PERMANENCE OF POWERS: COMMISSION OF THE EUROPEAN COMMUNITIES v. FRANCE

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Of the three European Communities, the European Atomic Energy Community (Euratom) is probably the least well understood. Its creation was not as historically significant as that of the European Coal and Steel Community (E.C.S.C.); moreover, its operations receive less publicity than those of the Common Market. Nonetheless, its institutions are unique in a number of ways, and their operations have contributed greatly to a growing body of law illustrating the increasingly federal nature of Europe.

The impact of Euratom upon the jurisprudence of Europe will undoubtedly continue to expand as the energy crisis worsens.[1] Within the recent past, the Court of Justice of the European Communities reached a decision concerning one of the institutions of Euratom which, in a broad sense, is of great significance to the continuing general development of European institutions. This article is intended to analyze that decision with a view to reaching conclusions regarding its impact upon the emerging "constitutional" nature of the Communities.

Specifically, the nature of Euratom and its unique subsidiary institution, the Supply Agency of the European Atomic Energy Community will be examined. A discussion of *Commission of the European Communities v. France*[2]—a case in which the permanent competence of the Supply Agency was challenged—will follow. With the principles developed by the case in mind, attention will be directed to the manner in which the competence of European institutions is now being accepted as "preemptive"

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1. For an early analysis of the need to coordinate all European energy resources, *see* Van derEsch, *Legal Aspects of a European Energy Policy*, 2 COMM. MKT. L.R. 139 (1964).

2. 11 Comm. Mkt. L.R. 453 (1972) (Case 7/71, December 14, 1971).

in nature, without regard to the level at which that competence is exercised within the Communities.

I. EURATOM AND ITS SUPPLY AGENCY

Euratom, established by one of the 1957 Treaties of Rome,[3] shares many of the characteristics of the other Communities. Since the Merger Treaty, Euratom has also shared certain of the major institutions of the other Communities. As with the other Communities:

> Euratom can be defined as a union of sovereign states, based upon an international treaty, with institutions of its own, acting independently from the Member States, ...[4]

Like the other Communities, Euratom has been endowed with a "supranational" nature in the sense that it is a "public authority which exists and operates directly within the Member States without the need for intervention by the national authorities of those States."[5]

Even though Euratom is essentially similar to the other two Communities in broad outline, it is markedly different in two respects. It is these two differences which justified the creation of a separate atomic energy community in the beginning.

The first difference is that, unlike the case with the E.E.C. or the E.C.S.C., Euratom is endowed with a strong "promotional" role in the development and control of a specific commodity. Thus, in addition to those functions normally exercised by the other Communities, Euratom administers and fosters the production and use of nuclear materials and services within the Member States. These promotional functions are clearly established in article 2 of the Treaty:

> For the attainment of its aims, the Community shall, in accordance with the provisions set out in this Treaty:
> (a) develop research . . . ,
> . . . .
> (c) facilitate investment and ensure, particularly by encouraging business enterprise, the construction of the basic

3. Treaty Establishing the European Atomic Energy Commission (Euratom), *done* March 25, 1957, 298 U.N.T.S. 167 [hereinafter cited as Euratom Treaty].

4. Mathijsen, *Problems Connected with the Creation of Euratom*, 26 LAW & CONTEMP. PROB. 438 (1961).

5. Glaesner, *The European Atomic Energy Community*, in INTERNATIONAL ATOMIC ENERGY AGENCY, NUCLEAR LAW FOR A DEVELOPING WORLD (1969).

facilities required for the development of nuclear energy within the Community,

(d) ensure a regular and equitable supply of ores and nuclear fuels to all users in the Community. . . .[6]

For the purpose of carrying out this promotional role, the Community has established numerous research centers, laboratories and other cooperative projects.

A second manner in which Euratom is unique is in its relations with countries outside the Community:

> While the Coal and Steel Treaty is practically silent on the question of international agreements, the E.E.C. Treaty has empowered the Economic Community to conclude agreements with other States only when the Treaty explicitly provides. Euratom, on the other hand, has received a general power to enter into agreements with third countries, or international organizations, concerning matters which fall within its competence.[7]

As a result of this grant of power, there exists an international organization which is authorized to act not only through its members, but can also act to bind its members vis-à-vis third countries.[8] This is without question a significant limitation of sovereignty by the Members and it is somewhat comparable to the power granted to the United States Federal Government to conduct the foreign relations for the individual states. Conversely, this is a significant advance over previous powers possessed by comparable international organizations.

These two unique aspects of Euratom are highlighted through its role of promoting the supply of nuclear materials to the Member States, including supplies from third countries. This role is the primary function of the Euratom Supply Agency.

The institutional nature of the Supply Agency is clearly delineated by article 54 of the Euratom Treaty which states that it: "shall have legal personality and financial autonomy."[9] Thus, the Agency is a "corporate body vested with financial independence,"[10] and is designed to be operated as an on-going business

6. Euratom Treaty, *supra* note 3, art. 2.

7. Mathijsen, *Some Legal Aspects of Euratom*, 3 COMM. MKT. L.R. 327, 334 (1966). The external relations of the Community are dealt with in Chapter X of Title Two of the Treaty, Articles 101-106.

8. This institution and these functions are detailed in Chapter VI of Title Two, Articles 52-76 of the Treaty.

9. Euratom Treaty, *supra* note 3, art. 54.

10. 1 CCH ATOM. EN. L. REP. 13938 [Para. 8407].

operation pursuant to its charter.[11] However, the Agency is responsible to the superior institutions of the Communities:

> The Agency, although it has legal personality, and financial autonomy, is placed under the control of the Commission which issues directives to it and possesses a right of veto over its decisions. . . ."[12]

Thus, the nature of the Supply Agency is really that of a *secondary* institution, or one of a lower order than the Council and the Commission; it is "a means put at the disposal of the Commission" in order to carry out the Commission's duties.[13] In more analytical terms, it has been suggested that the provisions of the Treaty concerning the Supply Agency are of "a different juridical dignity, [and are] reduced to a lower class" than those establishing the other institutions.[14]

It is this secondary, or subsidiary nature of the Supply Agency which is crucial to understanding the importance of the European Court's judgment affirming the permanence and preeminence of this institution in Europe. Before examining the situation which led to that decision, it is necessary to explore the functions of the Agency in more detail.

As previously noted, one of the primary functions of Euratom is to "ensure a regular and equitable supply" of nuclear materials to users in the Community. In order to accomplish this goal, article 52.2(b) mandates the establishment of a Supply Agency, and grants to the Agency:

> [A] right of option on all ores, source materials and special fissionable materials produced in the territories of the Member States and . . . the exclusive right of concluding contracts relating to supplies of ores, source materials and special fissionable materials coming from inside or from outside the Community.[15]

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11. Article 54 of the Treaty provides for this Charter in the form of a Statute which is to "determine the particulars of the commercial management of the Agency."

12. Mathijsen, *supra* note 7 at 334. *See also*, Euratom Treaty, *supra* note 3, art. 54.

13. *See* Mathijsen, *supra* note 7.

14. Reuter, *Juridical and Institutional Aspects of the European Regional Communities*, 9 LAW & CONTEMP. PROB. 381 (1961). In his analysis, the author cites as examples of his contention the simplified procedures for modifying the rules set forth in the Treaty concerning ownership of nuclear material, and safety control.

15. Euratom Treaty, *supra* note 3, art. 52.2(b).

The subsequent articles, setting forth more detailed provisions for implementing the Agency's supply function, make it clear that this Agency is "responsible for the entire supply [of nuclear materials] of the territory of Euratom, [and has] an import and export monopoly to all countries outside the Community."[16]

At the time this supply regime was established, there was within Europe, and in the rest of the world, a limited market for nuclear materials. Nuclear power for use in commercial applications was still of an experimental nature but loomed large in the minds of its proponents. Accordingly, in setting up the supply regime, the Member States were working in a vacuum.[17] Experience acquired through a number of years of practice led to certain operational changes, including the granting of permission to private users within the Community to contract directly with each other. "Only with respect to contracts concluded with parties outside the Community has the exclusive right of the Agency not been modified."[18] The reason for granting the right to contract directly was that the supply of nuclear material within Euratom, originally believed to be far smaller than the demand, proved to be vastly larger than anticipated.

The drafters of the Treaty were apparently not successful in predicting the precise nature of the demand for nuclear materials in Europe. They were, however, sufficiently aware of the potential problem to include special rules for modification of these supply provisions in the Treaty. Article 76 of the Treaty provides a simplified procedure for amendment with respect to the supply provisions. This article permits the Council, by means of a unanimous vote taken after consulting the Assembly, to implement

16. Bohm, *Ownership of Nuclear Materials in Euratom*, 11 AM. J. COMP. L. 167, 172 (1962).

17. "This body of provisions relating to supply, control and ownership has been established *a priori*, as it has not been possible to make reference to any experience in this field in several Member States," Gaudet, *Euratom.* 1 L. & ADM. 140, 171 (1960).

18. Glaesner, *supra* note 5, at 44. It should be noted that the Treaty provisions establishing the exclusive right of the Agency to contract were based upon "the fundamental principle" of "equal access to nuclear materials." *Id.* at 40. This can be contrasted with the legal situation which existed in the United States in 1958; under the Atomic Energy Act of 1954, "all right, title and interest in or to any special nuclear material . . . shall be the property of the United States. . . ." (Section 52). Thus, private U.S. individuals were permitted to conclude agreements among themselves for supply of nuclear material, although title to such material was in the U.S. Government.

a proposal of the Commission (or of a Member State) to amend the supply provisions of the Treaty. Article 76 then states:

> The Council may, at the end of a period of seven years after the date of entry into force of this Treaty, confirm these [supply] provisions *in toto*. Failing such confirmation, new provisions dealing with the subject-matter of this Chapter shall be laid down in accordance with the procedure set out in the preceding paragraph.[19]

Despite the authority contained in this provision of the Treaty, no amendment to the supply provisions has ever been adopted. Practical modifications have been implemented; but no amendment or confirmation has ever been adopted with respect to the right to contract for materials coming from outside the six Member States. Under the terms of article 76, confirmation or revision of the supply provisions was to have occurred by January 1, 1965 (seven years after entry into force of the Treaty). As a result, the process set forth in article 76 has never been utilized in the fashion contemplated by the drafters.

In spite of this inaction, the supply provisions of the Treaty continued to be applied after 1965.[20] Even a cursory reading of article 76 indicates that in the absence of such action, the continued validity of Chapter VI after 1965 was open to question.

II. COMMISSION OF THE EUROPEAN COMMUNITIES V. FRANCE

Acting in accordance with article 76 of the Euratom Treaty, the Commission in November 1964, proposed to the Council certain amendments to Chapter VI of the Treaty. No further action was taken as a result of this proposal.[21] Following expiration of the seven-year period stated in the Treaty, the Supply Agency continued to exercise its functions as before. It is of interest to note that France consistently maintained that these authorizing provisions of the Treaty did not have continuing validity beyond 1964.[22]

19. Euratom Treaty, *supra* note 3, art. 76.

20. Glaesner, *supra* note 5, at 44.

21. "[O]wing to the complexity of the problem, particularly the divergence of interests involved, the Council has not yet taken a decision on these proposals." *Id.* *See* Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 455 (1972).

22. "[A]ccording to one opinion put forward during the relevant discussions, the provisions of Chapter VI have lapsed for want of a decision by the Council. In practice, however, Chapter VI continues to be applied." Glaesner, *supra* note 5, at 44.

In accordance with its view of the legal situation, the French Government (through the mechanism of the French Atomic Energy Commission, or C.E.A.) advised French state and private enterprise that Chapter VI of the Treaty, and with it the institution of the Euratom Supply Agency, no longer had binding effect or authority. Following this notification, the C.E.A. concluded a number of direct contracts with overseas suppliers of nuclear materials. In so doing, the C.E.A. ignored the express provisions of article 64 of the Treaty.

Upon learning of this action by France in apparent contravention of the Treaty, the Commission of the European Communities began taking the steps necessary to establish a violation of the Treaty pursuant to article 141.[23] With France's failure to correct their alleged Treaty violation, the Commission referred the case to the European Court of Justice in 1970.

The basic issue raised in the case was whether France was in violation of its Treaty obligations. It is clear that this is an issue which, in its most limited sense, is a problem of treaty interpretation. Had the Court resolved it purely as a matter of Treaty interpretation, the case would be of little impact. However, the Court's decision involved a number of issues and statements which went far beyond mere questions of interpretation.

These transcendant issues involve three general areas: first, the nature of the European Communities as supreme within Europe, or their "constitutional" nature; second, the emerging rule of "preemption" within Europe, or the doctrine that a function once delegated to the Community is no longer properly exercised by the individual States; and third, the rule, which emanates from the first two doctrines, that Community institutions of any order are, absent contrary provisions in their charters, of permanent duration and competence.

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23. Article 141 provides:

> If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.
>
> If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

In 1969, the Commission, in a letter to CEA, stated its opinion that the contracts concluded by CEA were in violation of the Treaty. In reply, the French maintained their position that the provisions of Chapter VI had elapsed. After more discussion, the Commission, in 1970, issued a formal opinion in which the French were given 45 days to comply with the decision.

In addition to these three areas, the case is significant for a procedural argument which unfortunately was inadequately dealt with in the decision. The absence of a full discussion of this issue is of importance in analyzing the full scope of the decision. Before analyzing the major implications of the case, it is first necessary to briefly summarize the holdings of the case which are of more narrow interest.

The French Government's major argument was that the provisions of Chapter VI, which give the Supply Agency the exclusive right to contract for the supply of nuclear materials coming from outside Euratom, had lapsed by virtue of the failure of the Commission to adopt new provisions or confirm the old. Indeed, a reading of the relevant language of article 76 does not clearly establish the invalidity of this proposition. The "official resume" of the Euratom Treaty, in analyzing the amending-confirming language of article 76 contains the following statement:

> On the expiry of a period of seven years from the entry into force of the Treaty, the Council may confirm all these provisions. If they are not confirmed, fresh provisions *will be adopted* in conformity with the above procedure.[24]

The language of the Treaty is therefore clearly not dispositive of the issue. As pointed out by Advocate General Roemer,[25] the conflicting language translations add to the uncertainty of the words used in the treaty. For example, while the German and Dutch versions "clearly show that Chapter VI cannot have ceased to apply from January 1, 1965,"[26] the French and Italian versions "are less clear."[27]

In view of the ambiguities inherent in the language, the Court did not attempt to rest its decision solely on principles of Treaty interpretation. Rather, it ventured into the realm of the purpose, intent, and scope of the authority granted by the Treaty. Following these guidelines, the Court held that the failure of the Commission to confirm or replace the old provisions did not result in a lapse of Community authority:

> [U]ntil the decision is made whether to make the existing provisions permanent or to replace them with new provisions,

24. 1 CCH ATOM. EN. L. REP. 13939 (Para. 8407) [emphasis added].

25. Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 460 (1972).

26. *Id.*

27. *Id.*

> the provisions of Chapter VI are merely preserved temporarily. . . .[28]

This holding was based upon a view of the European Communities which is of a "constitutional" nature. Moreover, it rested firmly upon the doctrine that primary or secondary powers properly exercised by Community institutions are preempted by their institutions. Finally, it was based upon the notion that the institutions created by the six Member States are permanent and sovereign.

III. IMPLICATIONS OF THE DECISION

The European Communities have displayed attributes of sovereignty since their creation by the Treaties of Rome.[29]

> [B]y creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves.[30]

This creation of new sovereign institutions and powers quite obviously gives the enabling treaties an area of constitutionality, since each of them "instituted its own legal order, integrated into the legal system of the member-States and which has priority before their courts."[31]

The sovereign or constitutional nature alluded to above has been well established for the E.E.C. and presumably the E.C.S.C. through prior decisions of the European Court of Justice. The same was not true of Euratom until the instant case arose. As stated by the Advocate General in the case of *Commission of the European Communities v. France* "an organ of the Communities and a member-State are in dispute for the first time regarding questions of Euratom law."[32] Therefore, although broad principles had been articulated for the Communities in general, no

28. *Id.*, at 475.

29. March 25, 1957.

30. Costa v. E.N.E.L. (Case 6/64), cited in STEIN & HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA 204 (1967).

31. Wilhelm, et. al. v. Bundeskartellamt, 8 Comm. Mkt. L.R. 100, 119 (1969).

32. 11 Comm. Mkt. L.R. 453, 454 (1972).

detailed analysis of this principle had ever before been brought to bear upon Euratom, and more particularly, its unique institution of the Supply Agency.

A. The Constitutional Sovereignty of the Communities

As the prime justification for its holding in favor of the Commission in this case, the Court of Justice made the following statement concerning the European Atomic Energy Community:

> The member-States agreed to establish a Community of unlimited duration, equipped with permanent institutions invested with real powers resulting from a limitation of competences or a transfer of the powers of the States to this Community.[33]

Thus, the Court confirmed that which previously was implied from the sweeping language of earlier decisions respecting the other Communities. The institutions of Euratom created by the Member States are independent, constitutionally endowed entities whose "legal order is complete in itself."[34]

The legal order created by the Euratom Treaty appears to be broader in scope than those which have been created in connection with previous international organizations.[35] Probably the clearest example of this newly developed scope of authority in the Euratom Treaty is the ability of the organization to bind the Member States in the matter of commercial arrangements for the acquisition and supply of nuclear materials. This authority constitutes more than an ability to implement decisions of the Member States; it is a grant of the power to act independently of the States in a fashion which binds those sovereign entities. As characterized by the Advocate General, this power is a "compulsory centralization of supply . . . and demand . . ."[36] and

33. *Id.*, at 475.

34. Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695, 722 (1966): "The completeness of the Community legal order is apparent from the fact that it consists of an independent and legally autonomous system comparable to a constitution. It is not merely an accumulation of mutual rights and obligations of the founding States, the maintenance of which requires constant recourse either to municipal law . . . or to instruments of international law. . . ."

35. "Where similar organizations have existed in the past, they were not only rudimentary and embryonic but also so shortlived and so specialized that they cannot be compared with the Communities." *Id.* at 736.

36. Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 454 (1972).

quite clearly involves authority which traditionally is exercised by the individual States.[37]

This unique nature of the institutions of the Atomic Energy Community, and their constitutional basis, are strikingly evident in the developing doctrine of "implied powers" within Euratom and other European Communities. While it is true that the broad mandate given to Euratom in the field of supply and demand is particularly helpful in developing such a doctrine, it should be noted that any derogation of a State's sovereignty in favor of an international body has been construed narrowly. For this reason, any broadening of the authority of an international body to act independently of its sovereign creators would constitute a significant advance in the direction of internationalism.

In the area of supply of nuclear materials, and in the development of nuclear research within Europe, the Atomic Energy Community has acted to the fullest extent necessary to assert the authority contained in the Treaty. The ability to expand the institution's authority was recognized in the instant case by the European Court in its characterization of article 2(d) of the Treaty.[38] The court held it to be "a general obligation imposed on the institutions of the Community [which] is precisely to permit the supply system to be adopted to the evolution of circumstances."[39] This process of expansion of institutional authority beyond the narrow limits of the words of the Treaty is one hallmark of a dynamic institutional structure. Recognition of the expansion by the European Court gives added impetus to the growth of the "implied powers" of each of the Communities.[40]

37. "Unlike the institutions of practically all international organizations, those of the Community are not mere liaison offices where Member Governments meet from time to time to discuss the conclusion of international agreements or a procedure to be pursued jointly at the national level." Sasse, *supra* note 34, at 722.

38. *See* text accompanying note 6 *supra*.

39. Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 475 (1972).

40. *See* Collinson, *The Foreign Relations Powers of the European Communities: A Comment on Commission v. Council*, 23 STAN. L. REV. 956 (1971). In his analysis of the case, the author makes the following conclusions:

> [T]he Court declared that the existence of Community external affairs powers did not depend exclusively on specific provisions [of the Treaty] but could also be founded on more general provisions interpreted in light of the Treaty's overall system. . . . *Id.*, at 965.

and that:

> [A] Community external relations power may be founded on provisions other than . . . specific foreign affairs provisions. . . . *Id.*, at 967.

The general constitutional nature of the institutions of Euratom, recognized in the case of *Commission of the European Communities v. France,* is demonstrated by the developing concept of implied powers of these institutions. It is in another aspect of institutional competence, however, that this sovereign nature of the Communities is even more clearly defined.

B. The Permanence of Preempted Powers

One of the most characteristic attributes of a federal system is that the federal power has preemptive authority in exercising the functions delegated to it. This attribute has been developed strongly in the United States, and is now emerging in Europe. The doctrine of preemption is a corollary of the doctrine of implied powers discussed above. As a federal institution acts to the full limit of its capacity, it correspondingly reduces the jurisdiction of its constituent States.

The principle of preemption has been recognized within Europe from the time Communities' Treaties entered into force:

> The division of powers between the [European Economic] Community and the Member States thus means that the States cease to be competent whenever their competence is excluded by some provision of the Treaty or whenever the Communities have exercised their powers.[41]

For example, one area of Community law where the doctrine of preemption is well developed is in anti-trust law, where the rule is firmly established that "conflicts between the Community rule and the national rules . . . should be resolved by the application of the principle of the primacy of the Community rule."[42]

While this rule has been said to be "part of that solidly entrenched body of law applied in [all] comparable cases,"[43] it had never been applied by the Court of Justice to the institutions of Euratom prior to the case of *Commission of the European Communities v. France.*

In holding that the provisions of Chapter VI of the Euratom Treaty did not lapse upon the expiration of the first seven-year period, the Court of Justice concluded that acceptance of such a lapse "would mean accepting a break of continuity in a field

41. Sasse, *supra* note 34 at 745.
42. Wilhelm v. Bundeskartellamt, 8 Comm. Mkt. L.R. 100, 119 (1969).
43. Sasse, *supra* note 34, at 717.

which the Treaty . . . has provided for the pursuit of a common policy."[44] An analysis of the reasons for this refusal to accept a break in continuity reveals that it is based upon two factors: first, that the experimental nature of Euratom's mandate indicates an intention to oust the individual States of competence; second, that the nature of the supply regime created by the Treaty requires uniform application throughout Europe.

At the time of entry into force of the Euratom Treaty's supply regime, it was believed that this new form of energy would rapidly develop into a major industry. It was therefore necessary to develop an ongoing mechanism to ensure that the expansion was orderly and in the best interests of all Member States. Thus, the provisions of the Treaty were "linked to a certain stage of development of industrial and legal techniques."[45]

By the late 1960's, it was clear that the rapid growth of nuclear energy forecasted by the drafters had not occurred; however, the original supply regime had not been altered to meet these changed circumstances. Accordingly, France argued that since the Treaty had not been amended in order to insert provisions appropriate to the actual situation "it must be assumed that the original provisions ceased to have effect."[46]

In its opinion, the Court of Justice brushed aside this argument by noting that in a situation where an experimental regime has been established, it is "obviously difficult" to impose upon that experiment an absolute duty to prove itself within a set period.[47] The court therefore refused to find that there was a lapse in the competence of the Supply Agency such as to permit a Member State to resume the exercise of that competence.

This conclusion reinforces the preeminence of the authority of Community institutions. In spite of the fact that the authority of the Supply Agency was originally seen as experimental and subject to alteration, and in spite of the fact that the circumstances were such that an alteration was in order, the Court refused to permit any erosion of the authority of the Supply Agency.

The second factor supporting the Court's decision, as it re-

44. Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 475 (1972).

45. Gaudet, *supra* note 17, at 171.

46. Commission on the European Communities v. France, 11 Comm. Mkt. L.R. 453, 459 (1972).

47. *Id.*, at 460.

lates to preemption, was the need for uniform application of the Community laws concerning use and control of atomic energy. Uniformity, of course, is one major factor behind the operation of each of the Communities:

> It would be contrary to the nature of such a system [the Communities] to accept that the Member States may take or maintain in force measures liable to compromise the useful effect of the Treaty. The imperative force of the Treaty . . . could not vary from State to State by the effect of internal acts, without the functioning of the Community system being obstructed and the attainment of the aims of the Treaty being placed in peril.[48]

In order that the legal regime be uniform within its jurisdiction, it is necessary that the competence of actions taken pursuant to the regime be of equal validity everywhere. Accepting the terminology of the Court of Justice, giving each Member State independent authority in the area of supply of nuclear materials would be "difficult to reconcile with the elementary principle of the certainty of the law."[49]

In view of the legal situation in Europe, the decision was clearly correct. The Euratom Supply Agency had concluded many long-term contracts for the supply of materials to Member States, none of which contained a provision for novation in the event the Supply Agency died. To have invalidated such agreements by deposing the Agency would have created an intolerable situation. Generally, the significance of the concept of uniform application is that the Court has relied upon it to assert the preemptive authority of Community institutions.

The above analysis of the doctrine of preemption was based upon the substantive holding of the Court. In addition to this holding, there were two procedural findings which further emphasize the preemptive position of the Supply Agency.

The first of these involved France's argument that the Commission of the European Communities knew of the French position on the legal situation in 1965 but did not begin proceedings before the Court of Justice until 1970. Thus, argued France, the Commission had permitted France to put itself in a position of alleged breach of the Treaty when it could have avoided the

48. Wilhelm v. Bundeskartellamt, 8 Comm. Mkt. L.R. 100, 119 (1969).

49. Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 462 (1972).

situation by submitting an application to the Court at an early date.[50]

The Court did not accept this argument; nor did it limit itself to the narrow position that the Treaty nowhere establishes a period of limitation such as that urged by France. Rather, it went on to say:

> The uncertainty of the legal situation in which a Member State finds itself . . . cannot be invoked to justify a breach.[51]

By using this broad language, the Court seems to imply that in exercising the functions delegated to it, an institution (here, the Supply Agency) is not subject to a defense of laches. The powers granted by the Treaty are therefore permanent—*even if not exercised*—and self-help by the Member States is not permitted.

The second procedural argument urged by France was closely associated with the foregoing point, but was broader in scope. The contention was that the supply provisions of the Euratom Treaty has never had any useful application since the expected demand for nuclear materials had failed to materialize, and "that there could not therefore be any point in having it established that France has not observed them."[52]

This contention flies directly in the face of the concept of the continuing preemptive authority of the Supply Agency. In his opinion, the Advocate General failed to meet this issue squarely. Rather, the opinion dispensed with the French argument by disputing the conclusion that the Treaty provisions had never had useful application. The Court of Justice also disputed the facts alleged by France, but went beyond this factor to conclude:

> [T]he fact that for a certain period the market conditions made the use of the supply system provided by the Treaty less necessary does not suffice to deprive the provisions relating to that system of their binding force.[53]

In this analysis of the legal system, the Court is stating that the preemptive powers exercised by European institutions cannot be diluted by events other than constitutional change.

The Court concluded that the twin factors of the system's

50. *Id.*, at 457-58 (opinion of Advocate General).
51. *Id.*, at 477.
52. *Id.*, at 464 (opinion of Advocate General).
53. *Id.*, at 475.

experimental nature and the requirement for uniformity mandated the need for preemptive powers to be granted to the Supply Agency; and the exercise of these powers could not be diluted or prevented by either the concept of laches or by the failure of anticipated events to occur. It thus affirmed its earlier statement of this principle of preemption:

> [E]ach time the Community, with a view to implementing a common policy envisaged by the Treaty, lays down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to contract obligations toward non-Member States affecting these rules.[54]

France was held in breach of its Treaty obligations since it had assumed powers permanently delegated to a Community institution.

C. The Permanence of Community Institutions

In analyzing the case of *Commission of the European Communities v. France*, major emphasis has been placed upon the sovereign nature of the institutions established in the Communities, and the preemptive nature of the powers exercised by those institutions. These two aspects of the case, when viewed together, lead to a final broad conclusion: that unless altered by a constitutional change, the institutions which have been created in Europe are of a permanent nature, regardless of their relative dignity vis-à-vis the Member States.

While the Court used the need for uniform application of the rules of the Treaty as a justification for its decision, it did not view the failure of the Euratom Supply Agency to act in this regard as a matter of great concern. However, it viewed the possibility that there could be a disintegration of the institutional structure of the Community with what seems to approach abject horror.[55] Therefore, the conclusion was quite properly reached that a reversion of powers to the Member States, accompanied by the disestablishment of a Treaty institution, "alone could occur by virtue of an express provision of the Treaty."[56]

54. Collinson, *supra* note 40, at 957.

55. Since adoption of the French position "would entail temporary disintegration" of the institutional regime, "it can scarcely be conceived that the authors of the Treaty could have intended this to occur. . . ." Commission of the European Communities v. France, 11 Comm. Mkt. L.R. 453, 463 (1972).

56. *Id.*, at 475.

It must be remembered that the particular institution involved in this decision was not one of the major Community institutions. As noted earlier, the Supply Agency is of a "secondary" nature, responsible to the major institutions. The distaste with which the Court viewed "disintegration" of the supply regime did not involve the major workings of the European Atomic Energy Community, but rather a secondary institution which, it would appear from the Treaty, need not necessarily have been granted the permanent authority implied by the Court.

Therefore, the important conclusion toward which the Court seems to be moving is that the power of the Community may be permanently vested in secondary institutions; and, that in the event of a clash of asserted responsibilities involving those powers between a State and the lower institution, the rules of that institution "take precedence irrespective of the level of the two orders at which the conflict occurs."[57] Such a conclusion would present a dramatic advance for the proposition that Europe is moving toward a federal system in which powers formerly exercised by the Member States may not only be permanently exercised by the major institutions, but may be redelegated by those institutions to a lower order of the functionaries whose decisions will be no less binding on the Member States.

IV. CONCLUSION

The case of *Commission of the European Communities v. France* presented a large number of issues which could be discussed. I have chosen to emphasize the aspects of the case which have the broadest impact on the entire operation of the European Communities. Insofar as that operation is concerned, the case clearly represents an advance for proponents of a federalized Europe. However, in one aspect, the Court did not step out as far as may have been possible.

France's major contention was that after 1965 the provisions of Chapter VI ceased to have applicability. Yet the fact remains that following this alleged end of the Supply Agency's authority, the French Government continued to recognize and utilize the Supply Agency's activities and competence—nowhere in the case was this factor recognized.

French acquiescence in the Agency's operations occurred in

57. Sasse, *supra* note 34, at 717.

a number of ways. First, in executing contracts with foreign suppliers of nuclear materials, the French C.E.A. recognized the Supply Agency's authority by acquiescing in the Agency's concurrent execution of the contracts.[58] Moreover, following the alleged expiration of the Agency's authority, the French continued to utilize the supply regime established in contracts between the United States and the Supply Agency to which France was not a party. And yet, apparently no argument was raised that France was precluded from denying the authority of the Agency based upon its activities in this regard.

The upshot of this apparent anomaly may be that the Court of Justice is not yet ready to fully implement a regime which would irrevocably place the Member States of Euratom in an inferior position to the Community's institutions. To have held that the French Government was estopped to assert the invalidity of a secondary European institution would have been a further broadening of the already wide preemptive power of the institutions of the Communities. Thus, the continental regime continues to advance, but at a pace which remains moderate.

58. Contracts between the U.S. Atomic Energy Commission and the CEA for the supply of enriched uranium are also executed by the Euratom Supply Agency.