down by tape recorder and then transcribed, but this transcription is virtually unused. The testimony of the witness is also taken down in summary form by the Registrar on a typewriter and reread to the witness after its completion. The witness may make

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[214] See note 191 *supra.* This is particularly true if the party is likely to be in the possession of such documentary evidence.

[215] Statute, art. 23; Euratom Statute, art. 24; Coal and Steel Statute, art. 28; Rules of Procedure, arts. 47-48. If the Court is in possession of all required information as to the witnesses to be heard and the facts to be investigated at the time it renders its first order, one order will suffice. The fine may be imposed if a witness fails to testify or to take the oath, as well as when he fails to appear in Court. It may be remitted for good cause shown. See generally VAN REEPINGHEN ET ORIANNE 44, 45.

changes. Only this record prepared by the Registrar is considered as official. It is signed by the witness, the judge presiding, and the Registrar.[216] There is no official fee schedule for witnesses; they are entitled to travel expenses and loss of earnings,[217] but these provisions are not very important because, so far, most witnesses have been Community employees who suffer no loss of earnings when they testify before the Court.

If the Court decides that a witness has been guilty of perjury, it may defer the matter to the national judicial authorities for the infliction of appropriate punishment. Perjury before the Court must be considered as a crime identical to perjury before a national court in civil matters.[218]

There are no specific *exclusionary* rules relating to privileged communications[219] or any other matter. Hearsay evidence is admissible.[220] However, the rules provide very broadly that the parties may object to a witness for reasons of his incapacity, indignity, or any other cause. Such an objection must be made within two weeks from the time the order concerning the hearing of witnesses was served on

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[216] Rules of Procedure, art. 47. Witnesses may either take the form of oath prescribed in art. 47 ("I swear that I have told the truth, the whole truth and nothing but the truth and") or the oath prescribed by their national law. With the consent of both parties, the Court may waive the witnesses' oath. The practice of swearing a witness after his deposition was derived from German law. See, *e.g.*, Riese, *Die Verfahrensordnung des Gerichtschofes des Europaeischen Gemeinschaft fur Kohle und Stahl*, 6 N.J.W., at 524; *cf.* Gerbrandy, *De regeling van de procedure bij het Hof van Justite van de Europease Gemeenschappen*, 1 SOCIAAL-ECONOMISCHE WETGEVING EUROPA 97-99 (1960).

[217] Rules of Procedure, art. 51. These sums must be paid by the Court's pay office after the witness has testified, but an advance may be granted. Ultimately, the expenses must be borne by the party liable for costs, but the parties may be requested to deposit a sum with the Court to cover probable expenses of summoning witnesses whose testimony they have requested. Rules of Procedure, art. 47, § 3.

[218] On this point, there are some divergences between Statute, art. 27, and Euratom Statute, art. 28, which are identical, on the one hand, and Coal and Steel Statute, art. 28. The latter of prescribes that violations must be reported to the national Minister of Justice, but does not state in so many words that national courts must treat perjury as if it had been committed before them; the Statute and Euratom Statute contain such a clause but do not say what official must be informed. However, Supplemental Rules of Procedure, art. 6, J. O., May 5, 1962, provides that the national Minister of Justice must be informed. For a discussion of problems in this area, see Dumon et Rigaux, *La Cour de Justice des Communautés européennes et les juridictions des Etats membres*, 19 ANNALES DE DROIT ET DE SCIENCES POLITIQUES 7, 17-19 (1959); Rasquin, *Le Réglement additional de procédure de la Courde Justice des Communautés Européennes*, 77 JOURNAL DES TRIBUNAUX 345, 347-48 (1962).

[219] Presumably, the Court will not punish a witness who insists that his national law (for instance rules relating to confidential information acquired in a professional capacity, *cf.* FRENCH CODE PÉNAL, art. 378) prevents him from divulging information. Rules of Community law prohibiting the disclosure of information, such as Coal and Steel Treaty, art. 47, are evidently binding upon witnesses and the Court.

[220] See Prakash v. Commission de la C. E. E. A., case 19-63, 11 Recueil 677 (1965).

the parties.[221] It is not clear to what extent that provision incorporates the various national rules of the member states as to challenges to witnesses likely to be prejudiced (*e.g.*, because of relationship to the other side) or untrustworthy (*e.g.*, because of a criminal past) into the law of the Court of Justice of the European Communities.[222]

If a witness resides in one of the member states, the Court may, instead of summoning him, send letters rogatory to the court of his residence asking that he be heard.[223] These letters rogatory must be executed. There is no provision for the sending of letters rogatory to a country that is not a member of the European Communities.[224]

E. Experts, Viewing of the Premises

The role of experts before the Court of Justice of the European Communities, as in Europe generally, is somewhat different from the role of experts in trials in the United States. They are not restricted to the answering of hypothetical questions about facts already before the Court, but must frequently seek out the facts by whatever investigations are necessary, and then prepare a report detailing both the facts and their own opinion on these facts. Experts have been used quite rarely by the Court of Justice of the European Communities, not more than four or five times. Unlike the situation before general civil courts, where experts are usually concerned with the natural sciences, the Court has been more concerned with experts on economic matters.[225] Experts do not have to be nationals of the member states; in one instance a Swiss expert on railroad rates was appointed.[226] The Court of Justice of the European Communities keeps no list of official experts. In fact, if the parties agree on an expert, he will usually be appointed.

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[221] Rules of Procedure, art. 50.

[222] MIGLIAZZA, LA CORTE DI GIUSTIZIA DELLE COMMUNITA EUROPEE 181 (1961), argues that the Court has a complete freedom to exercise its own discretion in the matter; RICHEMONT, COMMUNAUTÉ EUROPÉENE DU CHARBON ET DE L'ACIER, LA COUR DE JUSTICE 367 (1954), believes the Court is bound by national law. So far, cases are lacking.

[223] Statute, art. 26; Euratom Statute, art. 27; Rules of Procedure, arts. 1-3 J. O., May 5, 1962, p. 113, which provide that the letters must be transmitted to the Minister of Justice of the pertinent member state. See generally Rasquin, *supra* note 218, at 345-46.

[224] In the only case so far involving an absent witness, he had travelled to the U. S. A. See Prakash v. Commission de la C. E. E. A., case 19-63, 11 Recueil 677 (1965).

[225] See generally WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS 211-25 (1965).

[226] Chambre Syndicale de la Sidérurgie de l'Est de la France v. Haute Autorité de la C. E. C. A., case 24-58, 6 Recueil 573 (1960).

If the Court wishes to appoint an expert, it so provides in its order concerning proof. The order should specify the matters the expert must deal with and give him a maximum time for the performance of his duties. The order is served on the parties and the expert. The expert then begins his investigations and prepares a report. During this period he should keep the reporting judge informed as to his progress. After the report is complete, it is presented to the Court. At that time the expert must take an oath that he has performed his duties faithfully and impartially, but the oath may be waived. The Court may order the expert to appear in open court, where he can be questioned on his report by the Court. The parties must be summoned to the hearing and can request the Court to ask questions.[227]

Experts are entitled to a fee and reimbursement for their expenses.[228] Presumably because experts are therefore somewhat expensive, the Court seems even more reluctant than in the case of witnesses to authorize their use unless a preliminary showing of good cause has been made.[229] The rules as to challenges to experts and the punishment of experts for perjury are the same as those applicable to witnesses.[230]

The Rules of Procedure authorize the Court to visit the premises involved in litigation.[231] So far, the Court has done so only twice, each time to get an impression as to actual industrial processes involved in litigation.[232] Parties and their counsel must be notified of such an event and are entitled to be present.

F. Termination of the Proof Procedure

At the end of the proof procedure, the Court usually gives the parties permission to file written memoranda concerning the proof and indicates a time limit for their filing.[233] In the memoranda the parties will comment on the evidence and may even request additional proof proceedings, especially if some new fact was developed. As

[227] In fact, the Court could appoint more than one expert, even a commission or official agency, Statute, art. 22; Coal and Steel Statute, art. 24; Euratom Statute, art. 23. As to the procedure for hearing experts, see Rules of Procedure, art. 49.

[228] Rules of Procedure, art. 51. There is no official schedule of fees, which seem to be a matter of agreement. The rules as to advances and ultimate liability are the same as in the case of witnesses.

[229] *E.g.*, Barge v. Haute Autorité de la C. E. C. A., case 14-64, 11 Recueil 1 (1965).

[230] See notes 218, 221-22 *supra*.

[231] Rules of Procedure, art. 45, § 2.

[232] See Société des fonderies de Pont-à-Mousson v. Haute Autorité, case 14-59, 5 Recueil 445 (1959); Société nouvelle des usines de Pontlieu-Aciéres du Temple v. Haute Autorité de la C. E. C. A., case 42-59, 7 Recueil 101 (1960).

[233] Rules of Procedure, art. 54.

noted, additional proof may be ordered even after the end of oral argument; normally, however, proof proceedings terminate with the filing of the memoranda.

VIII. Oral Procedure and Judgment

A. The Hearing for Oral Argument

After the termination of the proof procedure, cases are put on the calendar for the formal hearing. The preparation of the calendar is under the control of the President.[234] Cases should be put on the calendar in the order in which the proof proceedings have been terminated; in that happens for several cases at the same time, the date of the original filing controls. The rules provide for an automatic priority only in a limited class of cases; however, the President may grant a priority if this seems advisable. If both parties wish a postponement of the case, they must request it from the President, who is not bound by their agreement. If only one party desires a postponement, he must request it from the President, but the President transfers the matter to the Court for decision.[235] Attorneys are informed of the hearing date at least two to three weeks beforehand by letter. If the hearing takes place soon after the summer recess, this notice is mailed before the beginning of the vacation. In addition, a day calendar is posted in the Courthouse.[236] The time elapsing between the end of the proof proceedings and the hearing has varied.

The hearing is always before the full Court, except in employee cases handled by a panel. It is also attended by the advocate-general as well as the Registrar.[237] All of these officials wear gowns and sit on a rostrum. The courtroom is equipped with a simultaneous translation system enabling the members of the Court, counsel and spectators to listen to the proceedings in all four Community languages. The Registrar prepares summary minutes for each hearing, indicating the judges present, parties, et cetera.[238] Hearings are public, but the

[234] Statute, art. 31; Euratom Statute, art. 32; Coal and Steel Statute, art. 28. *Cf.* Rules of Procedure, art. 54, providing that the President determines the date for the beginning of the oral procedure after termination of the proof proceedings.

[235] Rules of Procedure, art. 55. *Cf.* art. 85. Priorities are granted automatically in cases in which the Court must deal with provisional remedies. See also Gori et Sizaret ¶ 15.827.

[236] Instructions to Registrar, art. 7, § 1.

[237] See text at part I B *supra*.

[238] Instructions to Registrar, art. 7, § 2, implementing Statute, art. 30; Euratom Statute, art. 31; Coal and Steel Statute, art. 27; Rules of Procedure, art. 62.

public may be excluded for grave reasons.[239] The President formally opens the hearing.[240]

Under the statutes, the hearing on each case starts with the report of the reporting judge.[241] It summarizes the contentions of the parties and the proceedings to date. It is customary, however, to mail copies of the report to the parties a few days before the hearing. At the request of the President the parties then usually waive the reading of the report. Subsequently counsel for both sides argue and discuss the facts and the various points of law raised during the proceedings. They may not raise new matters, except to the extent already indicated.[242] Sometimes questions are directed at counsel by the President. On occasion, the President has asked counsel to concentrate their arguments on one particular point which the Court considers to be crucial. The other members of the Court may also ask questions.[243] It is customary for the President to ask them whether they have any questions for counsel before counsel leaves the rostrum from which he addresses the Court.

Plaintiff's counsel always speaks first, followed by defendant's counsel. After defendant's counsel has terminated his discussion, the President asks plaintiff's counsel whether he wishes to rebut. The defendant's counsel is asked whether he has anything additional to say. Plaintiff and defendant do not always take advantage of their opportunity to rebut. There are no time limits on the arguments. Hence they frequently last quite long. Argument during one of the important scrap equalization tax cases, in which there were many parties, is said to have lasted over sixty hours.[244] Now that the Court is much busier than a few years ago, however, arguments tend to be shorter. In employee cases a main argument for each side lasting less than half an hour, with a few minutes devoted to rebutter would not be unusual. Hence, several cases can be scheduled for argument during one session of the Court. Parties' counsel are under no obliga-

[239] Statute, art. 28; Euratom Statute, art. 29; Coal and Steel Statute, art. 26. *Cf.* Rules of Procedure, art. 56, § 2: decision to exclude the public also means that reports of hearing may not be published.

[240] Rules of Procedure, art. 56.

[241] Statute, art. 18; Euratom Statute, art. 18; Coal and Steel Statute, art. 21.

[242] See text at part VI D *supra*. In at least one case counsel waived argument. Van Nuffel v. Commission de la C. E. E. A., case 93-63, 10 Recueil 961 (1964).

[243] Rules of Procedure, art. 57. The advocate-general assigned to the case has the same rights. See also De Gezamenlijke Steenkolenmijnen in Limburg v. Haute Autorité, case 17-57, 5 Recueil 9 (1959) (letter sent to counsel asking them to limit argument to one point).

[244] Riese, *supra* note 216, at 272. Another hearing is said to have taken about 24 hours. In such a case, the hearing is, of course, spread over several days.

tion to submit the manuscript of their argument to the Court, but this is done on occasion to facilitate the work of the simultaneous translation service.

After the conclusion of counsel's argument, the advocate-general assigned to the case gives his report,[245] though frequently the case is adjourned for a few days and the advocate-general's report is given on the adjourned day. This enables him to take the parties arguments into consideration. The advocate-general's report reviews the facts of the case and the applicable law and suggests a judgment to the Court. The discussion concerning the law frequently contains a detailed excursion into the comparative law aspects of the case. While it is in no sense binding upon the Court, it is therefore quite helpful and to some extent makes up for the absence of appellate review.[246] The report of the advocate-general terminates the oral procedure,[247] unless the Court should decide to reopen the case for additional proof measures or for additional oral argument.[248]

The statements made during the oral procedure are taken down by tape recorder and later transcribed. The transcript is put into the case file.

B. The Conference

As soon as feasible after the hearing, the Court (or panel, in an employee case) holds its conference on the case. It is conducted in a rather informal manner, though there are some rules. Above all, anything said in conference must remain confidential.[249] Only the judges, not the advocate-general, participate, and only those judges who were present for the hearing of the case. A simple majority controls the outcome.[250] In practice, the reporting judge prepares a draft judgment, which is circulated and then discussed. Other judges may also have a draft. The preparation of the final draft is again the duty of the reporting judge, even though he may have been in the minority. There may, of course, be corrections even in the final draft. Since everything said in conference must remain confidential,

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[245] Treaty, art. 166; Euratom Treaty, art. 138; Coal and Steel Treaty, art. 32a; Rules of Procedure, art. 59, § 1.

[246] See, *e.g.*, BECKER, DER EINFLUSS DES FRANZOESISCHEN VERWALTUNGSRECHTES AUF DEN RECHTSSCHUTZ IN DEN EUROPAEISCHEN GEMEINSCHAFTEN 139-40 (1963).

[247] Rules of Procedure, art. 59, § 2, provides that the President declares the oral procedure closed after the end of the advocate-general's submissions.

[248] Rules of Procedure, arts. 60, 61.

[249] Statute, art. 32; Euratom Statute, art. 33; Coal and Steel Statute, art. 29.

[250] Rules of Procedure, art. 27.

it is never known whether a decision was reached unanimously or by majority vote, and what the position of the individual judges was.

C. The Judgment

The rules of procedure mention two kinds of decisions of the Court of Justice of the European Communities: judgments *(arrêts, Urteile)*, and orders *(ordonnances, Beschluesse)*. Orders are issued either by the President of the Court when he grants or denies temporary relief, or grants extensions of time, et cetera. They are also issued by the Court in connection with some interlocutory or collateral matters such as proof proceedings or costs. Orders are not accompanied by an opinion. When the Court decides a case, however, whether on the merits or on a procedural point, such as lack of standing to sue, it does so by judgment.[251]

A judgment is a long and rather complex document. It must give the date of its rendition, state that it has been rendered by the Court (or a panel, as the case may be), and give the names of the participating judges, of the advocate-general and of the Registrar, as well as of the parties and their counsel. In addition it contains a summary of the facts and the prayers for relief of the parties. These formal recitals are followed by a rather detailed exposition of the contentions of the parties and their counsel as contained in their pleadings (though this does not seem to be required by the rules). There is also a summary of the proceedings had and then only the opinion, in which the Court gives the reasons for its ruling. At the end of the opinion comes the decretal portion of the judgment, in which the Court decides the issues and determines who must bear costs.[252] In their style, the judgments are a compromise between the French method in which the whole opinion consists of one sentence composed of a number of subordinate clauses introduced by the word whereas and the German method of narrative opinions. The whereas form has been formally retained, but the opinions are much more discursive than in France.

The official text of the judgment is prepared by the Registrar and signed by all the judges who participated (whether they voted for or against it). All judgments must be read in open Court. The parties must be summoned to this reading. At the time of the reading of the judgment, mimeographed copies of it in all four procedural lan-

[251] See generally Gori et Sizaret ¶ 15.828; VAN REEPINGHEN ET ORIANNE at 56.
[252] Statute, art. 33; Euratom Statute, art. 34; Coal and Steel Statute, art. 30 (requirement that judgment contain opinion); Rules of Procedure, art. 63 (formal contents of judgment).

guages are available outside the courtroom. The President usually asks counsel whether they waive reading of the formal parts of the judgment (parties' contentions, et cetera) and they invariably do. The Registrar then reads the opinion and the President the decretal portion of the judgment. A notice is made on the original that it has been read in open Court. The notice is signed by the President and Registrar and the original is filed. The parties receive certified copies.[253]

No appeal against a judgment of the Court of Justice of the European Communities is possible,[254] but to a limited extent the Court may be asked to correct minor errors, or interpret its judgment. Sometimes a reopening is possible.[255]

Judgments by the Court must be executed in all member states according to local procedures in civil cases,[256] but problems are not likely to arise. The full text of judgments is printed in the official reports of the Court, as is the report of the advocate-general. In addition, the decision is mentioned in the Official Gazette of the Communities.[257]

D. Costs

The procedure before the Court of Justice of the European Communities is relatively inexpensive. The Court itself demands neither filing fees nor the payment of stamp or similar taxes. Parties must, however, pay the fees and expenses of witnesses and experts. In addition, the Court may impose avoidable expenses on a party, and the Registrar is entitled to claim payment from a party for undue expenses of copying or translation caused by a party.[258] In actual

[253] See generally Statute, art. 34; Euratom Statute, art. 35; Coal and Steel Statute, art. 31; Rules of Procedure, art. 64.

[254] *Cf.* Rules of Procedure, art. 65 (judgment effective from day rendered).

[255] See Rules of Procedure, arts. 66 (correction of minor errors), 67 (addition of omitted material), 98-100 (reopening on the ground of newly discovered evidence), 97 (reopening at request of third party which could not intervene). Lack of space and time prevents a more detailed discussion of these procedures.

[256] Treaty, arts. 187, 192; Euratom Treaty, arts. 159, 164; Coal and Steel Treaty, arts. 44, 92. *Cf.* DELVAUX, LA COUR DE JUSTICE DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 88 (1956); Daig, *Die Gerichtsbarkeit in der Europaeischen Wirtschaftsgemeinschaft und Europaeischen Atomgemeinschaft*, 83 ARCHIV FUER OEFFENTLICHES RECHT 163 (1958).

[257] Rules of Procedure, art. 68; Instructions to Registrar, arts. 24, 25.

[258] Rules of Procedure, arts. 72, 73. Apparently, the drafters of the rules as to costs felt that a fee system would create substantial administrative costs, and furthermore the activity of the Court in clarifying Community law was in the common interest. Suggestions made by advocate-general Roemer seem mainly to have been followed. See Roemer, *Die Kostenordnung des Gerichshofes fuer Kohl und Stahl*, 8 N. J. W. at 617 (1955).

practice, a charge for such work is not usually made. Fees are, however, payable if parties to a suit or third parties request certified copies of documents on file.[259]

The judgment of the Court must contain a decision on costs. If its pleadings contain a prayer to that effect, the prevailing party is granted costs.[260] A party may include the following expenses in its costs: fees and expenses of witnesses and experts, fees paid to the Registrar (if any); its own travel and other expenses incurred in connection with the suit, and the fee of its attorney.[261] A reasonable fee for the agent appointed in Luxemburg to receive service of process may also be included, but a honorarium for more than one attorney will not, generally, be allowed.[262]

If there are several parties on the losing side, the Court allocates costs among them. If each side prevails in part, the Court may decide that each side bears its own costs or divides them in some other manner. The same may be done if there are "extraordinary circumstances."[263] The Court has rather freely used this authorization contained in the rules to make the prevailing side pay part of the costs if required by equitable considerations.[264] In addition, the prevailing party must bear costs it caused maliciously or without adequate reason.[265] A party withdrawing from a case must ordinarily pay costs. If the Court declares a case moot, it allocates costs as it sees fit.[266] In suits brought by employees against Community institutions,

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[259] *E.g.*, Rules of Procedure, arts. 15 § 5; 53; 62.

[260] Statute, art. 35; Euratom Statute, art. 36; Coal and Steel Statute, art. 32; Rules of Procedure, art. 69, § 1.

[261] Rules of Procedure, art. 73.

[262] Mandet v. Commission de la C. E. E., case 20-63, 10 Recueil 1209 (1964).

[263] Rules of Procedure, art. 69, §§ 2-3.

[264] *E.g.*, Forges de Clabecq S. A. v. Haute Autorité de la C. E. C. A., case 14-63, 9 Recueil 719 (1963) (Court held that plaintiff, who lost in action for review of scrap equalization assessment had been induced into bringing suit by the defective draftsmanship of the regulation on which the assessment was based, hence each side should bear its own expenses); Weighart v. Commission de la C. E. E. A., case 11-64, 11 Recueil 365 (1965) (decision not to give plaintiff a permanent position, which Court held was justified, was, nevertheless based in part on stated grounds which were incorrect; therefore held that defendant must pay half of plaintiff's costs, since defendant probably responsible for plaintiff's decision to sue).

[265] Rules of Procedure, art. 69, § 4. That section, too, has been interpreted quite liberally. See Comptoirs de Vente du Charbon de la Ruhr "Geitling," "Mausegatt" et "President" v. Haute Autorité de la C. E. C. A., case 16-59, 6 Recueil 45 (1960) (court rejected petition for review of letter allegedly amounting to formal decision because it was not a real decision, but held defendant liable for one third of costs on ground that letter, because of its peremptory language, could easily have been misinterpreted for binding decision).

[266] Rules of Procedure, art. 69, §§ 4, 5. *Cf.* Société "Rhenania Schiffahrtsund Speditionsgesellschaft mbh" v. Commission de la Communauté économique européenne, case 103-63, 10 Recueil 839 (1964).

the institution always bears its own costs; otherwise the rules just mentioned prevail.[267]

The Court's final judgment merely states what party must bear costs, without indicating any amount. If, as occasionally happens, the parties cannot agree on that amount, for instance because the party liable argues that the fee of his opponent's attorney is excessive, the matter may be brought before the panel to which the case was assigned, which decides the issue.[268]

A party unable to bear the expected expenses of a suit before the Court of Justice of the European Communities may request legal aid from the Court. This is frequently done as part of the original petition; it may also be done before that petition is filed. In the latter case a separate written request must be submitted to the Court. In any case, a document issued by the applicant's national (or, perhaps, domiciliary) authorities must be presented, which shows that he is unable to bear the costs. If the application is made by separate request, that request must include a brief summary of plaintiff's case. No attorney is needed. The petition is assigned by the President to a reporting judge. The panel of which the reporting judge is a member decides it after having given the other side a chance to make written comments. Legal aid may not be granted if the applicant's case seems hopeless. In determining whether the applicant has insufficient funds to prosecute his suit, the panel is obviously not bound by the certificate issued by the applicant's national authorities. It would seem that the Court may make an independent investigation into the applicant's resources.[269]

A grant of legal aid means in substance that the Court's pay office will make an advance up to a stated amount for the applicant's expected costs of litigation, and, generally also for his attorney's honorarium. In addition, the Court will appoint an attorney. If the applicant suggests one, the latter will generally be appointed. Otherwise, it will request suggestions from the applicant's national authorities, and appoint one of the attorneys so suggested. The appointed attorney is entitled to a reasonable fee.

If the applicant's opponent loses the case and must pay costs, he is obligated to repay the sum advanced to the applicant directly to the Court, instead of paying costs to the applicant. If the person having

[267] Rules of Procedure, art. 70.
[268] Rules of Procedure, art. 74.
[269] Rules of Procedure, art. 76.

been granted legal aid loses and must pay costs, he is theoretically under an obligation to return what he has received from the Court, since this is considered as a mere advance.[270] In practice, the situation arises rarely and the Registrar probably will not make very strong efforts to recover such amounts.

IX. CONCLUSION

Lack of space prevents a discussion of a number of special and collateral procedures, such as intervention, the procedures for the reopening of judgments, or the procedure used when cases are transferred from national courts for a preliminary ruling. But what has been said so far has perhaps been enough to give at least a general impression of the procedural style of the Court of Justice of the European Communities. It should be noted that, in spite of some criticisms on minor points, there seems to be no real dissatisfaction with its procedures. It has evidently solved the problem of accommodating various national views rather successfully. The general similarity of the procedural systems in the member states has been of assistance here.[271] Some very grave problems would undoubtedly arise should England ever join the Six.

It may, however, not be amiss to end this discussion with a non-procedural note. The court has sometimes been accused of lacking boldness in furthering European integration by legal means. This accusation may not be justified, but it is true that the Court has not pursued a policy of urestrained judicial activism. Its President, Mr. Ch. L. Hammes, has said:[272]

> But when existential conflicts are involved, the authority of the judge cannot prevail, and in such a case judicial authority is diminished if not debased because it played a role which put it in the limelight. Giving the courts the role of an arbitrator in political matters cannot depoliticize a problem, merely politicize the courts. A wise and restrictive jurisprudence of a court watchful for its prestige will be able to avoid these dangers....

In view of the political situation of the Six today, this may be the only feasible attitude.

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[270] Rules of Procedure, art. 76, § 5. *Cf.* Worms v. Haute Autorité de la C. E. C. A., case 18-60, 8 Recueil 377 (1962).

[271] It is of some interest that recent changes in French civil procedure bring that procedure closer to the procedure of the Court of Justice of the European Communities. See Décret No. 65-872 of Oct. 13, 1965, Journal Officiel de la République Francaise, Oct. 14, 1965, p. 9076, [1965] BULLETIN LEGISLATIF DALLOZ 600.

[272] Hammes, La Cour de Justice des Communautés Européennes, mimeographed text of lecture delivered in Luxemburg, 1959, p. 26.

APPENDIX I

CASES HANDLED BY COURT OF JUSTICE OF EUROPEAN COMMUNITIES' AND COURT OF JUSTICE OF EUROPEAN COAL AND STEEL COMMUNITY.

Year	New Cases Introduced	Cases Decided	Cases Settled	Cases Pending
1953	4	0	4	0
1954	10	9	1	0
1955	10	5	5	0
1956	11	6	5	0
1957	19	17	2	0
1958	43	37	6	0
1959	47	41	6	0
1960	25	24	1	0
1961	26	20	6	0
1962	36	32	4	0
1963	111	63	21	27
1964	58	33	4	48
1965 (Jan.-July)	46			

APPENDIX II

CASES DECIDED BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, BY TYPE OF CASE[A]

Year	Prices[B]	Coal Mkt.	Agr. Mkt.	Duties[C]	Cartels[D]	Subsid.[E]	Transp.[F]	Scrap[G]	Tax CS[H]	Contr.[I]	Priv. Imm.[J]	Employ.[K]	Attach.[L]	Nat. Tax[M]	Restr. of Trade[N]
1953	3	1													
1954	6	4													
1955	4	1						2	1			2			
1956	1	1			2			4	1			2			
1957					2	1		9	1	2		5			
1958		1			1		22	18							
1959	1	1			8	1	4	19	2	1		9			
1960		4			1			15			1	6			
1961	1			2	1		2	16				3			
1962			6	8	1			13		1		2	1		
1963			1	6	4			51	1			36	6		
1964	2		4	2	2			5	1			30	4	1	2
Totals	17	13	11	18	22	2	28	152	7	4	1	95	11	1	2

A. This table is based on unpublished statistics kindly made available to this writer by Mr. Everson, Deputy Registrar of the Court. As can be readily seen, the bulk of the Court's caseload is derived from two matters not quite anticipated by the drafters of the treaties, suits by employees and suits involving the now defunct levy intended to equalize the price of community and non-community scrap.

B. Involves prices under the Coal and Steel Treaty
C. And cases involving import restrictions, contingents, etc.
D. Cartels under Coal and Steel treaty.
E. Subsidies by member states.
F. Discrimination in transport rates, etc.
G. See note A.
H. Levy imposed by Coal and Steel Community to finance its operations.
I. Cases involving right of communities to exercise control measures.
J. Cases involving protocols on privileges and immunities of Communities.
K. Suits by employees against Communities.
L. Petitions to authorize attachment of funds in hands of Communities.
M. Actions for return of national tax.
N. Restraint of trade cases under Common Market treaty.