

Maurice Lagrange, The Court of Justice of the European Communities from the Schuman Plan to the European Union

Caption: Maurice Lagrange, who drafted the ECSC Treaty and was subsequently Advocate General at the Court of Justice for 12 years, retraces the history of the Court of Justice from the Schuman Plan to the European Union.

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The Court of Justice of the European Communities from the Schuman Plan to the European Union

by

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This contribution to *Mélanges Fernand Dehousse* does not claim to be an academic and scientific study of this subject. Very many eminent lawyers have already written about it, and it continues to attract a large number of commentators, increasingly interested in developments in the case-law of the Court of Justice and the creation of Community law.

My aim here is more modest. I intend to provide as detailed a description as possible of the gestation, the birth and the life of the Court, from the time of its inception as part of what was known as the 'Schuman Plan'. I shall then go on to consider the role it may play in the recently founded but, as yet, ill-defined European Union.

Mine is a first-hand account. I have had the privilege of both being directly involved in drafting the Treaty of Paris, and subsequently, of holding the office of Advocate General for a period of 12 years at the Court. Thus, I experienced the early years of the institution from 'the inside' and watched it grow.

I

The Court and the drafting of the Treaty of Paris

This is not the place to describe at length or even summarise the history of the Schuman Plan. That story has recently been recounted by Jean Monnet in his *Mémoires*, with all the authority he brings to bear on the subject. Let me simply quote that part of the Declaration of 9 May 1950, which Mr Monnet himself considers vital (1): 'By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and the other member countries, this proposal will lead to the realisation of the first concrete foundation of a European federation indispensable to the preservation of peace.'

The High Authority was, therefore, the only institution involved. Was it then intended that the High Authority should enjoy unlimited powers in the field of coal and steel production? That could not have been the intention of the French Government. As Mr Monnet tells us in his *Mémoires*(2): 'As early as 12 June, we were able to present to a French interministerial committee a proposal setting out the independence of the High Authority and specifying the *procedures for reviewing* its decisions. The concept of *an arbitration tribunal* already existed, as did the idea that the Executive should be politically responsible to a parliamentary body.' A proposal — 40 articles long and drawn up on these bases — was submitted to the Conference in the form of a working document on 24 June, shortly after the Conference had been formally opened in the *Salon de l'Horloge*, at the *Quai d'Orsay*, by Mr Robert Schuman on 20 June.

Shortly thereafter, the idea of a creating a special Council of Ministers took shape. It was to be responsible for intervening in issues which challenged governmental responsibility, in clearly defined circumstances. This was preferred to the system — proposed by the Netherlands — of *appealing* decisions of the High Authority before a Committee of Ministers, which would take qualified majority decisions. The principle of a parliamentary assembly to which the High Authority would be politically responsible was accepted without demur.

In early October, in circumstances vividly described by Mr Monnet in his *Mémoires*(3), I was suddenly called upon to take part in the negotiations. In fact, the meetings of the Conference had at that point been suspended for a few days to allow the French delegation to draw up the initial proposals for the draft Treaty, the broad lines of which the Conference itself had sketched out. From the institutional point of view, the (extremely) informal discussions, in which I was involved from the start, fundamentally clarified the legal nature of the Community and the distinction between the Community and the High Authority.

In his *Mémoires*, Mr Jean Monnet recalls (4): ‘It is my impression that that day (21 June) was the first time that I used the expression “European Community” to describe our objective.’ The idea had been put into words, but it was only an *objective*, and one that had appeared in the *Preamble* to the 40-article June proposal. But it was at that point (early October) that we, as a team, suddenly realised, thanks particularly, if I remember rightly, to Paul Reuter, that we needed to create a *genuine legal person governed by public law*, called the European Coal and Steel Community, with defined objectives, distinguishing it from the High Authority. Together with the Council, the Parliamentary Assembly and the Court of Justice, it would be one of the Community’s *Institutions*. The High Authority, like the others, would be granted its own powers enabling it to pursue, within the limits of those same powers, the attainment of the Community’s objectives.

And so the whole institutional system of the Treaty began to take shape. This is apparent in the distinction between Title One, devoted to the European Coal and Steel Community, and Title Two on the Institutions of the Community, including a High Authority.

In fact, this perfectly coherent system could have been based on another passage in the Declaration of 9 May, in which the French Government: ‘proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an *organisation* open to the participation of the other countries of Europe’. The concept of an ‘organisation’, of which the High Authority would be just one, albeit the main, element, had therefore existed, if only in outline, from the very beginning.

Moreover, the importance, legally speaking, of the distinction is clear, between Title One, which is to some extent the constitutional section of the Treaty, and Title Three, which establishes the powers of the High Authority in all areas of its activity, since not even the ‘minor amendment’ procedure under the third and fourth paragraphs of Article 95 is allowed to conflict with the provisions of Title One.

Against that background, I began to look in greater detail at the issue of the Court of Justice. We were no longer talking about an arbitration tribunal, but what then was its role to be? Was there not a risk that it might more or less paralyse the activity of the High Authority? Was the eternally feared spectre of government by the judiciary not about to materialise?

With the spotlight that had been turned on to the Community that had recently emerged, it was not hard for a member of the *Conseil d’État* (and that was why, with his usual foresight, Mr Monnet had referred to it) to envisage that, as *the Community’s internal judiciary* and one of its Institutions, the Court would, quite naturally, be responsible for *monitoring the legality* of the decisions by which the High Authority exercised its powers. In point of fact, Mr Monnet had abandoned the idea of a Treaty which merely established the High Authority and left it to that body to adopt its own rules of procedure. In view of the interests at stake, the apparently crucial decision to set out these rules in detail in the Treaty had been taken. The Treaty therefore appeared to be a veritable charter setting out the powers of the High Authority and the conditions for the exercise thereof. This mechanism would inevitably take the form of *decisions* which would have to be taken in compliance with certain procedures providing guarantees to the States or undertakings concerned. They would also have to abide by the limits which the Treaty placed on the exercise of those powers, that is to say the substantive conditions. Its role being to monitor procedural and substantive compliance with the rules, the Court would be performing a function similar to that of an administrative court hearing an *action for annulment* (formerly the procedure used to prosecute misuse of powers in the French system), based on the distinction between legality and expediency.

Our partners’ immediate response to a note setting out these ideas was one of surprise and objection, as theirs was an international approach (largely the source, it has to be said, of the proposals of 24 June on the appeals procedure). They were not open to the revolutionary concept, underlying the Schuman Plan, of an organisation independent of the States and operating in accordance with its own rules (what would later come to be known as the ‘Community legal system’). However, the Legal Affairs Committee, set up within the Conference and made up of individuals both highly competent and full of good will, soon saw the sense of what we were proposing and, in about 20 days, drafted what are now Articles 31 to 45 of the Treaty.

At that point, the Legal Affairs Committee began to hold meetings with the Economic Affairs Committee (chaired by Pierre Uri) to contribute to the drafting of both Title Three and Title Four. All this work was, of course, coordinated by the meeting of heads of delegation. Chaired by Mr Monnet, it took a view on the most complex or controversial issues.

As Mr Robert Schuman was later frequently to point out, the Conference had nothing in common with traditional diplomatic negotiations. It did not seek to reconcile national approaches based on government instructions, by agreeing, where necessary, to ‘withdraw from positions prepared in advance’. As the difficulties became apparent, solutions which worked to the benefit of all, without in any way compromising the objectives in view, had to be *devised*. Naturally, the role of the French delegation, as the unquestioned leader, was particularly sensitive: it had both to propose solutions and respond to the, sometimes apposite, objections of our partners and win them over — where necessary by amending the original proposals. It was also necessary to win over French political and economic players (the French steel industry, for instance). They feared being placed under the dictatorship of an irresponsible authority with unlimited powers, and it had to be demonstrated to them that the system set in place would actually bring them both substantial advantages and guarantees against arbitrary acts, far superior to the guarantees that they had had hitherto in the national system.

It goes without saying that the right to bring an action against the High Authority before the Court of Justice was one of the most important guarantees. In that respect, the draft Treaty incorporated virtually the entire range of procedures available in the French administrative courts, including actions for annulment, action for failure to act and non-contractual liability (service-related fault). The Court was even authorised to act as arbiter between the Community and a Member State where that Member State’s economy was experiencing ‘fundamental and persistent disturbances’. A genuinely constitutional responsibility was also conferred on the Court under the fourth paragraph of Article 95, as described above. Finally, Article 88 of the Treaty provides for and sets out a system for establishing whether Member States have failed to fulfil their obligations under the Treaty. This was necessary because the Member States are in part responsible for applying the Treaty without prior action by the Community Executive.

However, although the Court was thus accorded powers going beyond the usual framework of the administrative courts, its powers in relation to actions for annulment were substantially curtailed, at least as compared with the law of most of the participating States. Article 33, in fact, limited to cases of misuse of powers the admissibility of actions brought by undertakings or associations against decisions, other than decisions affecting them individually, in particular regulations. Only the Member States and the Council benefited fully from the right to bring such actions — and without even having to prove an interest. Finally, the Treaty of Paris does not provide for references for a preliminary ruling, merely for assessment of the validity of acts (Article 41). That possibility has never actually been used, perhaps because individuals and their legal advisers were unaware of it or because the disputes were resolved in other ways.

Subject to those reservations, it is quite apparent that the judicial system set up under the Treaty draws directly on French administrative law. That was possible because, to some degree at least, the legal systems of the other Member States were familiar with it. This has also, with all due modesty, to be seen as a tribute to the historical activity of the French *Conseil d’État*.

It is worth drawing particular attention to certain features. First of all, the office of *Advocate General*. This, again, was a proposal directly inspired by the French *Conseil d’État* which, as we know, includes ‘*commissaires du gouvernement*’ whose function is, similarly, to draw up independent reports. They have played a pre-eminent role in developing the case-law of the *Conseil d’État*. Save for the title, which has an historical basis but was clearly not acceptable, the inclusion of the office of Advocate General in the Court system was immediately welcomed and put forward by the Legal Affairs Committee. This was particularly surprising, since that office did not exist in the four Member States with a Council of State, aside from France. However, the articles on the Court had already been drafted — and there was no question of reviewing the other texts which had already been agreed — so the Advocates General and Registrar were slipped into the Protocol on the Statute of the Court of Justice, drawn up at the eleventh hour.

Nor did the proposal prompt objections from the Ministers meeting within the Conference to sign the Treaty. They may have seen it as twofold opportunity. It allowed the governments to secure two further posts within the Court and combined the principle of equality between countries (one judge per country, the second Netherlands judge being appointed to meet the requirement of an uneven number of judges) with the unwritten but fundamental principle of parity between France and Germany — there would be one French and one German Advocate General. Italy had none, but it did have the Presidency of the Court. A skilful ‘diplomatic balance’ was thus secured.

A second keenly debated point was whether *dissenting opinions*, permitted in some countries and in some international courts, should be permitted at the Court of Justice. Most delegates were resolutely opposed to this, considering it inconsistent with the procedures customarily applied in most Member State courts and — from the public perception at least — a threat to the judges’ independence. The main argument adduced in favour of allowing dissenting opinions was that it was important for different views to be set out so that legal theory could be developed. The counter-argument was that the Opinions of the Advocates General offered another way of securing different views. Their role was specifically to provide a critical and independent account of the various arguments, so that, whatever conclusion the Advocate General reached in his Opinion, his thesis could be compared with that of the judges. That argument both tipped the balance against dissenting opinions and lent weight to the proposed office of Advocate General. These days, no one appears to dispute the fact that the Advocates General have performed and continue to perform the tasks expected of them. Their Opinions are published in full in each case, once judgment has been delivered, in the European Court Reports.

Two important matters had been left in abeyance when the Treaty was signed and were further discussed at the meetings of the ‘interim Conference’ during the period between the signature and entry into force of the Treaty: the languages to be used and the seat of the Institutions.

As regards the rules governing the languages to be used, only one problem had been resolved, that of the language of the Treaty. Unusually, only the French version was authentic, as only one copy of the Treaty had been signed and it had been drawn up in French. That, obviously, was not the case with the other European treaties which continued the normal hypocritical practice whereby the Treaty is drawn up in a single copy ... in four languages, each of them authentic! But nothing else had been decided. There was an attempt to make a distinction between the four official languages (French, German, Italian and Dutch, the latter, with French, covering Belgium’s two official languages), and the working languages, which would have been French and German. But when the Italian delegate asked for Italian to be added to the other two working languages, the Netherlands delegate immediately objected. The only solution was to agree that the four official languages would also be the working languages. Most fortunately, these problems were empirically resolved on the basis of practice and common sense.

At their final meeting, in July 1952, the Ministers adopted a number of directives concerning the Court of Justice. They were based on complete equality between the four languages and the idea that the language of each individual case should be determined in accordance with objective criteria. Legally, it was for the Court itself to resolve these problems, and it did so in its Rules of Procedure of 4 March 1953 (5), by virtue of its powers under Article 44 of the Protocol on the Statute of the Court of Justice. The system has since been modified to some extent, but it seems to have proved satisfactory, since it combines the principle of a single language of the case with the necessary degree of flexibility.

Turning to the seat of the Institutions, we know that the Ministers were unable to reach agreement at the eleventh hour (in late July 1952) and simply decided that the High Authority would hold its first meeting in Luxembourg, on 10 August 1952. The Legal Affairs Committee had already discussed the problem, about which there were two conflicting views. Some argued that the Court should sit at a distance from the High Authority (in The Hague, for example), so as to remain independent of the ‘Executive’, as happens in some countries constituted on the federal principle (Switzerland and the Federal Republic of Germany, for instance). But others felt it a good idea that the Institutions should have their seats in the same place and cited the example of the United States. The dispute soon faded when the Court was called upon to meet

‘provisionally’ in Luxembourg, on 10 December 1952, after its Members had taken their oath, on the same day, in the Luxembourg City Hall. There is, however, no official text setting out that decision. What I can say is that there was no question of the judges’ independence being undermined. In fact, they undoubtedly benefited from the personal contacts they immediately established with the Members of the High Authority. This very quickly encouraged a genuine Community spirit in the simple and welcoming atmosphere of the city which had extended its hospitality to them.

II

The Court and the application of the Treaty of Paris

And so we find the Court installed (?), in the most ‘impractical’ of circumstances, in a lovely villa provided by the City of Luxembourg, surrounded by beautiful flower gardens, but able to accommodate only six Judges and the Registrar. The seventh Judge and the Advocates General had to seek shelter nearby, in a notary’s house ...

Far being detrimental to the Court in its infancy, this situation was actually beneficial. It led to increased personal contacts between people of different origin and nationality. They were able to engage in useful comparisons of their differing concepts of the law. As a result, it was almost always possible to identify a ‘common fund’ that could be used to resolve disputes without the need for agonising choices. That common fund was based on the domestic law of the Member States — and it was their domestic law, rather than international law, that provided a vital source of Community law. More often than not, that influence underpins case-law, and is sometimes very explicit (6) (Algera and others, 12 July 1957).

I was the only Judge to have taken part in the negotiations on and the creation — on paper — of the Court of which I now had the honour to be a Member. I was therefore particularly curious to see how our conception of the Court would match up to reality. I can now say that, overall, and despite a few surprises and finishing touches, experience has shown that the system is sound and, if I may put it this way, has held its own. Indeed, all the procedures laid down (save those provided for in Articles 41 to 43) have been used and played the role expected of them. This includes the exceptional procedures, such as that under Article 37 on fundamental and persistent disturbances or under Article 95 on ‘cases not provided for’ and ‘minor amendments’ to the Treaty.

It was, however, a year before the Court heard its first case. This was not time wasted. It had first to draw up its Rules of Procedure in accordance with Article 44 of the Protocol on the Statute of the Court of Justice. This made an immense contribution to establishing and cementing positive cooperation between Judges from very different backgrounds. Another very useful ‘exercise’ was the study of Staff Regulations in conjunction with the other Institutions and, in the meantime, regulating the contractual relationship between the Court and its officials. The responsibilities that fell to the President of the Court as President of the ‘Committee of Four Presidents’ (Article 78 of the Treaty), with responsibility for the budget, were inevitably of interest to the Court itself, as it had to draw up its own expenditure budget.

Finally, the Members of the Court took the trouble to use this time to familiarise themselves with the Treaty and monitor — with some interest, as you can imagine — the way in which the High Authority conducted its activities. The High Authority had, from the outset, to meet a critical series of deadlines in order to create the common market during what was called the ‘preparatory’ period.

I should add here that one of the Court’s official languages was spoken fluently by all its Members. No interpreter was ever needed in the deliberation room. That invaluable asset remains, even after enlargement. It may even have acquired the status of a tradition.

The Court was, therefore, if I may be permitted to use the expression, ‘broken in’ when, in early 1954, it was asked to give a ruling in its first case — the ‘price lists’ case.

A. Methods of interpretation

This case turned on the interpretation of a provision of the Treaty, namely Article 60(2)(a), concerning the publication by undertakings of their price lists. The Court did not follow the Opinion of the Advocate General and decided to interpret the text restrictively. Consequently, it annulled the decision of the High Authority (which had been challenged by the French and Italian Governments) in so far as that decision permitted a degree of flexibility in the arrangements for the publication of price lists. In reaching its decision, however, the Court did not merely rely on a literal interpretation or even an exegesis of the relevant provisions. It further stated: ‘It now remains to be considered whether the conclusion to which the Court has come as a result of its examination of the words used and *the reasons underlying them* is contrary to the Treaty’s other objectives, or whether it may be invalidated by other considerations. This is not the case ...’ The Advocate General had first considered the problem from the angle of a literal interpretation, but, deeming this to be of doubtful validity, he opted for replacing the text in the context of the article in which it was incorporated and then the article itself within the general context of the Treaty. According to the Advocate General: ‘Such an approach is always legitimate; it is particularly necessary in the case of this Treaty of 18 April 1951 because all its parts are interconnected. In particular, all the provisions of Title III represent only the implementation of the principles laid down in Title I, from which Title III must never be dissociated.’

In its very first case then, we see the Court opt unhesitatingly (albeit, on this one and only occasion, a little tentatively) for a ‘global’ method of interpretation, based directly on the rules applied in the national courts for the enforcement of national law. This approach differed markedly from the usual vagaries of the international courts. In reality, the Treaty itself demanded it. This was not fully appreciated, in the very early days, by distinguished experts in international law (some of whom came to plead before the Court), but the Court’s approach was crucial. It offered unlimited potential for extensive and courageous further development, as we now see under the Treaty of Rome.

The Court’s work in interpreting the Treaty of Paris covered the broadest range of issues. The first effect was to give undertakings as extensive access to the Court as the legislation permitted. In its order in Joined Cases 7/54 and 9/54 *Groupement des industries sidérurgiques luxembourgeoises* of 23 April 1956, the Court used an ingenious combination of Articles 33, 35 and 88 of the Treaty, accompanied — on this occasion — by a purely literal interpretation of Article 33 (7), to allow a group of iron and steel undertakings to challenge the legality of an implicit decision of the High Authority, which had refused to find that a Member State had failed to act on the basis of a governmental decision concerning the activity of a public body in the coal sector. Was it subsequently felt that the Court had gone too far in those two cases? Perhaps this was why the Treaty of Rome punished it, firstly by giving the Commission complete freedom to bring or not bring an action against a Member State for failure to act, without private individuals being given the right to compel it to do so, and, secondly, by restricting the right to bring a direct action for annulment against individual decisions (Article 173) solely to those same persons.

Many other judgments could be cited as examples of the Court’s efforts to provide interpretations in the interest of individuals. One example would be the *Meroni* judgment of 13 June 1958 concerning a plea of illegality, accepted as a general principle, and recognised in addition to the circumstance in which it is explicitly provided for by the Treaty (Article 36 in relation to pecuniary sanctions). [...]

B. Exercise of powers

The fundamental principle underpinning the institutional system of the Treaty of Paris is a principle of *conferred powers*. The States agreed to cede some of their powers (not to mention ‘delegate sovereignty’ — a more striking, but no doubt legally more questionable expression, used at the time of the Schuman Plan) only on condition that both they and their nationals were given *guarantees* that the Community Institutions would exercise their powers in accordance with the rules of the Treaty, which they had freely accepted.

The Treaty is absolutely clear on this point. The Assembly ‘shall exercise the supervisory powers *which are conferred upon it* by this Treaty’ (Article 20). The Council ‘shall exercise its powers *in the cases provided for and in the manner set out* in this Treaty’ (Article 26). The powers of the Court and the conditions under which cases may be referred to it are carefully set out in the various Treaty provisions. The High Authority,

whose powers are very wide-ranging, its duty being nothing less than ‘to ensure that the objectives set out in this Treaty are attained’ (Article 8), is able to exercise those powers only ‘*in accordance with the provisions thereof*’. The principle of conferred powers therefore unquestionably applies to both the High Authority and the other Institutions. This is best illustrated by the first paragraph of Article 95: it establishes a special procedure to cover cases not provided for in the Treaty, where it is necessary to give the High Authority the powers it needs to attain one of the Community’s objectives, as set out in the initial provisions of the Treaty.

It is initially surprising that the Court should have considered it necessary, on occasion, to fall back on the theory of ‘implied powers’ before granting to the High Authority a power that it did not possess under the Treaty. The prime example of this is Case 8/55 *Fédération charbonnière de Belgique* ([1955] ECR, English Special Edition, p. 292). But that case actually involved the interpretation of an obscure and badly drafted text (paragraph 26(2) of the Convention on the transitional provisions) rather than the granting of new powers to the High Authority. Moreover, the Treaty provided adequate powers under Article 53. The Advocate General did not, however, appreciate that until after he had presented his Opinion (8).

Following on from the principle of *conferred powers*, I should draw attention to the case-law whereby the High Authority is refused *regulatory powers* save in those circumstances expressly provided for by the Treaty. That is unequivocally confirmed by the judgments of 15 July 1960 on road transport (Case 20/59, for instance). But the question then arises of the powers which the High Authority enjoys in order to ensure that the Treaty is implemented where the obligations it lays down are incumbent upon the Member States. There is only one: the procedure under Article 88 concerning the failure of a State to fulfil an obligation. That procedure has been utilised on a number of occasions and endorsed by the Court, particularly in its above-mentioned judgments in Cases 7/54 and 9/54 of 23 April 1956. It has also been used to secure the immediate implementation of a decision challenged by a Government (judgment in Case 3/59 of 8 March 1960). However, the Court did not consider it necessary to accept the application thereof, even in principle, in its judgments of 8 March 1960 to which I have just alluded (9).

It has to be said that the solution cannot in itself be criticised, since the procedure itself was unlawful, as Advocate General Roemer clearly showed in his Opinion. But the Court’s interpretation of Article 88 is surprising. The Court held (in Case 20/59): ‘It is a procedure far exceeding the rules heretofore recognised in classical international law to ensure that obligations of States are fulfilled. However, Article 88 must be strictly interpreted.’ That approach is clearly justified in relation to *the second part* of Article 88 concerning the *penalties* applicable to a State which has failed to fulfil an obligation — where the matter has, if necessary, been referred to the Court for the appropriate finding. But it is questionable in regard to the *first phase* of the procedure in which a failure to fulfil an obligation is merely recorded. The very important function which that kind of procedure fulfils for the implementation of the Treaty of Rome is, moreover, abundantly clear. It has often made it possible to resolve minor disputes that barely touched on State sovereignty.

In that same judgment, however, the reasoning of which was clarified and confirmed in a subsequent judgment of 12 July 1962, the Court recognised that the High Authority enjoyed a power of *recommendation*. The purpose of this was to draw the Member States’ attention to their obligations under the Treaties. That was worth pointing out: on the one hand, the power of the High Authority is not, in that instance, specifically provided for under the Treaty; however, on the other, although it lacks legal definition, the recommendation is deemed enforceable in a court of law.

It is, in any event, regrettable, that these important disputes relating to road transport could not be resolved as favourably or rapidly as the no less important disputes concerning rail transport tariffs had been a few months earlier. This is particularly true of the judgments of 10 May 1960 which made a major contribution to resolving the serious conflict between the iron and steel industry in Lorraine and the German industry over what was considered to be the discriminatory application of certain special tariffs.

The lesson of this rapid survey of the Court’s attitudes to the Treaty of Paris is that the Luxembourg Judges clearly demonstrated, from the outset, that, in accordance with Articles 2 and 3 of the Treaty, they considered that, as a Community institution, they had the task of contributing, through the exercise of their

powers, to the attainment of the Community's objectives.

III

The Court and the application of the Treaty of Rome (EEC)

There can be no doubt that, in relation to the EEC, not only did the Court not waver in its approach, it actually took it further. There was no breakdown of continuity. But there was a significant development in the way the Court interpreted the problems posed by the Treaty of Rome compared with its approach to the Treaty of Paris. I want to describe two aspects of this which seem to merit particular attention, and both involve the methods of interpreting the Treaty. They are the principle of conferred powers and the concept of directly applicable provisions.

A. Conferred powers

The principle is the same. Under Article 4 of the Treaty: 'Each institution shall act within the limits of the powers conferred upon it by this Treaty'.

Having said that, I should first point out that the problem arises in relation to the limitations on the Community's powers compared with the powers retained by the Member States and not only with regard to the powers of the different Institutions. This comes as no surprise for two reasons. The first links up with the very aim of the EEC Treaty: it encompasses an area far greater than the ECSC, and its boundaries are, inevitably, far less clearly defined. That is daily apparent from the way in which the Institutions, and the Council more particularly, operate. It is, in fact, perfectly natural for the Ministers to take advantage of a Council meeting to consult each other and, if need be, take real decisions in areas which more or less overlap with Community issues. Formally, there is a distinction between 'the Council' and the 'representatives of the governments meeting within the Council', but it is sometimes difficult to draw the dividing-line, and this frequently poses problems. This is a matter for concern, as politicians are clearly going to be tempted to circumvent Community procedures and the compulsory application of the rules of the Treaty in order to be able to negotiate and reach agreement freely.

The second reason is linked to the drafting of certain Treaty provisions. As regards the Community's authority to enter into international agreements, for example, Article 210 simply provides: 'The Community shall have legal personality', a form of words used in Article 6 of the Treaty of Paris. But, whereas the latter specifically confers on the Community the capacity to enter into international agreements, the Treaty of Rome is silent on that issue, even though it adopts the wording of the Treaty of Paris in relation to the Community's legal capacity within the Member States. Moreover, since Article 228 establishes a procedure for the conclusion of international agreements: '*Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation*', it was reasonable to consider whether or not this had to be strictly interpreted. That was the Opinion of Advocate General Dutheillet de Lamothe in the case of *Commission v Council* (concerning the *AETR*) which resulted in a judgment of 31 March 1971. The Court took a different view in an extremely well-reasoned and analysed judgment in one of its most important judgments on this issue. Clearly, the Court could not arrive at that conclusion without taking a very comprehensive approach to interpretation, based on the objectives, the aims and the dynamic nature of the Treaty. The result was to make the transfer to the Community of the powers of the Member States to conclude an international agreement dependent on certain decisions taken by the Community Institutions at internal level.

It is hard to imagine a similar endeavour within the far more rigid framework of the Treaty of Paris, even though its general provisions governing the institutional system were taken over in the Treaty of Rome.

B. Directly applicable provisions

This is a problem that was very unlikely to arise in relation to the ECSC because the Treaty of Paris (a law-making treaty, as has often been pointed out) required implementing provisions before its provisions could be deemed applicable *per se* only in exceptional circumstances. The question arose only in regard to the

provisions of Title One in relation to the others. On that point, the Court immediately acknowledged that the provisions of Title One (of Article 4 in the case in point) ‘are sufficient of themselves and are directly applicable when they are not restated in any part of the Treaty’, and where this is not so, they must be applied simultaneously with those which have been restated (10).

As regards the Treaty of Rome, however, that whole question was very quickly raised and prompted what is certainly the most ‘integrationist’ of all the Court’s judgments. This is the *Van Gend en Loos* judgment of 5 February 1963, which recognised the self-executing nature of Article 12 of the Treaty. That article requires the Member States to refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other. Notwithstanding the form of words ‘the Member States shall refrain ...’, the Court held that ‘Article 12 must be interpreted as having direct effects and creating individual rights which national courts must protect’, a form of words it used in a number of subsequent judgments. There is no doubt that, as a result of this judgment, the Court of Justice and, thanks to the Court, the national courts, made a substantial contribution to attaining the aims of the Treaty (generally through Article 177). That would certainly not have been achieved to the same extent, had it not been possible to counter the inertia and opposition of the Member States using only the procedure relating to a failure to fulfil an obligation under Articles 169 to 171.

However, not all provisions could be considered self-executing. The provision in question had of itself to have the character of having direct effect. This was what the Court analysed in each individual case. It even accepted, without overly dwelling on the definitions in Article 189, that directives could, in certain cases, have direct effect (11), as could a decision addressed to a Member State (12) (*Franz Grad*, 6 October 1970, *Grands arrêts* [Leading Cases], p. 39).

Until recently, the criterion applied by the Court was that a text should exist that did not require the adoption of further provisions before it could take effect. That, in fact, is a line of reasoning which, in France, for example, makes it possible to make the direct application of a law — which establishes rights and obligations — subject to the adoption of implementing decrees if, were they not adopted, it would be materially impossible to implement the legislation. The attempts made, in Belgium in particular, to try to limit these consequences, if the Executive is negligent and fails to act over an excessively long period, are a far from adequate remedy.

However, a new factor of the utmost importance, which politicians, in particular, had passed over in silence, was to bring about a marked change in the Court’s approach to this problem of direct applicability. The crucial factor was the expiry, on 1 January 1970, of the transitional period provided for under the Treaty.

This posed a very serious legal problem. Article 8 of the Treaty, which provides for the progressive establishment of the common market during a transitional period of 12 years (capable of being extended to 15, which it was not), provides in Article 8(7): ‘Save for the exceptions or derogations provided for in this Treaty, the expiry of the transitional period *shall constitute the latest date by which all the rules laid down must enter into force* and all the measures required for implementing the common market must be implemented.’ That, as we know, is the provision on which the French Government relied to demand — and obtain — the establishment of the common agricultural policy by 1 January 1970. However, and the governments were clearly aware of this, the common market was far from complete, particularly since a large number of the regulations required for its completion had yet to be adopted (on the right of establishment, for instance). Even in the agricultural sphere, some sectors had yet to be made subject to a common organisation of the market.

How did this affect the legal position? Was it necessary to consider that the regulations and directives envisaged to bring into force certain Treaty provisions could no longer take effect, as the authority accorded for that purpose was limited to the transitional period, and, consequently, the rights recognised by the Treaty could be exercised in full? Or had it to be acknowledged that the delay in bringing into force the regulations or directives did not obviate the need to adopt them, even after 1 January 1970? And, in the meantime, were the provisions of the Treaty, in so far as they could be put into effect only by means of these regulations or

directives, not directly applicable?

In its *Reyners* judgment of 21 June 1974, the Court took the middle way. Mr Reyners, a Dutch national, fulfilled all the conditions required under Belgian law to be registered at the Bar in Belgium: place of residence, diplomas and so on, save for the nationality requirement. The Court drew a distinction. It held the requirement of non-discrimination on grounds of nationality to be directly applicable, with the result that, in relation to the right of establishment, nationals of the Community States are able to enjoy, in each Member State, the same rights as that State's nationals. Mr Reyners could not therefore be refused access to the Belgian Bar because he met all the conditions required under Belgian law. The Court did not, however, rule that the authority to adopt directives in that area had lapsed. In fact, it stated that: the directives 'have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect. These directives have, however, not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of the freedom of establishment.' This refers to measures such as the coordination of diplomas and the requisite harmonisation of national legislations. A distinction of that nature — between measures deemed to be directly applicable by their very nature and measures that require implementing provisions before they can be applied — seems perfectly judicious and reasonable. It appeared to confirm earlier case-law.

We might therefore have expected the Court to apply the same distinction in relation, for example, to the delays in implementing the common agricultural policy, with particular regard to the common organisation of the market in certain sectors. According to Article 38(2) of the Treaty, the rules laid down for the establishment of the common market (those of Article 33 for instance) are applicable to agricultural products only save as otherwise provided in Articles 39 to 46, that is to say, the implementation of a common agricultural policy as provided for in Article 39 and as it is to be attained in accordance with Article 40 et seq.: by establishing a common organisation of the agricultural markets. That organisation has to be based on clear and specific rules, laid down by the Treaties, which establish rights in favour of individuals. It goes without saying that the provisions of Article 40 are not 'directly applicable'. That was always the view of the Commission. It considered that national organisations of the market which fulfilled certain conditions should be retained until, in the relevant sector, they had been replaced by one of the forms of common organisation provided for in Article 40(2). Moreover, that view was largely justified by the wording of Article 43(2), according to which long-term agreements and contracts may exist until 'the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(2)'.

However, the *Charmasson* judgment of 10 December 1971, delivered contrary to the opinions of both the Commission and the Advocate General, followed a completely different line. It clearly shows that the Court had changed its view of 'direct effect'. This is not simply a matter of establishing whether a particular provision has, by its very nature, to be applied immediately. It is also necessary to identify, in situations where several provisions apply simultaneously, which is the most fundamental in the light of the general principles of the Treaty. In this case, the Court held the most important provision to be the abolition of quantitative restrictions (Article 30 et seq.), one of the foundation stones of the common market. That provision is directly applicable, and has, therefore, to take precedence over the requirements of the common agricultural policy, to the extent that the latter involves a watering down of the principle of the free movement of goods and was not able to be put in place within the time-limit set by the Treaty. That case-law was later confirmed by the *Miritz* judgment of 7 February 1976 concerning the application of Article 37 to the adjustment of State monopolies.

What led the Court to take a decision of that nature? It clearly did so because it considers it has a duty, in securing observance of the law, to give priority to the attainment of the fundamental objectives of the Treaty, in the face of any obstacle, and, more particularly, where the Community legislative authority has failed to act within the prescribed time-limit. The Court sees this as a way of exerting *pressure* on that authority to compel it to take without delay the measures required to comply with the Treaty.

Some consider this 'policy of case-law' highly commendable, not to say admirable. The Institutions are failing to operate in a coordinated manner, and this leads the Court to assume responsibilities it would not have had to shoulder, had the Institutions been functioning properly. Will this policy meet with success; or is

it not likely to provoke a crisis which threatens Community solidarity? Only time will tell. I think that we have to make a distinction here. In cases where the Executive has been unwilling to act, or simply uninterested in so doing, the Court can effectively counter this. But there are other cases which genuinely pose serious economic problems that cannot objectively be resolved by insisting on the unheeding application of the Treaty. It is to be hoped that, by judiciously combining the qualities of authority and wisdom which a court must possess, the Court of Justice will continue to merit the confidence so far shown in it by both States and individuals.

IV

The Court and the European Union (13)

My comments here will be brief [...] because they rely on *supposition*. Even this is not easy since we have only a vague definition of this 'European Union', and there has as yet been no real attempt to establish it on an institutional basis, other than in the Tindemans Report.

Even if the governments were to adopt Mr Tindemans' proposals — and that does not at present seem likely — and even though the proposals seek to reduce to a minimum the need for a new Treaty, it is clear that this is what we will need if the European Union is to have even the most basic of structures. Without it, the Union will merely consist of periodic meetings of the Heads of State or Government, like the 'summit' meetings that have been held to date.

Asked, like the other Institutions, to set out its suggestions with a view to the establishment of a 'European Union', the Court first noted that, because the concept had yet to be clearly defined, it intended 'merely to highlight the need for coherence between the Community in its present form and the Community as envisaged for the future; to set in place effective legal instruments and take into account the threshold beyond which the *acquis communautaire*(14) would be jeopardised', particularly if the rights of the individual were to be ignored.

That, in effect, is crucial. We need to safeguard the *acquis communautaire*(14) and avoid any break between the Community as it exists and the Community envisaged to take its place. We must, therefore, make use of all the potential of the existing Community, so that the Union benefits from the experience acquired over more than 20 years. That, moreover, is Mr Tindemans' approach.

Having said that, the Court suggests a number of areas in which progress needs to be made, both in the context of the European Union and under the existing treaties. This includes according individuals the right to seek the annulment of any unlawful decision by means of an action in which they would demonstrate that they had a direct interest. The restrictions set out in Article 33 of the ECSC Treaty and Article 173 of the EEC Treaty would thus finally be lifted!

But the Court also rightly insists on the need to provide the Union with an appropriate *decision-making body*, which would have to be a *legislative body*, enacting *positive law* which the Court could enforce. That is the crux of the problem of the Community legislature; it has long existed under the Rome Treaties and does not seem close to being democratically resolved, even if the European Parliament were to be elected by direct universal suffrage.

Intrepid in its approach to the interpretation of the existing treaties, the Court is clearly determined to continue to handle positive law. It does not want to find itself in the role of a mere arbiter with ill-defined powers, guided only by considerations of expediency or 'general principles of law' — always difficult to identify when unrelated to rules of objective law. Might this not herald the threat of that infamous 'government by the judges' which the Court has so successfully avoided hitherto?

[1 November 1976]

(1) J. Monnet, *Mémoires*, p. 353.

(2) *Op. cit.*, p. 377.

- (3) *Op. cit.* , p. 412.
- (4) *Op. cit.* , p. 379.
- (5) OJ dated 7 March 1953.
- (6) Case 7/56, Cases 3 to 7/57, *Algera and others* , 12 July 1957, [1957] ECR, English Special Edition, p. 39.
- (7) 'It is sufficient, in order that an undertaking or association may be able to institute proceedings against a decision or recommendation, for that decision or recommendation to be not general but individual in character, and it is not necessary for that decision to manifest this character in relation to the applicant', [1955] ECR, English Special Edition, p. 175. That interpretation of 'decisions of individual concern' was quite definitely not what the authors of the Treaty had in mind, but I applauded it! It was with a heavy heart that I had agreed to abandon the sole condition of *interest* , an inherent factor in actions for annulment, and one on which the Court did not hesitate to rely, on a number of occasions.
- (8) M. Lagrange, ' *Les pouvoirs de la Haute Autorité et l'application du Traité de Paris* ', *Revue du Droit public* , 1961, p. 47.
- (9) J. Boulouis and R. M. Chevalier, ' *Grands arrêts de la Cour de Justice des Communautés européennes* ' [Leading Cases on the Law of the European Communities], pp. 163 et seq.
- (10) Joined Cases 7/54 and 9/54, 23 April 1956, *Grouperment des industries sidérurgiques luxembourgeoises* , [1955] ECR, English Special Edition, p. 175.
- (11) Case 33/70, 17 December 1970, ' *Grands arrêts* ' [Leading Cases], p. 48.
- (12) F. Grad, 6 October 1970, ' *Grands arrêts* ' [Leading Cases], p. 39.
- (13) See my report on ' *La structure juridictionnelle de l'Union européenne* ' [The judicial structure of the European Union], presented in Bonn on 2 April 1976 at the 29th Round Table on the problems of Europe and published in ' *Les problèmes de l'Europe* ', No 72, p. 49.
- (14) The accumulated body of European Community legislation.