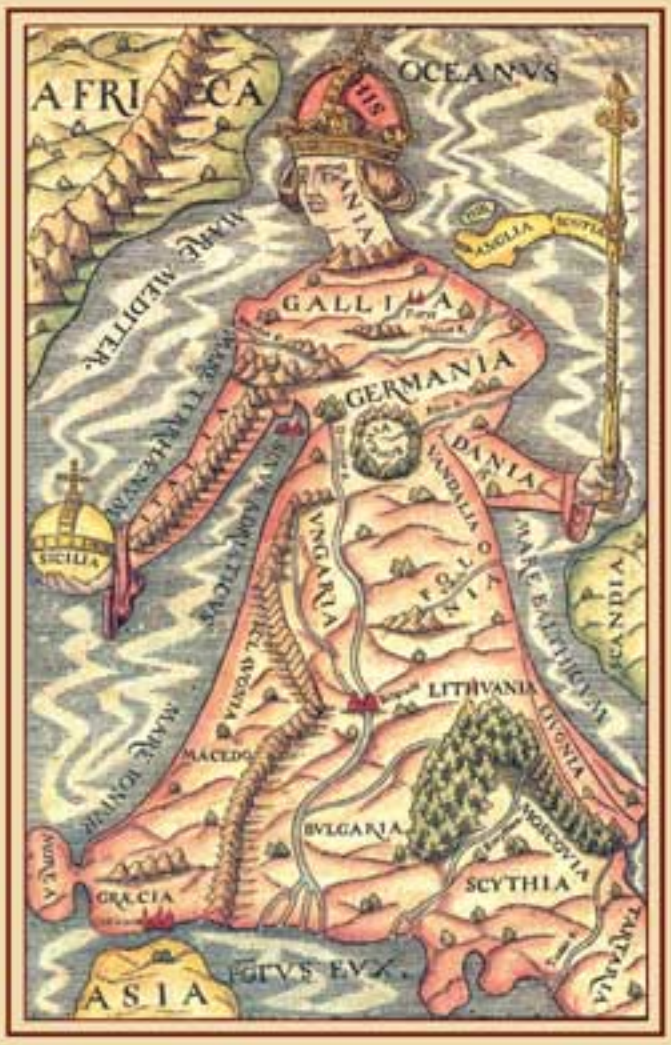
A Guide to European Private Law



A COMMON LAW *for* EUROPE

Gian Antonio Benacchio
& Barbara Pasa

CEU PRESS

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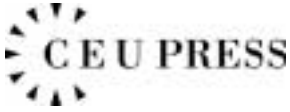
by

Gian Antonio Benacchio and Barbara Pasa

Translated *by* Lesley Orme



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EU law "is an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back" – per Lord Denning, *HP Bulmer Ltd v Bollinger SA* (1974)

Introduction

The *Europeanization* of private law, a process which has been taking place for a decade or more, is a phenomenon that everyone is watching. The new phases of European integration, which began with the accession negotiations for the entry of the Central and Eastern European countries, along with Cyprus, Malta, and Turkey, coincide with the debate on the desirability (or otherwise) of a renewal of the European *jus commune*; this increases the complexity of the whole scene.

This first volume, "*A Common Law for Europe,*" is the first part of *A Guide to European Private Law,* which is intended to give an account of the building of a new 'European common law,' enhanced by the perspective provided by the enlargement process of 2004. The second volume, "*The Harmonisation of Civil and Commercial Law in Europe*," will be dedicated to reconstructing the important parts in the formation of the new, common private law, which is no longer domestic, but *European* (or *Community*) in nature: consumer protection and contract law, product liability, the insurance, credit and finance industries, company law, industrial and commercial property rights, and competition law.

The *Guide* identifies the major issues posed by harmonization, uniformization, and unification of the legal rules and guiding principles of European Community private law, without overlooking the policy choices of the Community institutions. The European legal system, as everyone knows, is undergoing continual evolution: to describe its structure, the institutions, and rules which govern its working, implies no small cognitive effort. Such effort is often made futile by the premature obsolescence of everything which has been written and published. Despite this, the idea of producing this work on the private law of Europe took root, particularly in view of the enlargement of the EU.

The two volumes are offered as a guide for law students, but also for non-law students who are interested in the political and economic consequences of the Europeanization of law; for those professionals who work in the field (lawyers and judges) and would like to become acquainted

with the local species of transplanted Community rules; and for the networks of scholars, who bring their critical perspective to bear on the interpretation of new European private law. These books are intended, in particular, for the students and legal professionals of Eastern Europe, of those countries which are (or are about to become) new members of the European Union, in order to assist them in understanding the nature and the scope of EU law in a precise area, namely private/ commercial law.

This first volume observes this complex phenomenon from a double viewpoint.

On the one hand, the authors favor the 'legal process' approach, by observing the relationships between diverse institutions and structures with differing jurisdictions and competence (supranational and national). The book sheds light upon the consequences brought about by this relationship, highlighting the constant adjustments, which are the necessary by-products of the interplay between those institutions, and upon the side-effects of the competition between institutions.

On the other hand, the authors abide by the principles of comparative law. The starting point is the assumption that neither the legal text, nor academic commentary, nor the judge's ruling represents the whole of the law. The legal system—whether that of the European Community or of each individual Member State—has to be approached through its component parts (the so called *'formants'*); having identified them, we then seek to verify their coherence with the other parts that make up the rest of the legal system.

The authors are allowed considerable freedom with regard to the means of verifying this coherence. The comparative method searches for *'cryptotypes'* (hidden types); in other words, it hunts out mendacious arguments which exist within each domestic system of legal principles and rules, in order to reveal them in case they (apparently) distort the description of similarities and differences between the legal systems of the old and new Member States, as well as candidate States, of the European Union.

The chapters in this volume deal with the topics mentioned above: the process of harmonization/uniformization/unification of European national legal systems and the formation of private law in the enlarged Europe; sources and institutions of EC law, legal transplants of its rules and principles, the transposition of concepts and the related problems of translation; harmonization of law as an instrument for the membership of Central and Eastern European countries. Since the guide was being finished and updated while the definitive text of the future European Constitution was being approved, the authors decided to take some particular aspects of the *Treaty establishing a Constitution for Europe* into

account (rearrangement of law sources, institutional reform, the Charter of fundamental rights), briefly illustrating some fundamental provisions and offering the reader materials drawn directly from the original text.

The bibliography accompanying each chapter is, naturally, not intended to be exhaustive, but is aimed at suggesting further reading on the topics of greater interest which are covered in the book. Bibliographical references are given in the three languages most widely known or spoken in Europe (English, French and German) and in Italian, to provide the reader with a logical framework of reference (by topic and chronological order). Last but not least, we have favored the editorial approach of using small fonts in the main text in order to achieve the following aims. In the first place it makes the text more attractive for students and legal professionals, avoiding cluttered pages with explanatory notes or detailed bibliographies. In the second place, this method presents the reader with material drawn directly from the legal sources, without interpolation or interference by the authors. Finally, further explanation and detailed commentary can be provided which the student or legal professional may also decide to pass over, without losing the thread of the argument in the main text.

In this study of European Community private law, we highlight the aims of Community harmonization and the instruments chosen, observing and evaluating some of the effects which the *rapprochement* (approximation) to Community laws has produced in the legal systems of Member States and which are making themselves felt in the countries that participated in the last enlargement or that are still negotiating their accession for the next enlargement (such as Bulgaria and Romania, to be ready for membership by January 1st 2007). The book does not deal with the harmonization of the legal systems of Turkey, where the implementation of legislation, formally aligned with the *acquis,* continues to be insufficient, or Croatia (which is starting its negotiation in 2005), Albania, Bosnia-Herzegovina, Macedonia, and Serbia-Montenegro, which could become candidate countries in the near future.

A fixed point of reference in this analysis is the instrumental nature of judicial harmonization, which has the role of sustaining the values and objectives of Community policies.

The characteristic features marking the development of research in comparative law are mastery of the method and awareness of the problem which must be confronted.

Every legal issue presupposes a question which is worth answering, and here the questions are many and various: what features of interaction and conflict will arise from the birth of a new European *jus commune* and the present phase of enlargement? How will the rule or legal

principle transposed into each national system be interpreted? Will legal technicalities, expressed through differing legal languages, form a barrier to harmonization/uniformization? Will legal interpreters continue to be the harbingers of differing legal attitudes? To these questions, and many more still, we intend to offer concrete data and material for consideration (provisions contained in Community acts, implementation acts adopted at national level, Court rulings, to name but a few).

Trento – Turin, April 2005

Gian Antonio Benacchio
Barbara Pasa

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This work states the law as it was up to December 31st 2004. Chapters I, II, III, V were written by Barbara Pasa (Univ. of Turin).

Barbara Pasa

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CHAPTER I

Private Law of the European Community: The Process of Harmonization, Uniformization and Unification

Key words: Integration – Enlargement – Federalism – *Acquis Communautaire* – Legal Transplants – European Community Private Law – Unification – Uniformization – Harmonization – Communitarization – Comparative Law

1. Foreword

This book is the observation of a *process,* which has been happening for several years in Europe.

This process consists of a slow but continuing affirmation of common legal rules, principles, and judicial solutions for the legal systems which already form part of the European institutions—the European Coal and Steel Community (ECSC),[1] the European Economic Community (EEC), and the European Atomic Energy Community (Euratom)[2]—and for those which are and which will become part of the European Union in the years to come.

The main actor in the process with which we are dealing is the *European Community*, not to be confused with the European Union.

2. European Union and European Community

Let us briefly recall that the Treaty of Maastricht, signed on the 7th of February 1992, has brought about profound changes to the founding Treaty of Rome, signed on March 25th 1957.

The European Union (EU) was created by the Treaty of Maastricht in 1992, which came into force on November 1st 1993. It is the expression

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[1] The ECSC Treaty, signed in 1952, expired on the 23rd of July 2002, after 50 years. The Treaty has been integrated into the Treaty on the European Union.

[2] The two Treaties were signed in Rome, on the 25th of March 1957, by the six Member States of the ECSC: Belgium, France, Germany, Holland, Italy and Luxembourg. For more detail, the reader is referred to the specialised bibliography cited at the end of this chapter and chapter IV.

of another form of cooperation between Member States of the European Community, intended to promote economic and social progress by means of concerted effort and collaboration, in the area of justice and internal affairs, as well as foreign policy.

Europe is now constructed upon the so-called *three pillars*, which constitute the European Union:

I) the first pillar consists of the pre-existing structure of the European Community, which leaves out the adjective 'Economic' in the case of the EEC, thus becoming simply the European Community (EC); the European Community is now concerned with the implementation of the common market and economic and monetary union;

II) the second concerns the Common Foreign and Security Policy (CFSP) for the development of political collaboration planned by the Single European Act of 1986 and completed by the Treaty of Amsterdam; it is governed by different rules, although the institutional framework is partly the same (Title V of the Treaty of European Union or TEU, arts. 11–28);

III) the third concerns cooperation in the area of Justice and Home Affairs (JHA) and is regulated by Title VI of the TEU. The Treaty of Amsterdam has, however, transferred some sections contained in Title VI to the new Title IV of the founding Treaty of the European Community (TEC): visas, asylum, immigration and other political issues linked to the free movement of persons. Therefore there remains only judicial and law-enforcement cooperation in criminal matters in Title VI, arts. 29–42.

The first pillar is based on the *Community method*. This expression is used for the institutional operating mode which proceeds according to a logical system of integration, with due respect for the subsidiarity principle, and has the following features: the Commission's monopoly of the right of initiative; the widespread use of qualified majority voting in the Council; the active role of the European Parliament; and the uniform interpretation of Community law by the Court of Justice.

The second and third pillars are founded on the *intergovernmental method* of operation, which proceeds according to a logical system of intergovernmental cooperation and has the following features: the Commission's right of initiative is shared with the Member States or confined to specific areas of activity; the Council generally acts unanimously; the European Parliament has a purely consultative role; the Court of Justice plays only a minor role.

The two entities (EC and EU) have their own founding Treaties, entered into by the Member States:

Art. 1 TEC: "By this Treaty, the High Contracting Parties establish among themselves a European Community."

Art. 2 TEC: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

Art. 1 TEU: "**(1)** By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union'. **(2)** This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. **(3)** The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples."

Art. 2 TEU: "**(1)** The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty; to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17; to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union, to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime; to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced

> by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. **(2)** The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community."

The methodology which we will be using in this book will not be limited to an exposition of details in the rules (which will, in any case, be considered in the forthcoming edition of *The Guide*),[3] but shall be characterized by an analysis of the mechanisms by which rules, definitions, principles and judicial decisions are integrated into the panorama of *European Community Law*.

In other words, we will endeavor to highlight not only the final result, namely the formalization of a new set of rules, but the process—which may at the same time be historical, cultural, jurisprudential, political and economic—which affirms that set of rules and in which the law-maker is only one of the actors involved.

3. The Treaty Establishing a Constitution for Europe

The process taking place as we were writing, with the publishing of a *Draft Treaty establishing a Constitution for Europe,* adopted by the European Convention (also so-called Constituent Assembly)[4] and submitted to the President of the European Council in Rome on July 18th 2003, demonstrated dynamic evolutionary changes towards a *sui generis* legal system for the Union.

At its meeting in Laeken, in December 2001, the European Council convened a Convention on the future of the European Union. The first meeting of the European Convention took place in Brussels, on the 28th of February 2002; the last one, sixteen months later, on the 10th of July 2003.

The task of the Convention was to pave the way for the next Intergovernmental Conference as broadly and openly as possible. It considered the key issues arising for the European Union's future development: how to make laws simpler and more accessible; how to make the institutional system more responsive and transparent; how the division of competence between the Union and the Member States should be

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[3] See *The Harmonization of Civil and Commercial Law in Europe,* Budapest, CEU Press 2005.

[4] *Cf.* on internet at http://european-convention.eu.int/default.asp?lang=EN. The Preamble quoted Thucydides: "Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number" (II, 37).

organized; how the division of competence between the institutions within the Union should be organized; how the efficiency and coherence of the Union's external action can be ensured; what the European citizens can expect from the Union; whether the Charter of Rights should be binding; and how the Union's democratic legitimacy can be ensured.

The writing phase of the Convention took more than a year to complete. The Draft Treaty Establishing a Constitution for Europe was submitted to the Italian Presidency of the Council of the European Union on July 18th 2003. However, the approval of the fundamental Treaty was not contemplated before a 'medium-term' period, given that, in the first place, even an individual Member State could exercise its veto over the Draft Treaty. In fact, as a consequence, the Intergovernmental Conference—opening in October 2003 in Rome—was unable to approve it. At the Brussels summit of December 2003, heads of state and government did not reach an agreement on the final text of the Constitution. Therefore, the IGC continued in 2004 under Irish Presidency and reached agreement on the Treaty only in June 2004.

The *Treaty establishing a Constitution for Europe* was solemnly signed in Rome on the 29th of October 2004 on behalf of all 25 Member States and the 3 candidate countries.[5]

This Treaty will enter into force when it is adopted by each of the signatory countries, in accordance with its own constitutional procedures: the process is called the ratification of the Treaty by the Member States. Depending on the countries' legal and historical traditions, the procedures laid down by the Constitutions for this purpose are not identical. They comprise either or both of the following two types of mechanisms: 1. the 'parliamentary' method: the text is adopted following a vote on a text ratifying the international Treaty by the State's parliamentary Chamber(s); 2. the 'referendum' method: a referendum is held, submitting the text of the Treaty directly to citizens, who vote for or against it. Lithuania was the first country which ratified the European Constitution by approval by Parliament on November 11th 2004. There may be variants or combinations of these two methods, depending on the country, or other requirements, e.g. when the ratification of the Treaty entails a prior adjustment of the national Constitution because of the content of the text. Once the Treaty has been ratified and the ratification has been officially notified by all the signatory States (lodging of the ratification instruments), the Treaty will enter into force and become effective, in principle, according to the Treaty itself, on November 1st 2006.

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[5] The text is available on the Internet at http://europa.eu.int/constitution/index_en.htm.

The entry into force of the Constitution Treaty will involve many changes in the European legal order: the earlier Treaties (in particular the Treaty establishing the European Community and the Treaty on European Union) will be repealed (Art. IV-437 Constitution Treaty); the earlier legal acts of the European Community will be replaced by new sources of law (European laws, European framework laws, European regulations, European decisions, recommendations and opinions, Art. I-33 Constitution Treaty); the Union competencies will be governed by the principle of conferral and the use of Union competencies will be governed by the principles of subsidiarity and proportionality (Art. I-11 Constitution Treaty); and the Union will have legal personality (Art. I-7 Constitution Treaty).

In general terms, what was once called "Community Law" shall probably be known as "Union Law" in the future (Art. I-6 Constitution Treaty).

However, as we mentioned above, the entry into force of the new Treaty is not contemplated before a period of two or three years has elapsed. For this reason, the legal institutions and concepts adopted in the present work refer to Community law as currently in force and the legal language used makes reference to the classic taxonomy of Community law. In some cases we will draw attention to the important changes which will be brought about in the Community legal system by the Treaty establishing the European Constitution.

4. 'European' Federalism

There are some particularly original and specific aspects concerning what is happening in Europe today, which are worth noting. One need only think, for example, that, unlike Canada or the Russian Federation, Switzerland or Germany, Mexico or the United States, the European Union is not organized on a federal basis. For example, it is not typical of federal States to bring entities together which are themselves already federal or quasi-federal in character, such as is the case, given the complex national history of the members of the European Union.

In the broadest sense, the phenomenon of *federalism*[6] refers to the division of competence between a central level (the federation) and a peripheral one (which can be fragmented into more sub-levels—States, Regions, other autonomous entities—that are all parts of the federation). It also refers to the definition of the mechanisms for allocating this competence among normative levels of vertical differentiation, such as the

[6] *Cf*. the specialised bibliography cited at the end of this chapter.

principle of conferral for exclusive jurisdiction, the principle of concurrent competence, or the principle of subsidiarity.

A consideration of both past and present times offers us famous examples of States organized on a federal basis, where in certain sectors each State of the federation preserves its own autonomy, and hence its own legislative and jurisprudential character, while in other sectors a federal supreme law forms and develops, which is read and interpreted in a federal mode.

> **Art. I, Section 8, U.S. Constitution**: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; To borrow money on the credit of the United States; To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; To provide for the punishment of counterfeiting the securities and current coin of the United States; To establish post offices and post roads; To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; To constitute tribunals inferior to the Supreme Court; To define and punish piracies and felonies committed on the high seas, and offences against the law of nations; To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces; To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; And To make all laws which shall be nec-

essary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Art. I, Section 10, U.S. Constitution: "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Art. VI of the U.S. Constitution (the supremacy clause): "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Amendment X (1791): "(…) The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Notwithstanding the existence of similar phenomena, both in modern and less recent times, European federalism arouses particular academic interest, so as to attract significant scholarly attention from the other side of the Atlantic, too.

The EU has a Constitution-in-practice (or functional Constitution), which is not subordinate to any State's Constitution: it is a dynamic corpus of rules, which consists of precedents set by the courts and other institutions, and of doctrines and principles developed partly through judicial discourse and partly through the work of scholarly commentators, politicians and others.

The Union has a formal Constitution which will soon enter into force; nevertheless, it is not a State, nor a Federal Union, it is a legal order of its own kind.

The historical evolution of the European legal system has led to an expansion of the areas of intervention by the European Community,

which has come about either through formal recognition of the new areas of competence, or by means of extensive interpretation of those already assigned to the Community.

The *principle of subsidiarity* has become manifest in fairly recent times: it is not by chance that subsidiarity began to be discussed at the same time as the introduction of exclusive and partitioned categories of competence, which were absent from the Treaty as originally conceived. The principle of subsidiarity demonstrates the political and judicial will on the part of the Community, States, and institutions to delineate in a flexible way the Community sphere of intervention, and to reserve to this sphere the issues which, by their nature or effect, are not capable of being adequately dealt with by individual Member States.[7]

5. The Last Enlargement

Another specific aspect of what is happening in Europe today is marked by the *diversity* of the legal systems of the European States.[8]

> We are not referring here only to the fact that there are States belonging to the *Common law* tradition or to the *Civil law* one. As we shall see in the following chapters, *differences* are evident also within each tradition. For example, in Civil law countries, the harmonization of legal rules is often achieved with greater difficulty within the "Romanistic," the "Germanic," or the "Nordic" legal families (to use the traditional nomenclature of René David, later adopted by Zweigert and Kötz), than among these Civil law countries and countries belonging to different legal families, like the "Anglo-American" one.

The lack of homogeneity is much more marked with respect to the federal States mentioned above; if the mechanisms which permit and determine the creation of uniform rules are not necessarily different, it is, however, true that the obstacles and problems which present themselves require greater effort and considerable compromise.

The last *enlargement*, with the entry into the Union of ten out of thirteen States (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, and Malta)[9] and the increase in the ter-

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[7] See chapter IV.

[8] *Cf.* on this debate the bibliography cited at the end of this chapter.

[9] Bulgaria, Romania, and Turkey are considered candidate countries. Only Bulgaria and Romania are bringing the negotiations to a successful conclusion, with a view to signing the Accession Treaty as early as possible. *Cf.* chapter III.

ritorial size of the EU, have raised complex questions, first and foremost at the institutional level.

Furthermore, the Commission established a new framework for closer relations between the EU and Albania, Bosnia & Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, and Serbia & Montenegro, to be developed through a progressive approach adapted to the specific situation of each country. This new context provides for a wide-ranging partnership, notably through a new category of agreements, the *Stabilization and Association Agreements* (SAA).[10]

Enlargement (the previous one, but also those in the future) mainly concerns the ex-communist Central and Eastern European Countries (hereinafter referred to as CEECs, *cf.* chapter III). The geographical connotation has no historical roots and its meaning is merely conventional. Eastern and Central Europe has never existed as a "region" endowed with homogenous traits: if a homogeneity can be identified today, this is due to the remnants left over from the imposition of a politico–social model—that of economic development from Soviet Russian origin over a period of four decades during the 20th Century. Besides this, the expression contains within itself a further division (between Central and Eastern Europe), which acknowledges the traditional proximity of Polish, Czech, Slovak, Romanian and Hungarian judicial experience to the Roman–Germanic one, in contrast, for example, to the experience of the three Baltic Republics.

The previous enlargements (Denmark, Ireland, and the United Kingdom in 1973, Greece in 1981, Spain and Portugal in 1986, Austria, Finland, and Sweden in 1995) involved a maximum of three countries at a time. The fact that the last enlargement involved ten countries makes it necessary to view the consolidation of EU institutions as an urgent priority in order to keep the specter of possible paralysis of Community mechanisms at bay. In fact, the European institutional system—originally conceived for a union of six Members—cannot be subjected to simple mechanical adjustments, if it is one day going to consist of 27–30 Members.

It is true that, thanks to the 'reinforced pre-accession strategy,'[11] the latest enlargement of the European Union has been the best prepared so far.

The reform of the European institutions was considered to be of great importance, as it would confer upon them greater powers of decision-making and render them more efficient, transparent, and flexible. It should not be forgotten that any enlargement requires suitable adjust-

[10] *Cf.* chapter III.

[11] *Cf.* chapter III, 3.5.

ment of *functional* systems within the institutions (the weighting of the votes and the composition of the Commission, for example), whereas the *role* of each institution is clearly defined in the Treaty, hence the present institutional stability will remain unchanged. This is true at least in theory; in fact, the *role* of institutions could be modified at the Intergovernmental Conference.

The latest Intergovernmental Conference—which started in 2003—worked on the *Draft Treaty establishing a Constitution for Europe,* which the Convention presented to the European Council under the Italian semester (June–December 2003). The States which had concluded the accession negotiations and signed the Accession Treaty participated in the Intergovernmental Conference, in order to proceed with substantive modifications of the European Treaties.

As we have briefly seen, the Conference had the task of examining the crucial questions posed by the future Constitutional development of the Union, of guaranteeing legal continuity in relation to the European Community and the European Union. In fact, the European Union will inherit all the rights and obligations regarding European Community and of the Union, whether internal or resulting from international agreements.

A series of important reforms of the European Community institutions were discussed well before the Intergovernmental Conference in 2003. The Conference of govermental representatives from the Member States met at Nice in December 2000, in order to modify the Treaty on European Union, along with the other founding Treaties of the EEC and connected Acts.

In 'Declaration no. 20, on the enlargement of the European Union' and in the annexed tables, as well as in 'Declaration no. 23, on the future of the Union,' the govermental representatives from of the Member States noted that, at the enlargement conferences, the Member States would have to deal with some novel concepts concerning the division of seats in the European Parliament, the weighting of votes at Council sessions, and the composition of the economic and social Committee and that of the regions. The representatives further stated that, once the Treaty of Nice had been ratified, the European Union would have achieved all the institutional changes necessary for the accession of the new Member States.

The Treaty of Nice entered into force on February 1st 2003,[12] but the institutional changes continued to be discussed until the IGC reached agreement on the Treaty establishing the Constitution for Europe in June 2004.

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[12] Ratifications are available at http://europa.eu.int/comm/nice_treaty/ ratiftable_en.pdf.

6. Economic and Monetary Integration

Another aspect of the process we are analyzing concerns the issue of economic and monetary integration. The situation is fragmentary: not all the Member States have adhered to European Monetary Union (EMU).

> The EMU is the result of the work of the 'Delors Committee,' composed of the Governors of the Central Banks, the President of the Commission, and three independent experts, which reported their findings in 1989. It is an aspect which has to do with the three Community pillars, but it functions autonomously, providing differentiated procedures and expiry dates. The main aims are to reinforce regional and structural policies by means of increasing the amount of funds, the dedication of funds to achieve pre-determined goals, and the laying down of common rules for managing the deficit in the national balance of payments. The economic union is based essentially on price stability, while monetary union is based on very strict criteria of economic convergence (inflation rates, global deficit, exchange rates, and interest rates).
>
> The first phase (from July 1 1990 to Dec. 31 1993) provided for the free movement of capital between Member States and the coordination of economic and monetary policy of the States; the second phase (from Jan. 1 1994 to Dec. 31 1998) provided for the convergence of economic policy of the Member States, the renunciation of financing the public deficit, and the adoption of rules to protect the independence of the national central banks. The third phase (beginning Jan. 1 1999) was accomplished on Jan. 1 2002 with the introduction of the single currency (Euro), which definitively replaced the national currencies as from March 1st 2002. Let us remember that it is possible to distinguish between participation in the first phase of the EMU as obligatory for all Member States, and the adoption of the Euro as the single currency. Aside participating in the EMU, the new Member States were not bound to adopt the single currency at the time of joining.

Some old Member States are not participating in the third phase of the EMU: Great Britain and Denmark by choice (they have opt-out clauses, which imply that they are not obliged to adopt the Euro), and Sweden, because it does not satisfy the convergence criteria established by the Treaty of Maastricht. These States have not joined the Euro, which, as a consequence, is not effectively the single currency of the EU. Denmark is a member of the Exchange Rate Mechanism II (ERM II). This means that the Danish krone is linked to the Euro, but the exchange rate is not fixed.

Thus, the exemptions are provided in the Protocols annexed to the Treaty establishing a Constitution for Europe. Art. 1 of 'Protocol no. 13, on Certain provisions relating to the United Kingdom of Great Britain and Northern Ireland as regards EMU,' states that unless the United Kingdom notifies the Council that it intends to adopt the Euro, it shall be under no obligation to do so. A similar exemption is provided for Denmark in Art. 1 of 'Protocol no. 14,' in view of the notice given to the Council by the Danish Government on November 3rd 1993 of its intention not to participate in the third stage of EMU. The effect of the exemption shall be that all provisions of the Constitution and the Statute of the European System of Central Banks and the European Central Bank referring to a derogation shall be applicable to Denmark.

Despite participating in the EMU, the new Member States are not bound to adopt the single currency at the time of joining the European Union. In fact, they are discouraged from adopting the Euro prematurely, which could be extremely counterproductive. Once they have become Member States, they benefit from a waiver of rights and duties provided by Art. 122 TEC, sanctioned by the Treaty of Accession (art. 4), which allows them to continue to use their own national currency while still being Members of the EMU. In particular, Art. 4 of the 'Protocol no. 9 (annexed to the Treaty establishing a Constitution for Europe) on the Treaty and the Act of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic' provides that each of the new Member States shall participate in EMU from May 1st 2004 as a Member State, with a derogation within the meaning of Article III-197 of the Constitution.

From the Treaty of Amsterdam onwards, rules have in fact been laid down which provide for so-called '*closer cooperation,*' also defined as 'variable geometry,' by which it is possible for only some States to put into place actions at the Community level. In practice, the Member States adhere to a central nucleus of policies and actions which ensures the continuance of a single structure, while with regard to other sectors each State can decide whether or not to participate, and if they do, the level of intensity in their participation. As a result of this process, one can trace a differentiated integration, based on the driving force of certain Member States. Closer cooperation enables the most ambitious Member States to increase that cooperation between themselves, while leaving the door open to other Member States to join them at a later stage.

As things stand, therefore, it is possible to think that the CEECs, Cyprus, and Malta could join the third phase of the EMU (the single currency) in

the medium term, participating in the Euro zone on condition that they proceed with macroeconomic stabilization, structural reforms, and the reception of the complete package of *acquis communautaire*.

7. The Acquis Communautaire

Conventionally, this expression means the collection of decisions from the European Union, which are of a standardizing, political and legal nature, adopted during the various phases of European integration, which new Members are obliged to accept at the moment of joining.[13]

The *acquis communautaire* is constantly evolving and consists of principles, political objectives, and provisions of the Treaties, of legislation adopted in applying the Treaties; of the judicial precedents of the European Court of Justice; of the declarations and resolutions adopted within the framework of the Union; of acts which are part of foreign policy and common security; of acts which are part of justice and home affairs; of international agreements made by the Community, and of agreements made by Member States with one another in the sector of competence of the Union.

The *acquis communautaire* is one of the principal requisites that the candidate countries must satisfy, according to the requirements of the European Union. To achieve the status of a Member State implies acceptance of *acquis communautaire*—the legal heritage of the European Community, that is, all the actual and potential rights and obligations of the Community system and its institutional framework—in such a way as to safeguard what has already been achieved since the 1950's to the present day, in accordance with article 3 of the Treaty of the European Union:

> **Art. 3 TEU: "(1)** The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*. **(2)** The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers."

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[13] *Cf.* "*Community Acquis,*" in *Glossary: Institutions, policies and enlargement of the European Union,* at http://europa.eu.int/scadplus/leg/en/cig/g4000.htm.

The institutional and administrative capacity of each of the candidate countries to implement the *acquis communautaire* within the borders of the national state from the earliest moment of joining and during the process of negotiations before, constituted the central problem in preparing for enlargement. The countries which joined the Union at the previous enlargement (Austria, Finland, and Sweden) had, in fact, already incorporated a large part of the *acquis* as they were already Members of the European Economic Area (EEA), the Agreement signed on the 2th of May 1992, negotiated between the Community and seven Member countries of the European Free Trade Association (EFTA).[14] It is clear that the last enlargement dealt with a challenge far greater than that involved in the previous enlargements. Connected to this, is the qualitative and quantitative breadth of Community law to be incorporated.[15] As it did at the time of the previous enlargements, the European Council ruled out any possibility of *partial adoption of the acquis*, being of the opinion that to postpone the solution of the problem could create new and ever more serious difficulties.[16]

The European Union intended to guarantee that the last enlargement (to include eight of the CEECs, Malta and Cyprus) would strengthen new relationships with countries bordering on them and beyond, in particular with all the countries which, in the past, have been part of the Soviet Union. From the point of view of the European Union, the last enlargement would produce economic benefits in terms of the expansion of the single market, extension of the process of integration, and strengthening of the political position of the EU on the world stage.

In this extremely important political and legal context, the phenomenon which we shall be examining is not exhausted by an elaboration of new legal rules, be they supranational, Community, or conventional ones. It involves—and it could not be otherwise—both the legislative activity of the European Community, as well as the activities of judges, legal scholars and interpreters, professionals, advisers, businessmen, and whoever find themselves using, directly or indirectly, the new legal instruments designed by the (various) institutions of the Community.

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[14] EFTA was founded in 1960, as an alternative to the emerging Common Market. After the past enlargement (the aforementioned entry in 1995 of Austria, Sweden, and Finland into the European Union), EEA now includes only the EFTA countries remaining: Iceland, Norway, and Liechtenstein.

[15] *Cf.* below chapter III, and the second volume of the *Guide: The Harmonization of Civil and Commercial Law in Europe,* cit above.

[16] *Cf.* European Commission: *Agenda 2000,* Vol.1: *For a stronger and wider EU,* p. 47, Luxembourg, Office for Official Publications of the European Communities, 1997. The full text of this original document is also available on the Internet at www.europa.eu.int/comm/agenda2000. *Cf.* below chapter III, § 3*c)*.

Indeed on closer inspection, the fact itself of the production of law, whether at Community level in the form of Regulations and Directives, or at Member State level in the form of legislative provisions and regulations designed to implement European Community law, does not provoke as much interest as that aroused, on the other hand, by a whole series of other events and circumstances connected at an informal level with the production of law. The observation of this latter level offers considerable material for reflection.

8. The Dynamics of Legal Transplants

We are referring here, in the first place, to the huge phenomenon of the *diffusion (or circulation, or transplant) of intra-Community legal models*, by which a *legal system*, characteristic of a Member State, is adopted by the Community and then, in its turn, by other Member States.

> 'Legal system' is a multi-semantic expression:
> *a)* at the macro-level, a *legal system* may be defined as the set of legal rules and institutions of a country; the expression refers to projects of mapping the laws of all the countries of the world, using taxonomies based upon key distinguishing features (historical background, sources of law, ideology, etc.). So we study the French legal system, the German legal system, the Italian legal system or the Chinese legal system, and so forth. According to the taxonomy one wishes to adopt, such systems can be grouped within different 'legal families' as suggested by R. David (we have the Romanistic legal family, the Germanic one, the Nordic legal family, the Anglo-American legal family, and so on) or within different 'legal traditions' as suggested by H.P. Glenn (Chtonic Legal Tradition, Talmudic Legal Tradition, Civil Law Tradition, Islamic Legal Tradition, Common Law Tradition, Hindu Legal Tradition, Asian Legal Tradition);
> *b)* at the micro-level, the expression *legal system* leaves aside the borders of the national States and may be referred to different fields of law (family law, property law, tort law, contract law, and so on), within which legal rules and institutions, produced by every law-making source (by customary law, written law, judicial precedent, the Constitution), are organized in a systematic and coherent way. In this paragraph we use the expression with the latter meaning.

We are also referring to the diffusion of legal rules or institutions deriving from the legislature (in Continental Civil law countries), or from an appellate court judge (in British Common law) of a particular State, in a

certain field of law, which then pass into the legal sources of the Community and yet again circulate into the law of another Member State.

> This 'diffusion/transplant/circulation' of legal models is conceived as a battle-ground of competing sources, where different types of 'legal formants' compete. A *formant* can be a type of either institution (the provisions contained in legal acts or Codes, the *ratio decidendi* contained in a court ruling, general principles, etc.) or legal actors (practitioners, lawyers, law-makers, legislators, judges or upper level of administrations, and legal scholars such as law professors) involved in the law-making process considered as a social activity. According to R. Sacco, *legal formants* are all those formative elements that make any given legal rule (statutes, general propositions, particular definitions, reasons, holdings, customs, usage, etc.). All of these formative elements are not necessarily coherent with each other within each system. See *infra* § 14 this chapter and chapter II.

We are referring, secondly, to the *borrowing of legal rules, institutions or a whole legal system from extra-Community models*, through the mediation of the European Community institutions and processes, and to other aspects connected with the supranational production of law, such as the competition between highly sophisticated theories of interpretation, the competition in legal debate as to the technical pattern upon which to construct the rule, and as to different strategies of self-legitimization. We are referring to the formation of legal doctrines (and mentalities) which are progressively less municipal and more trans-national, and also to the process of (so-called) '*Communitarization*' of the laws of Member States,[17] and to the greater or lesser awareness of what is happening in Europe.

In the third place, we are referring to the reception of the *acquis communautaire* by the candidate countries during the last enlargement, which happened spontaneously because of the prestige that the model on offer enjoys, but at the same time it was imposed in the sense that any other possible alternative was denied. In other words, we are referring to the repercussions which the European Community unification, uniformization or harmonization, may have upon the new Member States or the other European States which do not yet form part of the Union.[18]

Finally, we are referring to the influence of all these described dynamics, both upon general principles and definitions, and upon each legal

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[17] See below this chapter § 12, and chapters II and VI.

[18] See below, this chapter and chapters II and VI.

system, and to the use of comparative legal studies for a critical knowledge of legal rules and concepts.[19]

Now, in light of the considerable development which the study of this subject has undergone in recent years, one may be forgiven for asking whether so much interest is truly justified. In other words, one could ask why, given that the European Community has existed since 1957, it is only in the last ten years that European Community Private Law has become so fervently discussed. Is it a new, trans-national, European, Community-based approach which is influencing the research methods of so much of academia, both European and otherwise, or is it an objective change which concerns the subjects of European Community competence?

A balanced response cannot ignore the fact that a new mentality is increasingly felt, not simply a legal one, but also an economic, entrepreneurial and cultural one, which crosses national boundaries and inclines the jurist to consider legal rules, institutions, judicial solutions, and contractual practices, not just from a European perspective, but also a global one.

On the other hand one cannot conceal the fact that it was only in the second half of the 80's that the Community stopped occupying itself exclusively with economic planning, milk quotas, the number of cattle for slaughter, agricultural production etc., and began to concern itself with issues that, until a short time before, appeared to be reserved to the exclusive jurisdiction of nation States: issues considered to be outside the ambit of Community rule-making, as being too technical, too legalistic, too tied to the traditions of each state's governance.

Legal rules governing private law have been introduced, ones that are no longer solely concerned with the theme of competition[20] (forbidding restrictive practices, control of the abuse of a dominant position by firms in the market place, antitrust legislation), which in fact was only of concern to huge, Community-sized businesses. These new legal rules represesnt new and uniform legislation which concerns all businesses, large, medium, and small, or else which concerns all natural persons, even those who undertake no business activity whatever.

This new legislation in the field of commercial and civil law is nothing more than the consequence of launching a single European market. It concerns the first practical, concrete, and effective reflections of the

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[19] See below, this chapter and chapters II and VI.

[20] Competition may be considered a classic theme of Community law, given that the relevant discipline was introduced by the Treaty of Rome, since 1957: see the second volume of the *Guide,* cited above.

Maastricht agreements, which have provided the definitive momentum to leave behind the preliminary phase and move on with the implementation phase of the European Union.

It is important not to overlook the fact that the new European internal market is attracting the commercial interest both of companies in Member States and companies in heavily industrialized countries outside the EU, such as Japan and the United States. This gives rise to the need for creating a market whose Member States are able to compete both with other Community enterprises and those from outside. In a true single market, founded upon free competition, all different economic subjects (individuals, entrepreneurs and commercial companies), while belonging to differing legal systems, should be put on the same level and be able to compete in the market place on equal terms.

For these reasons the Member States should overcome traditional protectionism, since this may present an obstacle to the internal market, or in any case encourage unfair advantage for national businesses over other Community ones.

Hence the need to unify legislation of the Member States and that of the new Members after the last enlargement, or at least to harmonize their different laws.

Naturally not all the laws, nor the entire body of law in all its complexity, require harmonization, only those necessary to build a common and uniform base, with the aim of creating a level playing field for those who operate in the internal market. In this sense one can refer to the '*Communitarization*' of the law, meaning the work of bringing domestic law in line with Community law, adapting the internal legislation to suit that commonly used in the majority of other countries, or which the Community has chosen as uniform regulations.

For all these reasons one can plausibly argue that the great interest in European Community Law at present is the result of a combination of at least two events, each closely connected: on the one hand the increase in subject-matter for the harmonization process, and on the other, the affirmation of a new, trans-national legal mentality.

9. Defining 'European Community Private Law'

What do we mean by private law of the European Community?

There is not an easy answer, in the sense that the phrase lends itself to differing interpretations. In fact, everything turns on a series of premises.

If we say, by way of a cultural debt to our training as lawyers under a domestic system of law, that the private law of the European Community is defined as *a collection of laws in force within the European Com-*

munity legal system, which determine legal relations between private individuals,[21] we are offering only a partial, incomplete view of the phenomenon because we are ignoring those aspects regarding the fundamental activity of compliance, implementation, and enforcement of the Community directives by the legislature and judges within each Member State. This activity, among other things, does not consist of a total, unconditional adaptation; on the contrary it is true that (more or less voluntarily) national peculiarities persist.

To focus more closely on the expression 'European Community Private Law,' one point must be initially clarified, and it is in our view fundamental, though it is often ignored. We are referring to the distinction to be made among the processes, which concerns not only the EC level, but also other international levels (and, for example, the Conventions promoted by those organizations), of:

– *unification*.
– creating *uniformity*.
– *harmonization* of the law.

For the purpose of *unification* of EC law and the national laws, it is not sufficient for the legal rules to be produced by a single legislative organ, on which the States have conferred law-making powers, but it is necessary that there be judicial activity carried out by a single hierarchy of judicial officers, so as to guarantee a homogeneous interpretation and application of the laws.

Uniformity at European and national levels, on the other hand, occurs when legal rules are produced by a single supra-national legislative organ, but their implementation and hence interpretation is left to the judicial hierarchy of Courts in each Country; or else when the rules produced by each Member State are equal to one another, as established by convention, but their application is, however, left to be diversely interpreted by Courts in each State.

Finally, *harmonization* occurs every time it is established that the legislation of each Member State is aligned to the EC law in the internal market, and it can vary from minimum to maximum (close to uniformity) harmonization. Member States are permitted to apply variations of greater or lesser dimension, but never such as to overturn the basic model.

All three types described above are to be found in the ambit of European Community Law.

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[21] According to the definitions of 'legal order' and 'private law' derived from the most traditional and dogmatic (continental) approach to private law.

There will be real and proper *unification*, for example, whenever the rules of the founding Treaties, or the legal rules which make up the secondary legislation, are subject to application by the Commission.

> Secondary legislation is based on the Treaties and implies a variety of procedures defined in different articles thereof. In the framework of the Treaties establishing the European Communities, Community law may take the following forms: Regulations, Directives, Decisions, Recommendations, and Opinions. Primary legislation includes in particular the Treaties and other agreements having similar status. Primary legislation is agreed by direct negotiation between Member State governments. These agreements are laid down in the form of Treaties which are then subject to ratification by the national parliaments. The same procedure applies for any subsequent amendments to the Treaties. See below, chapters IV–V.

There will also be unification whenever those rules are subject to judicial control through interpretation by the European Court of Justice (ECJ).

The system of preliminary rulings, according to the meaning of art. 234 TEC (before the Treaty of Amsterdam, it was art. 177), while not setting up any hierarchical relationship, has institutionalized cooperation between the Court of Justice and the national courts.

In cases involving Community law, national courts—if in doubt as to the interpretation or validity of that law—may, and in some cases, must, seek a preliminary ruling from the Court of Justice on the relevant questions. For example, articles 81 (formerly art. 85) and 82 (formerly art. 86) TEC are subject to the jurisdiction of the Commission, in the sense that it falls to that body to establish if there have or have not been violations on the part of businesses and, as a consequence, to apply sanctions; the appeal of the Commissions decision is referred to the ECJ, under art. 230 (formerly art. 173) TEC.

> The jurisdiction of the ECJ will no longer be exclusive, although shared with the European Court of First Instance for some preliminary decisions recognized by the Nice Treaty, which has reformulated article 225 (formerly 168A).
>
> Under the new Article 225 (1) TEC, the Court of First Instance is the court of general jurisdiction at first instance not only for actions brought by individuals and undertakings, but for all the direct actions referred to in the first sentence of Article 225(1). Within that framework, those exceptional cases in which the Court of Justice retains exclusive jurisdiction must be justified by particular circumstances.

> **Art. 225 TEC** "**(1)** The Court of First Instance shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding. Decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute. **(2)** The Court of First Instance shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the judicial panels set up under Article 225a. Decisions given by the Court of First Instance under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected. **(3)** The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute. Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling. Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected."

Uniformity, for instance, occurs when EC Regulations are adopted or else a Convention between the Community Member States is adopted, but they are interpreted by the judges of the national courts only.

Finally, *harmonization* occurs when EC Directives are adopted. These do not necessarily contain uniform rules (except, perhaps, directives which are sufficiently precise and unconditional), but are limited to indicating the final result to be achieved; each State therefore must ensure that implementing legislation is enforced, in the same way as it must provide for their interpretation and application by means of its own judicial system.

Returning to the issue of defining the subject, it is clear that the definition of EC Private Law can alter according to the efficiency of the individual item of Community legislation, and hence, to greater or lesser effectiveness to be attributed to the laws produced by EC institutions.

In other words, to hold that the private law of the European Commu-

nity is the manifestation of a collection of laws which govern legal relations between private individuals, could be meaningless where account is not taken of the fact that, in some cases, the law produced by the EC institutions, when it lacks a truly binding character (which only Regulations have, art. 249 TEC, *ex* art. 189), is not adopted at all within the State or is adopted only partially, or by only some of Member States. The fundamental activity of compliance, implementation, and enforcement of the Community Directives by the legislature and judges within each Member State is a relevant part of what we call EC Private Law.

For this reason the effectiveness of EC law may be limited to only some territorial areas. Furthermore, the process of complying with EC requirements is not always correctly carried out, and hence EC law and national provisions for implementation may not coincide. The fact is that if we recognize proper European Community rules for private law as being only those which are made effective in individual Member States by means of implementation (and hence only what has became domestic law), the consequence is that we do not attribute any efficacy to the rules produced by the European Community as such.

This method of approach therefore excludes from EC Private Law all the rules contained in the directives, which, it should be said, are the most important part of the harmonization activity carried out by the EC in the ambit of private law.

If one thinks of the fact that there has been a tendency, in recent years, to confer upon certain kinds of directives (those not yet implemented, but sufficiently precise and unconditional) direct effect within the legal systems of the Member States, it follows that limitations of this kind to the definition of our subject would be completely inadequate.[22]

Not to mention that the fundamental activity carried out by the European Court of Justice would not be taken into consideration: the formulation of fundamental principles of EC law through study and comparison of national legal systems, or the creation of legal rules by means of interpretation, a function which is specifically given to it by art. 234 (formerly art. 177) TEC.[23]

We must therefore think of a different definition, a wider one, which takes into account of all these details and which is able to adapt to the various aspects which supra-national creative law-making assumes, embracing the work of unification, uniformization and harmonization.

The former Treaties, based on international law, have created an institution—the European Community—that is a center endowed with a cre-

[22] See below, chapter V.

[23] See below, chapter II.

ative law-making capacity. In its turn, this institution has created its own directly applicable law and has promoted, with binding rules addressed formally to the States, a further law enhancing uniformity and harmony in individual areas.

We will be considering one law and another: all those rules which affect private parties, formulated by the EC legislature and elaborated by the European Court of Justice, whether they impose rights and obligations immediately and directly on private individuals, or if they are addressed to Member States in such a way that the latter are bound to confer rights and obligations on private individuals.

10. Unification and Uniformization of the Law

Sometimes, in legal literature or at conferences or study meetings, especially the sort which conclude with a resounding endorsement of common European law, EC law is presented as the emblem of a possible unification of the law of Europe in the 21st century.

Hope is often expressed that there will be more decisive intervention by the EC institutions in favor of greater uniformity, with the stated aim of creating the basis of an effectively united Europe, to facilitate the exchange of goods, people and ideas, and to ease commerce between states. To our way of thinking, such statements seem vague unless subjected to a more complex analysis.

To begin with, even before the creation of the European Community, whenever international trade met an obstacle due to the difference in laws, it was able to resolve the *impasse*: the development of the *lex mercatoria* is the most evident and characteristic proof.

Differences do not present obstacles to international trade; at the most they cause technical problems to arise as well as many other, perhaps more easily solvable issues (for example, using techniques of choice of law in the field of international contracts) with respect to those which may occur from using an obligatory, binding, and obscure national legal system, conceived and designed to resolve issues profoundly different from those which may arise in the ambit of international trade.

In the second place it is worth noting that the European Community has not often manifested the intention, at least in the ambit of private law, of unifying the laws of the Member States, nor of those who have just joined the EU or will soon be joining. The Regulations, Directives, and new rules, or institutions which have been developed have rather, for the most part, been directed towards harmonization of the rules, as seen above, than to their uniformization or unification.

Among the most famous examples of unification, remembering some

legal concepts worked out by convention and inserted into the founding Treaty in 1957, one can think of the *concerted practices* which may affect trade between Member States and the *abuse of a dominant position*. At other times, on the other hand, it concerns ideas introduced by Regulations or Directives—one can think of *merger control* contained in the 1989 Council Regulation and in the 1983 Council Directive on consolidated accounts. Yet another type might concern concepts or ideas which are not spelled out in the legal sources, but have been developed by Community jurisprudence and European Community Courts (the ECJ and the Court of First Instance), often in close collaboration with the Commission—for instance, that of *undertaking* which does not correspond with that formulated within Member States.

Not to be confused with the examples given above is what can be observed in relation to ideas and concepts such as *Community dimension*.

In these cases, the ideas are unified only because they have a content which is mathematically predetermined and numerical, hence they are necessarily uniform for all the Member States, but none has anything to do with real and proper unification of the legal concepts mentioned in the text. One thinks in this sense, of the idea of *Community dimension* formulated by the 1989 Regulation on the control of concentrations between undertakings: there is a Community dimension when the combined aggregate world-wide turnover of all interested undertakings is more than 5000 million ECU, and the aggregate Community-wide turnover of at least two of the undertakings is more than 250 million ECU, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

In all the cases described above,[24] we may indeed speak of the *unification of legal concepts*, not just because there is a common central organ —the Council or the Commission, which develops new ideas or assigns a single meaning to a particular concept—but also because there is a particular structure of judicial bodies, which ensures the uniqueness of interpreting definitions and concepts in tune with the European Community, and ensures the uniform application of the operative rules. Besides, the new ideas and uniform concepts, once awareness of their Community matrix is affirmed, will be interpreted in harmony with EC law by the national judges of the Member States (old and new) and of those about to join, which will necessarily have recourse to the interpretation accepted by the EC institutions.[25]

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[24] See also the second volume of the *Guide: The Harmonization of Civil and Commercial Law in Europe,* chapter VI.

[25] See below chapters IV–V.

In other words the unification of concepts, when it takes place directly at Community level, is also nourished by the activity of the same Member States which, referring more or less explicitly to the ideas developed by EC institutions, aid their acceptance and strengthen the capacity to be accepted.

The *unification of operative rules* is a different phenomenon.

Those rules represent how the issue would be resolved by case law in a given legal system. The attempts at a unification of the operative (known as working) rules are not common at the international and supra-national level. The reasons are evident if one thinks of the fact that among European legal systems, *different operative rules* derive from the *same legal concepts* as in the way the *same operative rules* are foreshadowed by *differing legal concepts*.

The distinction between operative rules and legal concepts (i.e. *symbolic sets of rules)* implies that it is necessary to *deconstruct* the law beyond the peculiar legal discourse of one legal system in order to reach the working level. The phenomenon is explained through the theory of *legal formants*, which are all those formative elements that make any given legal rule (statutes, general propositions, particular definitions, judgments, reasons, holdings, customs, usage, etc.).[26]

All of these formative elements are not necessarily coherent with each other within each system. Only domestic jurists assume such coherence. To the contrary, legal formants are usually conflicting and can better be pictured in a competitive relationship with one another. Thus, within a given legal system, the rules are not uniform, not only because one rule may be given by case law, another by scholars, and yet another one by statutes. Within each one of these sources there are also formants competing with each other. For example, the rule described in the head-notes of a case can be inconsistent with the actual rationale of the decision; or the definition contained in a provision of the Code can be inconsistent with the detailed rules contained in other provisions of the Code itself.

Basing their analysis on these two levels (on *symbolic sets of rules* and *operative rules*), some legal scholars in comparative law have concluded that—among European countries—the operative rules diverge from one another less often than the concepts.[27]

In effect, the international Conventions tend to unify the individual rules rather than the corresponding concepts: for example, the *Vienna*

[26] *Cf*. above § 7, this chapter.

[27] *Cf*. below § 14, this chapter.

Convention of 1980 on Contracts for the International Sale of Goods[28] does not unify the concept of *breach of contract* (every case in which the performance is in fact rendered falls short in some way of what was promised in the contract). Under art. 30 CISG, the vendor is obliged to deliver and to pass title in goods which conform to the contract, along with the accompanying documents. If the vendor delivers goods which do not conform to the contract (if he delivers too much or too little, too early or too late, etc.), this is a breach of contract which entitles the purchaser to exercise the rights provided by art. 45, including the right to claim damages. Despite the theoretical differences in all legal systems, the practical results in this case are the same.

The unification of rules and concepts, which is presently hoped for at the Community level, cannot exclude the creation of trans-national legal scholarship. The hope for more intense activity respecting *uniformization* of the law on the part of the Member States and *harmonization* of the law on the part of candidate countries by means of the acceptance of the *acquis communautaire*, cannot obscure another fact: the necessary development of training for European lawyers who are able to speak with other lawyers and work in European teams, critical and active in following the frenetic changes in present day law, as a large part of academia has highlighted.

It will not therefore, be sufficient for a particular document to be approved, more or less capriciously, by a group of ministers meeting at the Community level as representatives of the Member States. The laws will be rendered uniform when a uniform interpretation of them is developed. It will be necessary for a common legal mentality to grow, on the part of judges, academics and officials employed in the legal sector in all the States concerned. Only in this way can certain rules outlined in the supra-national document become uniformly applied rules.

11. Harmonization of the Law

The road most frequently traveled in recent years, however, is the one towards harmonization of the rules in force in the Member States, which happens principally in two ways. Above all by the revision of existing

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[28] The UN Convention, signed in Vienna on 11th of April 1980, was ratified by all the member States of the Union and also the countries about to join, beginning with the ratification by Hungary in 1983, to the ratification by Lithuania in 1997. The list of countries is to be found on the Internet at the following address: http://www.jus.uio.no/lm/un.conventions.membership.status/un.contracts.international.sale.of.goods.conventions.1980.chrono.html The text of the CISG is available in internet at: http://www.uncitral.org/British/texts/sales/salescon.htm.

rules in the various systems, endeavoring to "smooth out" the differences and bring solutions closer. In the second place by proposing a new model which leans towards some legal systems within the European Community itself or to external systems. As we will see, the latter has proved itself very effective, since the mentality of this mixed model, based on various factors such as prestige and efficiency, can favor its acceptance more readily than a model which represents a particular Member State's cultural dominance, and which could generate suspicion as much as its imposition upon European partners.

All this is also demonstrated by the fact that the European Community has adopted the strategy of *minimum harmonization*, that it is to say essential harmonization, just sufficient to eliminate those differences which could make rules and judicial solutions between Member States too hard to reconcile. The differences have to be reduced because they represent a disparity of treatment between businesses, according to the place where they operate and have their head office, and are in clear contradiction with the aims of the internal market.

By the expression *minimum harmonization* we would wish to emphasize other characteristics of the phenomenon as well, which are linked to EC activity. Harmonization activity proceeds in a manner which is hardly organic; it is fragmentary and usually incomplete, as well as partial.

Fragmentary, since it is not aimed at entire institutions, but at single objectives.

Incomplete, because it leaves undecided and unchanged issues which are sometimes closely connected with those subject to harmonization.

Partial because the new legal rules do not always replace the old; the latter do not get removed from the legal system of the individual State, but are left to coexist alongside the new ones, creating potential dualism and uncertainty.

This method of intervention on the part of the EC legislature, constrained to maneuver among the various requirements of Member States in order to reconcile these with those of a huge internal market, can only result in a low level of systematic organization with regard to EC private law, which the interpreter must remedy.

The judges of the Member States are more often required to apply laws whose rationale derives from purposes and interests which transcend national borders and with which they are by now familiar. Due to the lack of technical, legal, and cultural expertise, they do not hide their perplexity and uncertainty, and show evident unease at giving judgments 'in harmony with the European Community law' or 'in the light of European Community law.'

In this sense the present book makes a contribution to explaining the

incoherent nature of EC sources of law, which is due to the plurality of historical, authoritative, and formal sources, by reordering the mass of directives, regulations, rulings, and decisions of the EC institutions and organs. The second volume, *The Harmonization of Civil and Commercial Law in Europe,* then deals with the implementation of EC law in Member States, with national judgments and practices, and with the legal discourse in (mainly European) literature which analyzes and explains the new rules and solutions proposed by the European Community.

The present approach to the harmonization of law has been questioned for some years. The necessity for more insistent European Community action (with respect to that taken up to now) emerges, for example, in the field of contract law.

In the Communication by the Commission to the Council and European Parliament regarding European contract law of July 11th 2001, the Commission posed the question of whether the harmonization of contract law could create distance (or in any case confirm the differences) between the national laws of the Member States, for example on the theme of executions of cross-border contracts, or if it could lead to a non-uniform implementation of EC law or national measures of accepting it, such as obstructing functions of the internal market. The answer was that harmonization of the law is not enough and the co-existence of different national contract laws hinders the functioning of the internal market; thus, the Commission asked which option would be the most appropriate to solve such a problem. Among the possible options, was the adoption of an overall text comprising provisions on general questions of contract law as well as specific contracts, i.e. a European Contract Code (option IV), or to leave the solution of any problems to the market (option I). Other options were to promote the development of non-binding common contract principles, i.e. an Optional Code (option II), and to review and improve existing EC legislation in the area of contract law, i.e. a Common Frame of Reference for contract law (option III).

> *Communication by the Commission to the Council and European Parliament regarding European Contract Law*, 11/07/2001, COM (2001) 398 final. The Commission document proposed—beside the objective of solving inconsistencies in European contract law—of involving in an official debate not only the Community institutions, but also the national ones, not only judges and lawyers, but the universities, business, and consumer associations, with the goal of codifying private Community law.
>
> The Commission adopted the same strategy in successive documents, mainly in the field of consumer protection: see the *Green*

Paper on European Union Consumer Protection, Oct. 2nd 2001, COM (2001) 531 final; the Commission's *Follow- up Communication to the Green Paper on EU Consumer Protection,* Jun. 11th 2002, COM (2002) 289 final. *Cf.*

To avoid the malfunctioning of the internal market, the European Commission in the further Action Plan of February 12th 2003 insisted, from among the potential strategies, on the possible adoption of a 'new legal instrument at Community level,' which may ensure coherence in preparing drafts of Community legislation and later on in implementation and application of the law in the Member States, alongside the promotion of common, non-binding principles and the revision of existing EC legislation in the field of contracts. Moreover, the Action Plan set out specific plans for consumer protection in line with the Consumer Policy Strategy 2002–2006.

In particular market sectors, the Action Plan 2003 suggested the adoption of the *Common Frame of Reference* (CFR), which is not a legally binding instrument (at least at a first stage). It will provide for a set of definitions of legal concepts and specify relationships between definitions, which may (or may not) coincide with compromise concepts or definitions already existing in European national legal systems. The Commission outlined how the CFR will be developed in order to improve the coherence of the European existing *acquis (Acquis communautaire)*, the uniformity of interpretation, and reasoning with legal concepts. It will have to supply a set of principles and doctrines to provide the courts with something equivalent to the national codes of Civil Law countries, in order to ensure coherence. The courts should be able to rely upon the CFR as a source of 'determinacy in meaning.'

In other words, the work on the CFR seems to be, essentially, the development of a new *Grundnorm* for private law in Member States. The courts must presuppose a new source of meaning and validity for regulatory laws emanating from the Union, and at the same time, this regulation has to be integrated in existing private law systems. In this Action Plan the Commission is proposing a new legal vocabulary: the emphasis in the idea of a CFR imposed upon the definition of legal concepts is central to a codified system of legal reasoning. The system cannot work without this precision in legal concepts. Therefore, despite its protestations to the contrary, the CFR looks like a proposal for a European Code; it appears to serve the same function as a 'European Contract Code' under another name, as some commentators have pointed out.

The second measure suggested is the promotion of EU-wide use for *Standard Terms and Conditions* (STC) by private parties in business-to-

business transactions, as well as in contracts between the business sector and the government.

The third task included in the Action Plan is to examine further whether more general legislative measures are needed, such as an *Optional Code of General Contract Law* that would provide a modern set of rules suitable for cross-border transactions, to be selected as the choice of law by the parties in contract.

> *Communication from the Commission to the European Parliament and the Council "A more coherent European Contract Law—An Action Plan"*, 12/02/2003, COM (2003) 68 final; see also Council Resolution on *European Contract Law*, 10/10/2003, OJ., C 246, 14/10/2003.

In its last Communication of October 11th 2004, the Commission sets out the timetable for the preparation and criteria on elaborating the CFR. The Commission envisages that preliminary research work for the CFR will be commissioned and funded within the Sixth Framework Programme for research.[29] By 2007, the researchers are expected to deliver a final report which will provide all the elements needed for the elaboration of the CFR by the Commission. These researchers should aim at identifying the common fundamental principles and best solutions, taking into account national contract laws (both case law and commercial practices), EC *acquis,* and relevant international legal act, such as the Vienna Convention on Contracts for the International Sale of Goods (CISG) of 1980. The existing principles (freedom of contract, binding force of contract, legitimate expectations, etc.) would be completed by a set of definitions for key concepts (contract, information, damage, good faith, document, etc.) and supported by model rules mainly in the field of consumer contracts (conclusion of a contract, form of a contract, contents and effects, validity, interpretation, etc.). The adoption of the CFR is foreseen for 2009. According to the Commission, the CFR can play different roles: it could be used by national legislators when transposing EU directives in the area of contract law into national legislation; when enacting legislation on areas of contract law which are not regulated at Community level; in arbitration—to find balanced solutions and resolve conflicts arising between contractual parties; in developing a body of

[29] The Decision no. 1513/2002/EC (O.J., L232, 08/29/2002, p. 1) set out that the Commission will finance three years of research under the Sixth Framework Programme in order to ensure the high quality of the CFR.

standard contract terms; finally, it could be used in addition to the applicable national law.

Concerning the more general legislative measures—the Optional Code on general contract law and certain specific contracts—the Commission takes into consideration the respondents' position to the debate launched with the Action Plan 2001 and supports the *'opt in'* model, a purely optional model which would have to be chosen by the parties through a choice of law clause. It should cover business-to-business transactions as well as business-to-consumer contracts, with two consequences. Firstly, the introduction in the optional instrument of mandatory provisions concerning consumer protection, in the meaning of arts. 5 and 7 of the Rome Convention represents a great advantage: the parties, by choosing the optional instrument as applicable law to their contract, would know —from the moment of the contracts conclusion—which mandatory rules are applicable to their contractual relationship. Secondly, the introduction of the business-to-business transaction within the scope of the optional instrument raises the issue of coherence and compatibility with the Vienna Convention (CISG). If the optional instruments take the form of an 'opt in' measure, by choosing the optional instrument as applicable law to their contract, the parties would have tacitly excluded the application of the CISG on the basis of art. 6 CISG.[30] This Optional Code would give parties the greatest degree of contractual freedom. It could take the legal form of a Regulation.

In its Communication 2004 the Commission clearly states that its intention is not to propose a 'European Civil or Contract Code.'

> *Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward*, 11/10/2004, COM (2004) 651 final.

The moment to move on with *uniformization* of the law in the sense set out above (at least in the field of contracts) seems to have arrived.

12. Effects on National Laws

The most immediate effects of the activity of EC institutions are also the most obvious, most emphasized, and best known. These consist of the introduction of new rules and solutions into national legal systems,

[30] "The parties may exclude the application of this Convention or, subject to art. 12, derogate from or vary the effect of any of it provisions."

which sometimes overturn the pre-existing rules (see for example the rules on the single-member private limited liability company) of new forms of association (as, for example the European Economic Interest Grouping or the European Company) to relatively recent topics (such as consumer protection).

To understand these consequences, which we shall call *immediate effects*, one merely has to read a regulation, a directive, or a national implementation provision. In this way, by reading the Council Directive no. 85/374 on the liability for defective products, or the Council Directive no. 87/102 on consumer credit, or all the numerous other ones on the subject of commercial company law, insurance law, etc., it is not hard to realize which and how many new solutions they have imported into each national legal system.[31]

There are other consequences aside from these direct and immediate effects, less obvious but nonetheless relevant. We shall call them *secondary effects*, since they are not the desired aims of the EC legislature. They derive, for the most part, from the interface of new rules made in various branches of the European Community and the prevailing situation in each Member State. These are, therefore, effects which vary from State to State, and rely exclusively on the structure of each State's system of private law.

Let us consider, for example, the new system for consumer protection. The Community legislation is based on the *consumer*, understood as a person who must be protected from those who, in the exercise of economic activity, constrain her/him to agree to a contract under certain conditions. So far, it introduces a category of 'consumer contracts,' subject to rules which differ from those normally applied: the new rules on unfair terms, on package travel, on contracts negotiated away from business premises, on contracts relating to the purchase of the right to use immovable property on a time–share basis, and on consumer credit, are in fact only applicable when the other party is a natural person acting in a non-professional capacity.

This means, for example, in relation to the Italian legal system, the re-establishment of two separate disciplines, one for *consumers' contracts*, and the other for *all the remaining areas*, recalling a distinction already present in the Italian legal tradition during the 19th century, such as that between commercial and civil contracts, which was repealed when the Civil Code of 1942 was adopted.

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[31] See the second volume of the *Guide*, cited above.

Another example concerns *product liability* and the debate on how much a distinction between contractual and extra-contractual liability is a useful one. In this field EC law aims to overcome the differences between various legal systems, some of which are based on tortious and others on contractual liability. The Directive on liability for defective products no. 85/374 and, above all, the draft directive of 1990 on the liability of service providers, contain a legal regime which is not only better suited to both types of liability, within and outside of the contract, but actually seems to overtake this distinction, through its independent ability to generate a model which cannot be traced back to either one of the two classic types of liability.

Then there can be other effects, which we can call *induced effects*, in that they are not the direct consequence of an obligation to carry out EC precepts. They concern those frequent situations where a Member State, as a result of important rulings from the European Court of Justice, feels constrained to make other institutions or situations comply, even though they are not directly involved in the principles expressed in the judgment. What followed was the ruling in *Bosman* of 1995,[32] where the ECJ confined itself to considering the method of transferring footballers when the transfer was from one Member State to another. Internal transfers were not contemplated in this judgment. Nonetheless this has inevitably modified transfers which occur within each State: for example, in order to avoid disparities in treatment occurring between 'Community and national' football transfers, with potential implications regarding constitutional legitimacy, the Italian government issued the Decree of May 22nd 1996, no. 383, reiterated on October 20th 1996, no. 485, eliminating transfer fees between national clubs as well, fees which were previously introduced by Act no. 91 of March 23rd 1981.

> **Bosman ruling**. As is well known, the ECJ ruled as follows: "(**1**) Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee. (**2**) Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which

[32] Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman* (1995) ECR I-4921.

> they organize, football clubs may field only a limited number of professional players who are nationals of other Member States. (**3**) The direct effect of Article 48 of the EEC Treaty cannot be relied upon in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before, the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date."

Sometimes the introduction of new rules involves a review of definitions: one can think of the concept of *company* which in the Roman law tradition has always been treated as an agreement between at least two persons. Following the directive which led to the introduction of the single-member private limited liability companies, it was decided to omit the definition of company and to consider the contract as the normal hypothesis for its establishment, which may also be done by unilateral act.[33]

One can say as much about the *contract* and its binding force. Today, following the provisions at European level which accord to only one of the contracting parties the right of withdrawal, the traditional statement *pacta sunt servanda* is to be reconsidered. It means that the principle according to which a contract binds the parties until the performance of the duties has been modified and all the general sections of private law textbooks will have to be reviewed and recast in light of the new rules on the right of withdrawal.[34]

13. 'Communitarization' of National Laws

New expressions have passed into the daily language: globalization of markets and the economy, internationalization of work, and 'Communitarization' of business are only some of the most frequently used. Although almost always, as happens when neologisms are not developed in a scientific way which serves to define their limits, such expressions are ascribed various meanings.

Even the idea of 'Communitarization' of the law is not immune to this problem, lending itself to various interpretations by its very breadth.

Legal scholars and jurisprudence have used this expression to describe special intertwined phenomena, namely the progressive erosion of national peculiarities by means of grafting on new elements bearing the Commu-

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[33] See second volume od the *Guide*, chapter IV.

[34] See second volume od the *Guide*, chapter I.

nity hallmark. This concerns a wide area which involves not just private and commercial law but, in addition and above all, other areas of law such as agricultural law, employment law, and environmental law.

Now, it may be useful to focus on the various situations which could be subject to the so-called *Communitarization of the law,* to avoid the indiscriminate and improper use of terms and concepts.

In fact, if one wishes to describe the phenomenon by means of which certain persons (natural or legal) have become subject to the authority of Brussels, so that their regulation is from a particular moment onwards reserved to the EC legislature, the expression 'Communitarization' of the law should be understood in the sense of a transfer of law-making authority and legitimacy from the Member States to the EC institutions.

The examples are legion: one thinks of the vast area of competition and antitrust rules, where the Council and the Commission really do have exclusive authority over law-making in these areas. Customs legislation is also to be considered: as a result of the single customs tariff coming into force (July 1st 1968), the 'Communitarization' of the GATT (General Agreement on Tariffs and Trade) has taken place (Geneva, 30th of April 1947) in that the European Commission, from that date onwards, has replaced the signatory States in the commitment contemplated by that agreement.

The expression 'Communitarization' refers also to the European Court of Justice, although it is not to be confused with the fact that the Court has exclusive jurisdiction on certain issues. For example, on the subject of labor law, the ECJ has the right to supervise the compliance between the EC Treaty and the rulings adopted by Member States following conventions and recommendations of the International Labor Organization (ILO), saving the competence of Member States to conclude agreements according to the Constitution of ILO. The ECJ has communitarized the agreements and has involved the Community in their application, asserting its own competence in relation to conventions agreed between Member States in the ILO, retaining supervision of the Member States' activities in this organization, and therefore subjecting them to the supremacy of Community law.

By the expression 'Communitarization' of the law, however, we would wish to refer to another phenomenon by which national law is aligned to EC law by means of the process of interpretation carried out by judges at a national level. It is the phenomenon, among the most interesting in the context of the Community, by which national judges must interpret the laws of their own legal system in a way which is in tune with the Community, that is to say, according to the aims, principles, and rules of EC law, and not according to a municipal viewpoint.

This process (i.e. interpreting national law according to European Community aims and principles) works under two circumstances:

a) when it concerns the interpretation, in compliance with the Community, of an internal rule which results from the implementation of a directive. It goes without saying that there would be no sense at all in a State—which has formally approximated its own legal system to the rules imposed by the Community, and so demonstrated its own intention to adapt in order to fulfil Community objectives—not enacting them at the enforcement stage. In such cases, the interpreter must favor, among the possible legal arguments, the one which is most faithful to the text and the purpose of the directive. The principle has been clearly formulated by the Luxembourg Court itself in *von Colson* (1984), according to which "(…) the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Art. 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts;"[35]

b) when it concerns the interpretation of internal rules which have no apparent functional link with EC law—that is, rules which are not the result of the implementation of a directive—and do not derive from an expressed or implied obligation to comply with EC law. This situation occurs each time the pre-existing internal rule would be in conflict with later EC rule not yet implemented, if interpreted according to national criteria. The internal one would be incompatible with the Community rule which is yet to be implemented. In such a case the national judge has the duty to adapt the interpretation of the national legal rule, so that the judge may continue to apply national rule without running the risk of a ruling against it by the ECJ which, as we have seen, ensures the correct application of EC law. The ruling which formulated this duty for national judges is the *Marleasing* case (1990). Rather than a presumption of conformity, here the principle of supremacy of Community law over national law is operating.[36]

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[35] *Cf.* § 26 of the judgment in *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, Case C-14/83 (1984) ECR I-1891. See further details in chapter V.

[36] *Cf.* C-106/89*, Marleasing S.A. v. Comercial Internacional de Alimentacion*, (1990) ECR I-4135. See further details in chapter V.

A particular hypothesis regarding the 'Communitarization' of national law can be seen to result from a legislative disposition whose formulation is not due to a peculiar theory of law elaborated at the national level, or to answer a specific need of the society or the market, but to the reproduction of European Community text. A typical example is furnished by the antitrust legislation developed in the 1990's by CEECs on the basis of what has been established in Title V of the Europe Agreements. Each Agreement regulated the subject of competition, taking as a model the corresponding EC law, and literally reproducing the two principal rules on the subject contained in the EC Treaty, in particular Art. 81 (formerly Art. 85) on restrictive practices and Art. 82 (formerly Art. 86) on the abuse of dominant position, and a large part of those contained in EC Regulation n. 4064/89 on merger control.[37]

Another significant example of 'Communitarization' is where national legislators themselves expressly impose upon national institutions the use of EC principles and criteria in the interpretation of internal law. This occurred, for example, in the Italian legal system with the antitrust legislation of 1990: according to art. 1 (4) of the Act, the interpretation of these rules should be carried out "on the basis of the principles of the European Community legal system on the field of competition law."[38] The referral to the EC legal system to interpret the national law on competition will oblige the Italian competition authority (*Autorità garante della concorrenza e del mercato*) to use EC concepts such as 'undertakings,' 'agreements restricting competition,' 'abuse of dominant position' or 'concentrations,' referring back to judicial precedents of the European Court of Justice or to the decisions of the Commission, and which cannot be excluded under any circumstances.

14. Areas of Law which are Affected by European Community Private Law

The primary objective of EC law is (and always has been) the formation of a common market, that is, an economic space on a broad territorial base, where goods, services, and capital can freely circulate with no further barriers between the States; a space where persons (employed, self employed, and professionals) can move freely and carry on their activity in whatever Member State, in a great single market.

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[37] *Cf.* second volume of the *Guide*, chapter VI.

[38] *Cf.* second volume of the *Guide*, chapter VI.

This ambitious project, which was within the contemplation of the European Economic Community right from the outset, has proceeded for a long time among obstacles and difficulties, especially of a political order, which have impeded its progress.

Nowadays it is no longer exactly like that.

As we have said since the first page, the development of a common market for all Member States has seen an unprecedented acceleration. Thanks to the maturing of the idea of the European Community and a greater awareness of its effective role developed by the Governments of the Member States, it has been possible to achieve what attentive observers of Community issues have hoped for, on the basis that to achieve a single market it is not enough to prevent the States from erecting trade barriers, nor to abolish measures which have an equivalent effect, nor even to issue legal guidelines which free the movement of people and goods.

A single market requires other presuppositions, nonetheless important, so that production and exchange can take place on the basis of strategic choices, unconditioned by criteria outside economics or manufacture, which could favor the choice of establishing or carrying on business activity in one country rather than another. For example, so that the free movement of business and company may be effectively established, it is necessary that there be relative equality of tax treatment between all the Member States; that there be uniform legislation on the subject of relations with employed workers, which do not favor the entrepreneurs of one Member State over another, and so on.

In this way the free movement of capital (for example the freedom to invest money in shares of any company, in any State of the Union) could not exist as such, if the laws protecting investors did not offer sufficiently similar guarantees in all the Member States. The laws on liability of producers of defective goods must necessarily be the same in all of the market's Member States. To have a single market where all the insurance companies of the Community can work, it is not enough to proclaim the principles of right to establishment and of freedom to provide services, but it is also necessary to render rules on insurance contracts, unfair terms, right of withdrawal, product liability, etc., uniform.

We could multiply examples, but the aforesaid is sufficient to understand the reasons why in recent years the European Community has expanded its range of activity, whether by initiating inter-institutional procedures involving the Commission, Parliament and the Council, business, lawyers, academics, and consumers, or by producing a considerable quantity of directives aimed at harmonizing sectors of private law which (until now) have never been the object of Community intervention.

The areas of substantive private law which are subject to harmonization, with which we shall be concerned in this *Guide to European Private Law* (2 volumes), are as follows:

1. *Competition* law. It is *par excellence* the classic theme of private Community law, which has engaged the Community institutions most profoundly from the beginning—the Council, the Commission, and the Court of Justice. It is the field which has always characterized European Community activity and has demonstrated the great capacity to create new law which is effective and above all, uniform. The exclusive activity of the Commission, charged with ensuring compliance with the competition rules and with investigating cases of suspected infringements or behavior which do not conform, together with the rulings of the Court of Justice—which has jurisdiction in disputes relating to decisions of the Commission—have developed Community competition law over the course of time, composed of written rules, rulings and doctrines which, taken together, have given rise to a considerable body of substantive Community law in relation to this subject.

2. *Company law*. After competition, this is certainly the biggest area, since it includes a large number of issues which, in a more or less important way, have been respectively unified or harmonized by regulations or directives. One thinks in particular of the following:

a) the company *directives*, which have dictated new rules on disclosure, nullity of companies with limited liability, on formation of public liability companies and maintenance/alteration of their capital, on mergers and divisions, on annual accounts, annual reports, on consolidated accounts, on single-member private limited liability companies, etc.

b) the *regulations* on 'European Economic Interest Grouping' (EEIG), on the 'European Company,' and 'European Cooperative Society'.

c) the *draft* regulations on the European Mutual Society and the European Association.

3. *Intellectual Property rights*. If the main target of the Community is the formation of a common market where trade is able to compete under unique or at least uniform rules, the classic themes of protection of intellectual property such as patent rights, trade marks, and copyrights cannot be omitted, any more than subjects of more recent origin, such as software protection. In this field too, Community action has shown itself in directives and regulations, which have highlighted the near uselessness and inadequacy of the Community and European Conventions as a

means of uniformization, which were the only recourse in previous years.

4. *Civil Liability*. For the moment, there are only two aspects within the ambit of tortious liability which the Community legislature has concerned itself: manufacturers' liability for damage caused by defective products, which originated in the 1985 Directive, and service providers' liability, where the directive is still in the formative phase.

5. *Contract law*. This is the part of private law which lends itself to the most stimulating observation and which offers a vast number of points for reflection with regards to the development and evolution of European private law. As in company law, harmonization of national laws with Community acts are numerous in the area of contract law. Think of the directives on unfair terms, on package travel, on contracts negotiated away from business premises, on contracts relating the purchase of the right to use immovable property on a time–share basis, on consumer credit, on banking & insurance contracts, and on factoring, franchising and leasing contracts.

This concerns a body of law which, having been conceived, elaborated on and mainly approved by case law over the last twenty years, is causing fundamental changes in the national legal systems because of its innovative content and frequent contrast with operative, age-old rules and principles.

15. Comparative Law and European Community Private Law

As long ago as the 1960s, outstanding legal scholars theorized about the "additional purposes" of comparative law; they listed among these the "formation by means of the courts or legislative organs of a Commonwealth of States—of a Law common to the States themselves or a Law of the Community."[39]

The statement was made in such a way as to reveal a certain indifference to this kind of "vulgarization" of the comparative science. In fact it was later repeated, and today it is the predominant belief among com-

[39] One of these scholars was Gino Gorla (1909–1992), an Italian Professor of Comparative Law at University of Rome, who devoted himself to the study of comparative law in a historical perspective. His most influential work is on contracts and on the role of case law in the *Civil law* tradition. We refer the reader to the bibliography at the end of this chapter.

parative law experts, that comparative law *is a science*, the task of which is to acquire a better critical knowledge of the law.[40]

The comparative method serves to provide more than a superficial knowledge of other legal systems and legal models aside from one's own, by means of historical analysis.

The activity of legal academics in the field of comparative law is aimed at measuring the differences and analogies between legal systems, understanding the contradictions between *legal formants* of each individual system, and at critical commentary on legal data (legal concepts and operational rules) gained through scientific research, rather than serving eminently practical ends.

The fundamental role which the science and methods of comparative law have had in the field of Community law production is, in any case, undeniable.

First and foremost one thinks of the activity of the European Court of Justice in elaborating common principles of law, which are utilized not only as a means of integration and interpretation of the written laws, but above all as parameters of the legitimacy of the law.

We will dwell further upon these aspects in the following chapters; for the moment we want to emphasize not so much the formulation of the common principle as such, but rather the methods by which the principle is researched, studied, analyzed, and hence formulated.

Just reading a few passages from rulings of the Court of Justice is enough to understand to what extent the comparative method is indispensable to gauging the presence of common principles in Member States, and to realize that this method is used correctly and with insight by the judges themselves.

More than once the Court of Justice, in openly confronting the various Articles of the Constitutions of Member States, has affirmed that in order to establish whether a particular principle is to be considered common to all, it is not sufficient to consider the textual data of the written law, but "it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States,"[41] or, even more explicitly, that "unless the court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by

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[40] *Cf.,* on this point, Rodolfo Sacco, Emeritus Professor at University of Turin (Italy), who developed the theory of 'legal formants.' Among the most influential of Sacco's works is the *Introduzione al Diritto Comparato*, Torino, 1980. We refer the reader to the bibliography at the end of this chapter.

[41] *Cf.* § 20 of the judgment in *Liselotte Hauer v. Land Rheinland-Pfalz* , C-44/79, (1979) ECR 1-3727. See below chapter V.

the legislation, the learned writings and the case law of the Member countries."[42] One cannot fail to appreciate the scientific method used by the judges of the Luxembourg Court, a method which, above all, does not preclude the existence and validity of legal formants other than the legislative ones.

The Court of Justice is not the only institution interested in comparative law.

The Community legislature, since it began, in an extremely determined way, the process of harmonization in large areas of private law, such as company or contract law, has made use of the comparative method, having to contend with the resistance of those countries which have strong reservations regarding the attempts at uniformization, so revealing all the difficulties involved in reconciling new models or new rules where diverse and deep-rooted national legal systems are concerned.

The fact is that harmonization necessarily presupposes the critical recognition of *diversity*. Perhaps rules can be rendered uniform by creating new ones, but it is impossible to harmonize differing rules unless you can recognize the differences. This is why the comparative method, which is above all concerned with recognition, becomes indispensable to the construction of new Community law. It is only necessary to read the '*having regard to*' or '*whereas*' clauses (also called *recitals*) which precede the rules of the harmonization directives, in order to realize how important the preliminary study of the different systems of the Member States has been.

> For example, the directive which establishes new rules on single-member private limited liability companies has taken into account the fact that in Portugal—although limited companies with only one member are not allowed—a one-man business with separate ownership may be established.
>
> Another example is the directive on liability for defective products, which leaves the choice to the Member States whether (or not) to introduce, in the implementing legislation, the rule by which the manufacturer may escape liability if s/he can show that the state of scientific and technical knowledge at the moment of the product launch did not permit the discovery of the existence of the defect. This option has taken into account the fact that, under French case law, the possibility of exemption from liability of this kind is not allowed.
>
> See, respectively, chapters IV and II in the second book of the *Guide*.

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[42] *Cf.* joined cases 7/56, 3/57 to 7/57, *Algera & others v. Common Assembly of the European Coal & Steel Community,* (1957) ECR I-81. See below chapter V.

The more the European Community concerned itself, from the mid-80's onward, with the process of harmonization of the laws, the more the comparative method became an essential tool. Nowadays, Community law is a legal model in itself, a collection of general principles, rules, and judicial solutions which are sometimes original and other times the result of meeting half way and compromising between the models of the different Member States.

Therefore, to sum up, and taking *Law in Action* as a reference point, we may conclude that Community law is the result of a process of comparison, whether more or less conscious or more or less scientifically correct; a process which tends to compare differing models, either in the phase preceding the drafting of the legislation (aimed at getting to know the various realities of the Member States) or in the true law-making stage, when it is necessary to develop working rules which better suit the legal systems, or again, at the later stage, when the new rules must be interpreted and applied by the Court of Justice and the national courts.

It is (above all) in this latter phase that trans-national academic commentary comes into its own. As previously mentioned, in order to explain and give meaning to the new rules, we cannot ignore their origins. Today no professional in the legal sector, no judge, no lawyer involved in applying harmonized national law can forget the European legal matrix from which the harmonized rules derive. Notwithstanding the present lack of a common academic viewpoint on the subject, the statement seems acceptable, where we see that European and Community law are subjects of close study in numerous legal journals concerned with European comparative law. We shall be returning to this aspect in the following chapters.

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See also bibliography chapter VI

CHAPTER II

The Diffusion of Legal Rules and Models and the Transposition of Concepts

Key words: Legal models – Competition – Intra-Community models – Extra-Community models – Compromise models – European Court of Justice – National Courts – Language – Legal concepts

1. Foreword

More than once in the following pages we will be discussing *diffusion* (also referred to as 'circulation' or 'transplant') of legal models and rules which occurs within the EC countries or from the Community to the new Members and candidate countries which will join the EU in the coming years.

The expression usually designates the phenomenon by which a collection of technical rules, of general principles and of judicial solutions, which constitute a defined legal model, is transferred from one legal system to another one. The reasons for transfer may be very different.

A model may, for example, circulate by *imposition*, or due to the *prestige* in which it or the system it derives from is held. Also the means of circulation may be different, according to whether it concerns an activity brought into being by legislators, by judges, by legal scholars, or a combination of these factors, or whether it results from the activity of international institutions.

In the political context of the European Community, the diffusion of legal models and rules has particular features.

First of all, to those which we could call a *normal and physiological circulation* of legal rules from one country to another, all the more frequent if the two countries have a *common legal tradition* (and of which history offers innumerable examples), we can add a circulation which does not occur *immediately* from country to country, but rather is the *object of mediation* by the activity of the Community institutions. These institutions *select* a model or a particular rule of one Member State, incorporate it, and then impose it on other Member States. The phenomenon of the incorporation of models and actual rules occurs so frequently as to

bring about, from the end of the 1970's, a real *Europeanization* of the national laws, not only because of the large quantity of laws produced by the Community, but also for the novelty of the concepts formulated by it.

In the second place, still within the ambit of the European Community, the models and rules may also circulate owing to a combination of Community and national judicial activity. In fact, quite frequently a national "case law model" may be taken up by the European Court of Justice, is formalized in its rulings and, later, the same model appears with no Community or national intervention.

To return, for the moment, to the activity of the Community legislature, one cannot help noticing, on the one hand, that the major part of the rules contained in the directives and regulations are inspired almost exclusively by legal models which exist among the Member States, and in particular, from the most politically and economically influential countries. The legislation produced at Community level often tends to reflect the judicial blueprints and self-interest of Germany, the UK, and France. This is due to the specific influence of these countries, either because of the wider organization of pressure-groups, or because national legislation on the problem which involves Community intervention often already exists, so that this latter serves as a basis for the European text.

It is not within the scope of this book to investigate how far the political influence of one Member State over the Brussels authority counts in determining the choice of one model over another.[1]

On the other hand, it is not always the greater political weight of some Member States which is the decisive factor. Sometimes the choice made by Brussels is based on technical/legal reasons, or greater efficiency; this may happen, for example, where a particular State already has a tried and tested model, which is efficient and easily adapted to other, differing, national experiences. When, for instance, the Commission was developing the consumer directives, it could not discount the experience of countries like Germany and France, with a body of law on that subject, which had produced a great deal of well developed academic commentary.

Without a doubt, particularity and national characteristics are tending to give way to a greater degree of uniformization.

Seen in its entirety and complexity, the new Community law is increasingly a *harmonized*, even *uniform* one, even though it contains in a more or less obvious way the gene of certain national laws.

The circulation of legal models and rules ceases to be the expression

[1] See the selected bibliography at the end of this chapter.

of a simple incorporation of foreign models, and becomes instead an instrument aimed at creating new law for the European Community legal system, distinct and different from the States of which it is formed.

2. The Diffusion of Intra-Community Models

The rules produced by the Community legislature under directives or regulations with the aim of the harmonization or uniformization of a particular institution or area of law are hardly ever original. In fact, the Community legislature borrows from the national legal systems of Member States or from the countries outside the Community either legal rules or solutions or even peculiar institutions.

There is a natural tendency to welcome Community laws which are known and used by least in some Member States; however, as we shall be seeing later, cases of incorporation by the Community of legal models from outside itself are by no means rare, at least where their *prestige* or, so to speak, *neutral* character in relation to national models render their adoption opportune.

It should be noticed that, when we refer to the diffusion and transplant of legal models, we are aware that economic policies influence the law-making process. An instrumental use of the law has taken place, which aims to sustain economic relationships, and Brussels has adopted a '*technocratic approach*' in the ways of making law.

It is almost too easy to cite examples of the diffusion of legal models within the European Union. The history of comparative law in Europe is that of the diffusion of legal models, concepts, and legal rules.

A directive or regulation does not exist which lacks the expression of a legal model in force in one or more of the legal systems of the Member States, and at the same time, the instrument or means of transplantation of that model to another Member State. What is more, the Community has limited itself to creating rules which seem new, but which are in reality the natural evolution of those which, in any case, are present in other laws of other countries.

There is not just a historical value in knowing how models circulate, in understanding their mechanisms, which are not always immediately apparent, and in knowing the fundamental rules which govern them.

Indeed, if the Community Regulations and Directives are the direct and immediate expression of legal circulation (the so called *legal transplant*), and in particular the incorporation by the Community legal system of a particular set of rules, institutions, and concepts, then the *national laws for the implementation of Directives* are the expression, albeit indirect, of that circulation.

As a consequence, the application as well as the interpretation of the law, whether implemented by the Community or by a national system, can benefit from familiarity with its origin. Whatever problem there may be of application or interpretation of a particular law, especially if it is new, it cannot properly be resolved without knowing the original model from which the law derives, or its *ratio*, its scope, and the context in which it was formed.[2]

It is not advisable, for example, for the interpreter to set about understanding the new concepts of *professional, consumer,* or *unfair terms* if s/he does not understand the original significance such concepts possess in the legal system where the law was developed, nor can s/he ignore the origins of the discipline on the theme of consumer protection; in the same way it does not seem apposite to ignore the context in which the concept of *consolidated accounts* was formulated (which identifies the particular tie that binds a number of businesses or companies in a holding*),* which are fundamental for the application of the new rules regarding annual accounts and consolidated accounts of banks and other financial institutions (Council Directive 86/635/EEC of December 8th 1986).[3]

Sometimes the Community institutions do not stop at incorporating a single solution or certain individual rules, and instead produce a coherent set of rules and impose them on all the Member States.

Among typical examples, one can note those which concern the European Economic Interest Grouping (EEIG), literally transposed from the French system where it had been introduced under the name *Groupement d'intéret économique (G.I.E)*, and now adopted, by means of Council Regulation no. 2137/85/EEC of July 25th 1985, as part of the legal systems of all the Member States, adapted to the aims and needs of transnational cooperation. Again from the French legal system there is the model of the *sociétés à responsabilité limitée à un seul associé,* formulated by the European Community itself from Directive 89/667/EEC of December 21st 1989 on single-member private limited liability companies.[4]

And once again from the French system there is a large part of the rules on consumer protection. However, the directive on unfair terms was, as we have already noted, modeled on the French and German versions.[5]

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[2] Compare the comments in chapter I.

[3] See the second volume of the *Guide*, chapters I and IV respectively.

[4] See the second volume of the *Guide*, chapter IV.

[5] See the second volume of the *Guide*, chapter I.

Again, the rules concerning company *annual accounts* were actually borrowed from German and British models and transposed in the Fourth Council Directive 78/660/EEC of July 25th 1978, based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies. The Seventh Council Directive 83/349/EEC of June 13th 1983 based on Article 54(3)(g) of the Treaty concerning *consolidated accounts,* is characterized by a similar mixed nature, part German, part British.[6] On the other hand, the rules providing the basis of Directive 94/47/EC of the European Parliament and the Council of October 26th 1994 regarding the protection of purchasers in respect of certain aspects of contracts relating to the right to purchase immovable properties on a *time–share* basis[7] were taken from the British model, while the German model of *Mitbestimmung* dominates the rules regarding the *European Company*, known by its Latin name of *Societas Europaea* (or SE).[8]

In its turn, the legislative model in force in the Netherlands on the subject of *trade mark* rights has been used in drafting the First Council Directive 89/104/EEC of December 21st 1988 which harmonized the law of the Member States in this area.[9]

3. The Incorporation of Extra-Community Models

If it is natural that almost all the new laws emanating from the European Community borrow from the legal system of the Member States themselves, this does not mean that there cannot sometimes be reception of models which come from countries outside the European Community. The instances are rather rare and exclusively concern models coming from the North American continent.

For example, all the Community *antitrust rules*, whether those contained in the EC Treaty, or in successive EC legislation or, above all, the fundamental rules which establish the supervisory activity by the European Commission on business enterprises, owe their original format to the late 19th century American model, when the precocious and swift development of commerce and industry, as well as the formation of the first large industrial groups, required the development of a specific set of rules to correct abuse and distortion of free competition.

Again, what has accurately been defined as the earliest process of the harmonization of European law clearly carried out under the influence

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[6] See the second volume of the *Guide*, chapter IV.
[7] See the second volume of the *Guide*, chapter I.
[8] See the second volume of the *Guide*, chapter IV.
[9] See the second volume of the *Guide*, chapter V.

of US law concerns Directive 85/374/EEC on *liability for defective products*, which introduced in the Community the principle of strict liability or liability without fault. According to it, any producer of a defective movable must compensate any damage caused to the physical well being or property of individuals, independently of whether or not there is negligence on the part of the producer.[10]

Still in the area of tort law, the Proposal for a Council Directive on the *liability of service providers*, which sets out to protect the physical integrity of persons and of their private property and to allow compensation where a service is defective in terms of safety, seems to show clearly the influence of US legal thinking, as demonstrated by the *res ipsa loquitur* rule.

It should also not be forgotten that the concept of *consumer protection* is originally from the US, even though the importation of this model by various European countries and the successive reworking of the rules has freed it from its origins.[11]

4. Compromise Models

Community Law meets difficulties in the formation process, above all when it has to choose which model to adopt.

Although essentially political in origin, the question involves aspects which are also of relevance from the legal point of view. The basic problem concerns not only the influence that some States—particularly the more politically and economically influential ones—may have on the genetic process of the Community law, but also the degree of firmness with which the other States oppose the choices offered by the former. Sometimes the force of resistance indeed overcomes the force proposing them.

It is only natural that each State, when it comes to the choice of a model or common a rule, will try to ensure that its own rules prevail and will, as a consequence, seek to safeguard national customs or the interests of individual, politically influential national sectors.

As an example, one of the most important Community laws of the last few years, Council Directive 93/13/EEC of April 5th 1993 on *unfair terms in consumer contracts*, actually dates back to the 70's, but was only approved twenty years later, in 1993, when certain legal rules, which appeared in preceding drafts, were eliminated from the text.

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[10] Compare the second volume of the *Guide*, chapter II.

[11] Compare second volume of the *Guide*, chapter I.

Anyone who has compared the draft of 1975 with the definitive text of 1993 will have discovered that the rules which operated decisively in favor of the "weaker party" have been expunged. One thinks of the replacement of the "black list"—which would have involved the immediate and autonomous invalidation of the clauses, by a "gray list"—which permits their insertion where there has been negotiation, or where there is an equilibrium between the legal positions of the parties. The reasons behind this modification will be illustrated in the chapter on the harmonization of contracts. It is sufficient for now to observe how the Community decision-making process may often lead to *weak legislation*, less far-reaching than the initial plans and intentions which inspired the original proposals. This weakness really does seem to be the price to be paid for *minimum harmonization*.

As for the rest, there are the same "*Having regard to*/*Whereas"* phrases in the preamble to many directives, which inform the reader of the fact that there can be only partial harmonization for the national law in its present form.[12]

The interest that each State shows towards the contents of a directive, from the moment of setting out its earliest draft, is due to various factors.

To begin with, there is the tendency towards a kind of *legal nationalism,* which is still showing strong signs of life. The instinct to preserve one's own culture and legal traditions compels the various draughtsmen to ensure that Community law pays due respect to the domestic legal systems. Sometimes the legal systems are very recent; more often defenses are built against rules and solutions which are feared because they are still unknown.

There is another fact that should not be overlooked, which compels the Community lawmakers to undertake a kind of technical check of the legal texts. Here we are referring to the *defense of interests* on the part of those (be they involved in the legal sector, business, or are technicians or professionals in various sectors) who are concerned with ensuring that the directive does not introduce little-known concepts which would be difficult to adapt to, or penalizing effects.[13] A sort of wearisome bargaining derives from the intertwining and combining of all these diametri-

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[12] For an example, see the 12th *having regard to* of Directive 93/ 13/EC, cf. the second volume of the *Guide*, chapter I.

[13] Think, for instance, of the interest stirred up in Italy in the profession of notaries, by the choice of "*inefficacia*" (*inefficacy* rather than *nullity),* as a sanction of an *unfair term*, or, in all the countries, the interest raised by the definition of *defective product* in the branch of law concerning product liability.

cally opposed interests, which drives the Community legislature to ambiguous, not to say contradictory, results.

The compromise to which recourse is often of necessity is not, of itself, a bad thing, especially when it is the means by which the originality and variety of the European legal heritage is preserved. It can become a bad thing, however, when it is used as an expedient which sacrifices the most effective legal result.

One thinks of Council Directive 86/653/EEC of December 18 1986 on the coordination of the laws of the Member States relating to self-employed *commercial agents*. The draft directive, based largely on German law, had to contend with the opposition of the *British Law Commission*. This body bitterly criticized the proposal, accusing the EC Commission of using concepts unknown to British jurists. As a result, it maintained, the German lawyer would be able to draw upon a wealth of academic commentary and tried and tested jurisprudence while the British lawyer would be at the mercy of some unknown instrument. In 1986, after ten years of negotiation, the Directive was issued, demonstrating, however, a very small level of harmonization, limited to indicating to the States only very few common principles to be adopted. Difficulties arising out of the diversity of national systems of contract law has, in fact, impeded more extensive and far-reaching harmonization.

The case of *liability for defective products* is also typical. The institution was conceived as part of the harmonization of laws among Member States in order to avoid the situation where differing legal results could give rise to disparity of treatment amongst entrepreneurs in the European internal market, and as a consequence, differing protection for the injured party. However, the opposing positions of some States have ensured that a series of exceptions and derogations from the original plans have been introduced, so that the Directive misses, in great part, its predetermined aims.

Given the diversity of rules and practices in the Member States with regards to the manner in which employees' representatives are involved in decision-making within companies, the draft regulation on the *European Company* stalled for many years while waiting to resolve the argument between those who, like Germany, wanted to put in the *Mitbestimmung*, and who like the United Kingdom, were firmly opposed any system which did not partake of its own cultural and legal tradition.

Finally it came out as Council Regulation no. 2157/2001 of October 8 2001 on the statute for a European company, together with Council Directive 2001/86/EC of October 8 2001 supplementing the statute for a

European company with regard to the involvement of employees:[14] a unified European model of employee participation is not intended. Nevertheless, procedures for the information and consultation of workers at trans-national level will be ensured. When rights to participate exist within one or more of the companies establishing an European Company, those rights will be preserved through their transfer to the European Company itself, once established, unless the parties involved decide otherwise within the special negotiating body, which brings together the employees' representatives of all companies concerned.

5. The Court of Justice, National Courts, and the Circulation of Legal Models

The *case law of the Court of Justice* has, since the 60's, identified and formulated many general principles, which have found a place amongst the sources of the Community legal system.

The Treaty of Rome itself, has, since 1957, expressly provided some general principles, mostly to do with the strong economic connotation which characterized what had been, at least until the Single European Act of 1986, the primary (if not the unique) aim of the Community, that is, the development of a *common market.* Hence the *free movement of people, goods, capital, and services* within the Community was codified: articles 39 (ex art. 48), 23 (ex art.9), 49 (ex art.59) TEC; the principle of *free competition:* art. 3 (ex art. 3) TEC; the *right of establishment*: art. 43 (ex art. 52) TEC; the principle of *non-discrimination on grounds of nationality:* art.12 (ex art.6) TEC.

In other cases, the Member States have felt the need to formulate other principles, more concerned with *human rights* than the formation of a single market, such as the principle of *non-discrimination based on nationality between workers* of the Member States with regards to employment, remuneration, and other conditions of work (art. 39, ex art. 48, no. 2, TEC), or the principle of *equal pay for male and female workers* for equal work or work of equal value (art. 141, ex art. 119, TEC).

The part played by the Court of Justice has been fundamental in the legal backdrop provided by the successive Treaties, in elaborating and defining the characteristics, principles, aims, and limits of the Community legal system; it has performed a genuine work of so-called *'Constitutionalization'* of Community law, securing maximum uniform application and efficiency.

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[14] See the second volume of the *Guide*, chapter IV.

The Court of Justice may formulate a general principle in the following ways:

A) From the verification that it concerns a *principle common to the Member States*.

B) From the application of *international Conventions*.

A) So far as the first hypothesis is concerned, it is interesting to note how the procedure used by the Court of Justice to arrive at the affirmation that a particular principle is to be considered as *inherent* to the Community legal system, is essentially based upon a comparative analysis of the legal systems of Member States. And it is the Court itself, which decides, not only after an evaluation of constitutional and legislative rules but, above all, the legal practices followed in each of the Member States, that a particular principle may attain the rank of a *Community principle*.

Such is the case, for example, with regard to *the right to confidentiality,* formulated by the Court of Justice in relation to client confidentiality in the lawyer-client relationship.[15]

> In the ruling cited, one reads as follows:
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> ***AM & S. v. Commission* ruling**: "(§ **19**) As far as the protection of written communications between lawyer and client is concerned, it is apparent from the legal systems of the Member States that, although the principle of such protection is generally recognised, its scope and the criteria for applying it vary, as has, indeed, been conceded both by the applicant and by the parties who have intervened in support of its conclusions. (§ **20**) Whilst in some of the Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, in as much as it contributes towards the maintenance of the rule of law, in other Member States the same protection is justified by the more specific requirement (which, moreover, is also recognised in the first-mentioned states) that the rights of the defence must be respected. (§ **21**) Apart from these differences, however, there are to be found in the national laws of the Member States common criteria in as much as those laws protect, in similar circumstances, the confidentiality of written communications between

[15] ECJ Judgment of 05/18/92, *AM & S. v. Commission,* C-155/79, (1982) ECR I-1575 We will cite some important passages, as we believe that a reading of them will highlight even more clearly how the Luxembourg judges behave and think in relation either to general principles as such, or the methods of research and analysis of those principles.

> lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."

It is also the case with regard to the *limits of private property in accordance with the general interest* in relation to the exercise of the right to property.[16]

> In the ruling cited, one reads as follows:
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> ***Hauer v. Land Rheinland-Pfalz* ruling**: "(§ **20**) Therefore, in order to be able to answer that question, it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German *Grundgesetz*, art. 14 (2), first sentence), to its social function (Italian constitution, art. 42 (2)), to the subordination of its use to the requirements of the common good (German *Grundgesetz*, art. 14 (2), second sentence, and the Irish constitution, art. 43.2.2), or of social justice (Irish constitution, art. 43.2.1). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. Thus in all the Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property. (§ **21**) More particularly, all the wine-producing countries of the community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property. (§ **22**) Thus it may be stated, taking into account the constitutional precepts common to the Member States and consistent legislative practices, in widely varying spheres, that the fact that regulation no 1162/76 imposed restrictions on the new planting of vines cannot be challenged in principle. It is a type of restric-

[16] ECJ Judgment of 12/13/1979, *Hauer v. Land Rheinland-Pfalz,* C-44/79, (1979) ECR I-3727.

> tion which is known and accepted as lawful, in identical or similar forms, in the constitutional structure of all the Member States."

It is also the case regarding *principles* of the *non-retroactive nature of law,* and many others formulated in the course of the last forty years, like the *equality* of citizens or *proportionality* between crime and punishment.

B) In other cases the affirmation of general principles derives from the application of *international Conventions*. It is the case regarding *human rights,* that the *Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950 protects, under its various provisions, such as *freedom of conscience and religion,*[17] *freedom of assembly and association* including the right to form and to join trade unions for the protection of her/his interests,[18] *freedom of domicile* and so on, and which the Court of Justice has on several occasions expressed the wish to guarantee directly.

One could multiply examples. It is sufficient to recall, amongst others, the incorporation by the Court of principles deriving from the *Civil law tradition*, such as the principle of *good faith,* or the principle of *legitimate expectation,* which comes from the German legal tradition; or vice-versa, deriving from the *Common law tradition*, such as the principle of *reasonableness*.

The formulation of general principles by the Court of Justice (as to which, see above) is not to be confused with the activity of the same Court and national courts, thanks to which merely the *diffusion of general principles or legal models* is achieved.

In the first case, the Court of Justice confines itself to the discovering of general principles present in the Member States. It concerns more than anything the vertical incorporation of a model, which arises from the legal systems of Member States and passes into the Community system.

In the second case, the diffusion of the model goes in two directions: having ascended, thanks to the Court of Justice's activity, from one or more Member States to the Community, it goes down again, this time to be used in the national Courts, in systems where it did not previously exist or was never used.

This phenomenon, from certain points of view, achieves a more sig-

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[17] ECJ Judgment of 10/27/1976, *Prais v. Council*, C-130/75, (1976) ECR I-1589.

[18] ECJ Judgment of 10/08/1974, *Union Syndicale and others v. Commission*, C-175/73, (1974) ECR I-917.

nificant degree of harmonization of the legal systems than the implementation of EC law does.

In fact, the application of a Community regulation, the implementation of a directive, or the interpretation of national laws in conformity with Community directives all amount to the *performance of an obligation imposed by the Treaty*, from which judges may not derogate. On the other hand, no obligation exists to compel the same national judges to apply rules and principles which do not belong to their own legal system.

The obligation would only arise if it concerned a procedure in the context of a preliminary ruling under Art. 234 (ex art. 177) TEC. In such a case the national judge must stay the proceedings, submit the issue to the Court of Justice for interpretation, and wait for the binding judgment of the Court.

In the situation we are illustrating, on the other hand, the *national judges voluntarily* make use of legal principles formulated by the Court, autonomously and without binding interpretative effect. The new principle does not enter into the case law of the particular State because it has been imposed by the Community, rather it enters because the national judge has accepted it of his own motion.

This is a clear sign of the development of a common European consciousness, which brings the national systems nearer to a common nucleus, here represented by the Community system, and which inclines judges to fill the gaps in their own law by borrowing from Community jurisprudence, made more "convincing" thanks to the prestige enjoyed by the Court of Justice.

One thinks of the so-called *principle of proportionality* which the Court of Justice has used many times since the 1970's, regarding as a basis the corresponding concept of *Verhältnismässigkeitsgrundsatz* under Articles 2 and 14 of the German Federal Constitution, to affirm that provisions of Community organs may not impose obligations which are not proportionate to the prescribed aims.[19]

The principle of proportionality later made its entry into Great Britain and has been used both for issues relating to Community law and questions of internal law. In 1980, Glidewell J. of the Queen's Bench Division invoked the principle in a reference for a preliminary ruling under Art. 177 (now art. 234) TEC, to decide whether a particular punitive sanction by the Commission ought not to be considered as too severe with

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[19] ECJ Judgment of 12/17/70, *Internazionale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Füttermittel*, C-11/70, *(*1970) ECR I-1125.

respect to the violation committed, and whether it was incompatible with the principle of proportionality.[20]

> The Court of Justice accepted the British party's argument.
> ***Man (Sugar) v. IBAP* ruling**: "**(§ 20)** It should be noted that, as the court held in its judgments of 20 February 1979 (case 122/78, *Buitoni v. Forma*, (1979) ECR 677) and of 23 February 1983 (case 66/82, *Fromancais sa v. Forma*, (1983) ECR 395), in order to establish whether a provision of community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalise failure to comply with the secondary obligation as severely as failure to comply with the primary obligation."

In another case, the principle was invoked with respect to issues which had nothing to do with Community law. This involved a judgment of the British Court of Appeal in 1976,[21] which considered that the penalty inflicted upon a street vendor was disproportionate in that his trading license was permanently revoked for his having violated a bye-law.

Another typical example of spontaneous judicial incorporation concerns the *principle of legitimate expectation* applied to administrative decisions of the State. The principle, which arose and was developed in post-war Germany (*Vertrauensschutz*), has also been adopted by the Court of Justice, which has confirmed its applicability at Community level in numerous decisions,[22] where it concerns the recognition of responsibility by the Community institutions for having adopted measures without safeguarding legitimate expectations raised by previous legislation.

Later, in two well-known judgments of 1994, the principle of legitimate expectation was accepted by French as well as British administrative law.

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[20] ECJ Judgment of 09/24/1985, *Man (Sugar) v. IBAP,* C-181/84, (1985) ECR I-2889.

[21] *R v. Barnsley M.B.C. ex p. Hook*, 1976 3 *All ER*, 452 ff.

[22] Among the first, see ECJ *Judgment* of 06/05/1973, *Commission v. Council* C-81/72, (1973) ECR I-575; ECJ *Judgment* of 05/14/1975, *CNTA v. Commission*, C-74/74, (1975) ECR I-533.

In the first case,[23] the *Tribunal administratif* accepted the comments of the *Commissarie du gouvernement* which, among other things, invited the *Tribunal* to:

> "vous tourner vers d'autres horizons juridiques, ce à quoi vous invite à vrai dire la position géographique privilégiée à cet égard de votre tribunal, à proximité immédiate de l'Allemagne et au voisinage du Luxembourg, où le principe de *confiance légitime* occupe une place éminente dans l'ordre juridique alors que il est à peu près ignoré dans notre système juridique."[24]

The *Tribunal* agreed with the comments of the *Commissarie du gouvernement*, and accepted the invitation, applying for the first time in France a principle which the European Community had already incorporated, borrowing in its turn from the German legal system.

In the second case,[24] the learned judge suggested that the formulation of a policy, together with exceptions, is a legitimate mode of resolving the potential conflict between the two imperatives.

> At *722A* Sedley J. said that there are "two conflicting imperatives of public law: the first is that while a policy may be adopted for the exercise of a discretion, it may not be adopted with a rigidity which excludes consideration of possible departure in individual cases (...); the second is that a discretionary public law power must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it [...]. The line between individual consideration and inconsistency, slender enough in theory, can be imperceptible in practice."

In that way, this policy was a means of securing a consistent approach to individual cases. The Queen's Bench Division rejected the opposing argument of the Ministry, and invoked the principle which the European Community had already incorporated.

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[23] *Tribunal administratif de Strasbourg*, *Entreprise de transports Freymuth c. Ministre de l'Environnement,* 12/08/94, concl. J. Pommier, *AJDA* 1995.555, note M. Heers, *RFD adm.* 1995.963. But a year later, the administrative court of last resort, the *Conseil d'État,* did not agree with the policy suggested by the administrative lower court.

[24] Approx: "You are applying to other legal horizons, which frankly your privileged geographical position suggests to you with regard to this tribunal, in the immediate proximity of Germany and the Luxembourg neighborhood, where the principle of legitimate confidence occupies an eminent position in the legal procedures while it is somewhat neglected in our legal system."

[25] *Queen's Bench Division,* 11/03/1994, *Hamble Fisheries (Offshore) Ltd.* v. *Ministry of Agriculture*, [1995] 2 *All ER* 714 (QB).

6. Competition between Legal Models, Political Forces, and Economic Policies

An analysis of the circulation of legal models and rules within the Community has proved a very useful tool for assessing how far *competition* plays a part in the process of producing Community law.

First of all, it follows from what we have seen above that the lack of approval of a Community regulation or directive should not be attributed to the unwillingness of States to give up their own rights of sovereignty and the exercise of legislative power. The reality is that the States have already, and in a striking way, conceded the right to exclusive jurisdiction, and have shown on many occasions that they have now "assimilated" this new order, which is sanctioned at a formal level by the codification of the principle of subsidiarity.

If a regulation or a directive is not approved, there are almost always economic reasons behind it. The cabinet ministers concerned, industrial and professional associations, various lobbies which operate at Community level or which form part of the Economic and Social Committee or which in any case manage to influence the Commission, veto the proposal through their own State representatives within decision-making bodies, until the agreed common solution is to their liking.

The Community law therefore becomes, more often than not, a '*bargained law*,' the result of trading between the parties. The lower the novelty content, the less room there is for innovation of internal rules and modification of their essential points, and the easier it is to adopt a regulation or a directive.

What normally happens around the Brussels table is not a competition between models, but a competition between political forces or economic forces, or between these two factors. The final result therefore runs the risk of being not necessarily the most efficient.

The fact is that Community law and national law are aimed at achieving a single market and they clash with freedom of economic choice and private autonomy. The mandatory rules, whether Community or national in origin, intervene on the other hand, to limit freedom of choice, sometimes with the aim of protecting a party which is perceived as weak, and other times to placate certain lobbies. The legislative choices, whether made in Brussels or at national levels, are therefore made under the influence of the pressure of interested parties, counterbalanced by a nevertheless widespread political will to make room for the Market (*versus* State) in all its aspects.

In this balancing act, not only the Community but above all the Member States themselves are compelled to welcome efficient laws (that is,

rules which do not impede the market) so as not to risk alienating the entrepreneurial sector.

For example, when several alternatives are made available by the Community in a directive, the States will choose—at the implementation stage—the one they consider least costly, the one which, from the point of view of a single market and free competition among businesses, can offer the best opportunities for those to whom it is directed. But it can by no means be said that those who make the choices know how to evaluate which model is the most competitive and efficient. This method is perhaps the most frequent in the ambit of the Community, and works by means of the adoption of harmonization directives which propose a model, leaving the possibility open to the States to derogate in relation to specific rules. One thinks of the directive on products' liability which leaves to Member States the right to introduce, or maintain, at the implementation stage, stricter rules for producers; or one thinks of the directive on time–share, which allows States to adopt more severe measures to protect the buyer. It is clear that where different solutions persist, the businessmen (or the customer, depending on the case) who operate in this sector of the State in question may be penalized, and in the long term, conformity with the standard used in the other countries will be necessary.

Other more (or less) efficient alternatives of harmonizing national laws are generated by spontaneous competition among the different models, competition which will produce a winning version and the adoption of the one which turns out to be the best, most convenient, and efficient.

These are alternatives which the Community itself more (or less) unconsciously makes use of every time a minimum uniform model is planned by means of a directive, whose integration is left to spontaneous competition amongst the working rules applied in the various Member States, to be refereed by citizens, business, and clients who will decide on and affirm the most convenient version. For example, in the field of insurance, the harmonization directives have established some uniform rules respecting conditions of access and the way the insurance business is operated, but have avoided detailed rules about contracts of insurance. Starting with the assumption that insurance companies can circulate freely within the Union to offer their own insurance products, contracts, and conditions in whichever Member State they like, it has been seen as preferable to leave to the market—to commercial rivalry and therefore to competition—the job of harmonizing the final working rules.

The competition among legal models and rules, a fundamental means of legal transplant, does not occur either in Brussels or in the various national seats of government, but in the marketplace. We have demon-

strated abundantly the advantages that a competitive model can boast. As far as we are concerned, we share the view that the circulation of legal models, or in other words, the chance for various legal systems to compete and to be imitated or selected for their prestige or efficiency, is proving itself more and more a valid alternative which does not exclude, but aligns itself with the "centralized" harmonization process.

The perplexity which States demonstrate in the face of harmonized legal models and rules, the compromises to which the Community legislature has to agree with in order to obtain the necessary majority agreement, the ever-reducing scope which characterizes harmonization activity, are all elements which should prefigure the development of competitive technique among the models, encouraged by ever greater economic, social, and cultural integration among the Member States.

7. Language Problems

In every modern legal system, lawyers, judges, legal scholars, and people involved in the administration of the law, use terms which have precise meanings in order to exchange ideas and concepts.

When lawyers make applications to judges, when academics express their own interpretations, when the legislature produces new written laws, discourse is possible because technical language with its own particular meaning is used. The more unequivocal the meaning of a term or an expression, the easier the process of communicating the idea.

The language in the legal sector is therefore a technical one, hardly comprehensible to those outside the field. What matters is to know this linguistic Code in order to be able to understand and make oneself understood by others using the same "grammar." The use of precise terminology, of terms charged with a particular significance, is nonetheless a necessity, above all when, with just one word, one may express an idea or a concept which would take dozens of words to explain each time.

Take, for example, the expression *derecho foral*[26] used by the Spanish to indicate laws of a regional or local character, founded on special provisions for Aragona, the Balearic Islands, Catalonia, Navarra, and Vizcaya (today these five regions still retain these laws), otherwise known as the *foral systems* (or non-Castilian law). It represents the end result of seven centuries of local customary law, especially civil law, that was recognized as equal, if not superior, to national civil law.

[26] See art. 169 of the Spanish Constitution of 1978.

Take another example: to indicate the particular watchdog body for public limited liability companies, the *supervisory board*, which performs something more than, and different from, a simple control function, the Germans use the term *Aufsichtrat* which does not correspond to the Italian *Collegio sindacale*.[27]

To indicate that original event, typical of the common law tradition, on the basis of which a benefit or capital sum is owned by one person and held to the benefit of a third party, the British used the term *trust*.[28] To indicate the parameters which a judge must use to assess the behavior of a reasonable man, the Italian expression *buon padre di famiglia* is used, and so on.

Sometimes the *literal* translation of a term or an expression from one language to another exactly expresses the same concept. But it is not always so. If the German word *Geschäft* which translates into Italian as *negozio* means the same thing in both the legal systems, the word *contract* in British Law does not correspond to the French *contrat* or the Italian *contratto*.

The British term *obligation* is wider and less rigorous than the Italian *obbligazione*, but for its part, the French word *obligation* means the same as Italian *obbligazione*.

The German *Kausa* is not the same thing as the Italian *causa*, just as the German *Betrieb* is not exactly the same as Italian *azienda* nor exactly *impresa,* but embraces a part of both the concepts of *azienda* and *impresa*.

Such linguistic differences, if not well noted, can have repercussions within the internal legal systems at the implementation stage of Community law.

The language of the Community acts is usually extremely simple, descriptive and easily read and understood by the general reader, but at the same time it is full of doubts and uncertainties for the legal expert. For this reason we will have no problem in recognizing the extra-national matrix of an implementation provision, which clearly shows its Com-

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[27] Of great use in these cases, are the dictionaries of German law, such as the *Einführung in die deutsche Rechtssprache* by H. Simon, Munich, 1999, or *Einführung in die italienische Rechtssprache*, by S. Cavagnoli and J. Woelk, Munich, 1997, and French, British and Italian legal dictionaries: *Dizionario giuridico, Inglese-Italiano,* vol.1, *Italiano-Inglese*, vol.2, Milano, by F. De Franchis; *Vocabulaire juridique*, by G. Cornu (ed.), Paris; *Lexique des Termes Juridiques*, by R. Guillien, Paris, 1999.

[28] The term has not been translated or substituted even in the Convention: *The Hague Convention on the Law applicable to Trusts and on their Recognition* (concluded July 1st, 1985), on the Internet at http://www.hcch.net/e/conventions/text_30e.html, where there is a link to the list of the 56 Member States of the Hague Conference.

munity origin. In effect, the Community legislature uses a language very different from that used within national legal systems. The fact is that very often the directives use a non-judicial, non-technical language. The Community and national legislatures which implement Community laws are tending to use a type of language ever more directed at individual sectors, destined for the professionals within the sector concerned with the provisions in question; so, for example, the particular language taken from that used in the workplace for the directive on "all-in" package tours in travel contracts, or for the directive on time–share, or consumer credit; we shall be returning to these directives in the second volume of the *Guide to European Private Law*.

Sometimes the legal terminology is completely overturned; very often translation difficulties involve approximate or face-value renderings of the terms.

For example, in the Italian version of Directive 93/13/EEC of April 5 1993 on *unfair terms* in consumer contracts (a non-negotiated term is unfair when it establishes a significant imbalance, to the consumer's detriment, between the rights and obligations of the contracting parties), the expression *clausole abusive* comes from a careless translation of the French term *clauses abusives*. In French the adjective *abusives* means the same as Italian *vessatorie*—a term used in the legal system area of terms of contract. The translators' inaccuracy was about to import into the Italian legal system an expression (*clauses abusives*) which would have had unfortunate consequences had it become part of the terminology and organization of the Italian Civil Code. Only at the last minute, on the point of implementation, was a different expression chosen, more faithful to the original aim of the directive, using the terms *clausole vessatorie*. It is to be noted, however, that notwithstanding all this, the term *abusive* has "slipped past" the Italian legislators a few times: see the new article 1469-*quinquies*, clause 4, e 1469-*sexies,* clause 1, of the Italian Civil Code.[29]

It is only natural that when a German, Italian, or Portuguese lawyer needs to speak with a European colleague, s/he needs to know first of all what terminology that person is using. The problem takes center stage in the study of Community law when the discourse widens to include Hungarian, Czech, Slovak, Polish, and Slovene lawyers, and all the others.

Paradoxically, it will be easier to know and learn a different terminology where this expresses different notions and concepts, than to use one where the same term corresponds to different notions and concepts.

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[29] See the second volume of the *Guide*, chapter VII.

The likely conditioning by one's own legal training is a factor which cannot be ignored. In other words, it will be easier for a continental jurist to learn the meaning of the British term *trust* than the meaning of the term *property.*

This problem seems to be closely connected to that of translating Community legal texts, a question of no little account when one considers that there are 20 official languages in the Europe of Twenty-five Members.[30] For example, the French term *professionel* or the British one *professional* used in the original text of the directive on consumer protection has a meaning which does not correspond exactly to Italian *professionista*. Nonetheless, in the Italian texts incorporating the directive, the term *professionista* is used.

8. Old Terms for New Concepts: Some Examples

Having established this necessary premise, let us return to the problem of the different meanings which certain expressions take on in the ambit of the Community with respect to that of the national legal systems.

Sometimes this concerns broader, more extended meanings, so as to include rules and institutions which do not appear in the individual systems, or only appear in some of them; at other times, on the contrary, it concerns narrower concepts; in some cases the use of a new meaning given to a word remains confined to the Community ambit, that is to say in the interpretation and application of the Treaty and the derived legislation, while at other times the new meaning is also used within the (national) systems, modifying the international translators' terminology in the application of internal law.

For example, the notion of *undertaking* in the Community legal system does not correspond to its use in the Italian legal system (*impresa)*. The issue is not of secondary importance. The questions which interpreters have asked themselves since 1957 is whether the notion of *impresa* in the Civil Code corresponds to the kind contemplated in Articles 85 (now art. 81) and 86 (now art. 82) TEC, the two fundamental rules in compe-

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[30] Among the free access online dictionaries made available by the EU, we remind readers of the automatic translation system (a multilingual term bank) *Eurodicautom* (http://europa.eu.int/eurodicautom/Controller) and the terminology information system (a terminological database) on-line *TIS* (http://tis.consilium.eu.int/utfwebtis/frames/introfsEN.htm). These instruments, while sophisticated, are not conceived to identify the semantic meaning of the legal terms they translate, and therefore are not as yet capable of resolving the problems raised by the translation of notions and concepts which lie behind legal rules.

tition law which carry heavy penalties for whoever disregards them. But it does not end here.

In the case of Italy, for example, the *antitrust law* (Act no. 287/90) introduced new rules in the area of competition. Given that the law refers to concepts known to the Italian Civil Code and, at the same time, to Community law, and considering that the latter must be taken into consideration for interpretative purposes (since art. 1 (4), of the antitrust Act provides that the law is to be interpreted according to the principles of Community law), the interpreter may ask her/himself whether the activity in question is tied to the concept in the Code, or whether s/he can exclude it, with in preference to the Community version of it.

Beyond what is established by art. 1 (4), Act no. 287/90, the law is plainly inspired by the Community, although no directive has been implemented, and concurs with the Community law system. Thus to conclude, in applying the Italian Act 287/90, the interpreter should construe *undertaking* (*impresa*) according to the meaning given to it by the Community law.[31]

The Treaty of Rome which founded the European Economic Community contains no definition of undertaking. If it seems curious, at first glance, that a legislature which occupies itself mainly with issues and problems generated by the great theme of competition has refused to define a concept which is fundamental to the economic reality, this omission is nonetheless easy to explain.

A general definition of undertaking, common to all Member States, would have had to encounter all the national differences and diversity. Another reason against attempting a general definition on the part of the Community legislature was the fact that the three founding Treaties of the European Community (EEC, ECSC and Euratom) pursue different objectives; to produce a unique concept to suit all three situations seemed not only a difficult but also an ill-advised task. An elastic concept of such a hard-to-define topic has shown itself in all probability more useful in a supranational system, which by its very nature must be capable of adapting to all kinds of real situations.

Thanks to the vagueness of the concept of undertaking which is typical of the greater part of national legal systems,[32] since the 1960's the Court of Justice has forged a concept of undertaking which sets out the following basis:

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[31] Compare chapter IV of the second volume to *A Guide to European Private Law*.

[32] With the possible exception of the Italian one: in fact, see arts. 2082, 2135 & 2195 of the Italian Civil Code.

> "An undertaking is constituted by a single organisation of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim. According to this concept the creation of every legal entity in the field of economic organisation involves the establishment of a separate undertaking; a particular economic activity cannot be regarded as forming a single unit in law when the legal effects of that activity must be separately attributed to several distinct legal entities."[33]

The presence in this first definition (which remained practically unchanged until the mid-60's) of the *economic aim*, and above all, of the *legal personality* foreshadowed what was to become the later conception of undertaking in the ambit of the Community. It turns on the concept of *autonomy* as understood in the legal, economic,[34] and decision-making sense,[35] to the point of reaching the considerable expansion which the concept has undergone in recent years, given according to a current definition by the Court of Justice:[36]

> ***Höfner and Elser v. Macrotron*** **ruling: (§§ 21–23)** "It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity. (…) The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment. It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules."

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[33] *ECJ Judgment* of 07/13/1962, *Mannesmann AG v. ECSC High Authority*, C-19/61, (1962) ECR I-675.

[34] In fact, undertaking can constitute all economic activity (and hence also that carried on by public entities, which, while being non-profit making, are subject to Community law in the area of competition) which is of relevance to the Community in the sense that it has the potential to affect the common market, provided that they have decision-making autonomy.

[35] The requirement of autonomy in decision-making can be used for opposite reasons, either to apply art. 81 *(ex* art. 85) TEC, or to exclude its application.

[36] *ECJ Judgment* of 04/23/91, *Höfner and Elser v. Macrotron*, C-41/90, (1991) ECR I-1979.

This very wide definition has been partially modified by another decision of the Court[37] in which it was stated that activity connected with the exercise of prerogative, which is typical of public authorities and which is not of an economic nature, thereby justifying the application of the Community laws on competition, does not constitute undertaking.

> ***SAT Fluggesellschaft v. Eurocontrol*** **ruling: "(§ 18)** It follows from the case-law of the Court (see especially the judgments in Case C41/90 Hoefner and Elser v Macrotron GmbH [1991] ECR I-1979, at paragraph 21, and in Joined Cases C-159/91 and C-160/91 Poucet et Pistre [1993] ECR I-637, at paragraph 17) that, in Community competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. **(§ 30)** Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition. **(§ 32)** On those grounds, the answer to the question submitted must be that Articles 86 and 90 of the Treaty are to be interpreted as meaning that an international organisation such as Eurocontrol does not constitute an undertaking within the meaning of those articles."

The concept of undertaking has expanded considerably. The Court of Justice (supported by the Commission) has construed it in objective terms through case law. It is no longer identified as a legal person carrying on economic activity, so much as the *activity* itself. For example, the competition rules are applied excluding entirely the requisite of legal personality.

The irrelevance of the legal requisite of being a legal person has been confirmed in the well-known Decision of the Commission 69/195/EEC, in the case *Christiani-Nielsen* of June 18th 1969[38] on the subject of negative clearances, where it was held that the two companies, *Christiani* and *Nielsen*, although possessed of legal personalities, could not be considered, (with the aim of forbidding the stipulation of restrictive agree-

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[37] *ECJ Judgment* of 01/19/1994, *SAT Fluggesellschaft v. Eurocontrol,* C-364/92, (1994) ECR I-43.

[38] O.J., L 165, 07/05/1969, p. 12, not available in English. The principle of the irrelevance of legal personality has since been taken up and confirmed on many other occasions: see the Decision of the Commission 70/132/EEC, in the case *Kodak*, of the 30th of June 1970 (in O.J., L147, 07/07/1970, p. 24, not available in English).

ments on competition), as two distinct companies, given that one had control over the other's activities, with the power, amongst other things, to nominate and remove directors. The requirement of decision-making autonomy, which merely makes the competition rules applicable, does not arise automatically on the acquisition of legal personality, but indeed excludes it.

According to a current definition provided by the case law of the Court:[39]

> ***Commission v. Italy*** **ruling**: **"(§ 36)** It must first be noted that, according to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21; Case C-244/94 Fédération Française des Sociétés d'Assurances and Others v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013, paragraph 14; and Case C-55/96 Job Centre [1997] ECR I-7119, paragraph 21), and that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 Commission v. Italy [1987] ECR 2599, paragraph 7)."

What emerges above all from all this, is the way in which the Community institutions (Commission and Court of Justice) are more concerned with the economic *effects* of the businessmen's operations than with the legal requirements, when they are called upon to evaluate the behavior of companies which may affect their competitors.

In the second place, what emerges is the major importance of the company's *functional* aspect over all the other aspects (organization, legal personality), and in particular over the subjective aspect. For this reason the interpreter must, when considering company issues at Community level, keep in mind the effects of an *activity* in the economic mechanism of competition, and not be bound by the rigid definitions of her/his own particular legal system.[40]

In the area of product liability, introduced by Directive 85/374, of July 25th 1985 on liability for damage caused by defective products, the concept of *manufacturer* takes on a meaning different from the etymological one which is commonly used.

Since there is, among the more immediate aims of the Directive, that of ensuring better protection for the injured party, the decision has been

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[39] *ECJ* Judgment of 06/18/1998, *Commission v. Italy,* C-35/96, (1998) ECR I-3851.

[40] See chapter IV in the second volume of this *Guide*, already cited.

taken to involve other parties who, in one way or another, have had something to do with the defective product. In this way an attempt has been made to raise their attention threshold in relation to products which, directly or indirectly, they have helped to put on the market. For this reason, the concept of *manufacturer* includes, for the purpose of applying these rules, not only the manufacturer of the final product, but also the supplier of some primary material or component part, as well as the one who puts his own trademark, name or logo on the product; for the same reasons, the importer[41] of the product is also to be treated as a manufacturer. To conclude, any producer of defective goods must compensate for any damage caused to the physical well-being or property of individuals, independent of whether or not there is negligence on the part of the producer.

But there are numerous examples in other fields, not exclusively private law ones, of concepts which, owing to ever greater Community intervention in recent years, have undergone partial transformation of their meaning.

In the field of Community *agricultural law,* the Court of Justice came up against the concept of *force majeure,* so as to attract the attention of the Commission and academics, which revealed a difference of approach in that adopted by the Commission and the Court of Justice on this ambiguous point. In fact, the Commission would like the Court to develop a definition of *force majeure* specifically for Community law, with the aim of ensuring transparency and certainty in the application of the *force majeure* clause in European law.

For its part, the Court asserts that:[42]

> ***An Bord Bainne and Inter-Agra*** **ruling** "**(§§ 10–11)** The concept of *force majeure* adopted by the agricultural regulations takes into account the particular nature of the public-law relationships between traders and the national administration, as well as the objectives of those regulations. It follows from those objectives as well as from the concrete provisions of the regulations in question that the concept of force majeure is not limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of

[41] The consequences for the European legal systems brought about by the new laws on product liability are covered in the second volume of this *Guide*, in chapter II.

[42] *ECJ Judgment* of 10/13/93, *An Bord Bainne and Inter-Agra v. Intervention Board for Agricultural Produce*, C-124/92, (1993) ECR I-5061.

> excessive sacrifice (see inter alia judgment in Case 11/70 Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125). (…) it must first be borne in mind that the Court has consistently held that, since the concept of force majeure does not have the same scope in the various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate."

Given this partial divergence of opinion it is not possible, for the moment, to foresee what weight will be given to the concept of *force majeure* being developed in the particular context of agricultural law on the interpretation, for instance, of the same expression *force majeure* in the Council Directive 90/314/EEC of June 13th 1990 on package travel, package holidays, and package tours, or in other directives relevant to contract law.

9. The New Concepts

Law evolves continuously, modifying old rules or producing new ones. This evolution does not always happen at the definition level; in these cases the ability to apprehend and transfer these variations is left to the interpreter's sensibility and skill.

At other times however, the new legal rule or institution is identified conventionally by an expression, a term or a concept which typifies it, thus allowing it to spread more quickly and widely in the legal arena.

The Community legal system has a case law very rich in concepts and institutions which are truly novel, in the eyes of lawyers of the various European countries.

In some cases the new legal rule is exclusive in character, that is to say that, having been developed for reasons strictly connected to achieving European Union objectives or the needs of the common internal market, it remains confined at Community level, within the ambit of Community law, and is used only to apply those community rules. This is the case, for example, with respect to the legal concept of *aid granted by State by favoring certain undertakings* contained in art. 87 (ex art. 92) TEC, of the *right of establishment*, or the *exercise of freedom to provide services*, which we shall be returning to in later chapters.

However, in other cases the new rule, while nonetheless developed as a response to Community requirements, proves itself useful at national levels, for resolving cases which have exhausted judicial remedies within the domestic legal systems. In such cases the rule or institution is incorporated and adopted either by the national legislature or by national judges, thus giving rise to a special and interesting version of the circu-

lation of legal models, passing from the Community legal system into the national systems.

In all these cases the interpreter (lawyer or judge) when called upon to use the new instruments, cannot ignore the Community origin of the rule or institution, nor can s/he ignore the interpretations supplied over the years by academics and Community case law.

It is here, especially in the fields of civil and commercial law, that Community law stimulates interest and the inevitable necessity to know ever more about the content, the rules, the concepts, and their respective evolution.

One thinks of the *doctrine of exhaustion of patent right*, which had originally been developed as a response to purely Community requirements.[43] Until the 1960's, the owner of a patent had the right to divide up his/her market in order to maximize his/her own profits, allowing sale of the product only in certain areas, forbidding or limiting it in others (the so-called *isolation* of national markets). It concerned a right which was normally recognized by all the Member States within their own market.

However, this possibility of limiting, for commercial purposes, the movement of goods enjoying patent rights soon appeared in sharp contrast to the aims of a single market and, in particular, to the principle of free movement of goods.

The Court therefore established, by the ruling in the *Centrafarm* case of 1974,[44] that:

> ***Centrafarm* ruling**: "**(§10)** An obstacle to the free movement of goods may arise out of the existence, within a national legislation concerning industrial and commercial property, of provisions laying down that a patentee's right is not exhausted when the product protected by the patent is marketed in another Member State, with the result that the patentee can prevent importation of the product into his own Member State when it has been marketed in another state. **(§11)** Whereas an obstacle to the free movement of goods of this kind may be justified on the ground of protection of industrial property where such protection is invoked against a product coming from a Member State where it is not patentable and has been manufactured by third parties without the consent of the patentee and in cases where there exist patents, the original proprietors of which are legally and economically independent, a derogation from the principle of the free movement of goods is

[43] See the second volume of this *Guide*, in chapter V.

[44] *ECJ Judgment* of 10/31/1974, *Centrafarm BV and others v. Sterling Drug*, C-15/74, (1974) ECR I-1147.

> not, however, justified where the product has been put onto the market in a legal manner, by the patentee himself or with his consent, in the Member State from which it has been imported, in particular in the case of a proprietor of parallel patents. **(§12)** In fact, if a patentee could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents. **(§14)** It should be noted here that, in spite of the divergences which remain in the absence of any unification of national rules concerning industrial property, the identity of the protected invention is clearly the essential element of the concept of parallel patents which it is for the courts to assess. **(§15)** The question referred should therefore be answered to the effect that the exercise, by a patentee, of the right which he enjoys under the legislation of a Member State to prohibit the sale, in that state, of a product protected by the patent which has been marketed in another Member State by the patentee or with his consent, is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the common market."

In other words, while all the other rights relating to the commercial exploitation of industrial property remain intact, the right of a patent-holder to limit movement of the product is exhausted once the product has been sold in another country of the Community. The doctrine of exhaustion of patent right was then officially formulated in the later Luxembourg Convention of December 15th 1975, which created the so-called *Community patent*, and in particular by articles 32 and 81.[45] The same principle has been successively extended by the Court of Justice to include *trade mark rights* and *copyrights* and codified first in First Council Directive 89/104/EEC of December 21st 1988 to approximate the laws of the Member States relating to trade marks (art.6), then in Council Regulation no. 40/94/EC of December 20th 1993, which established the Community trade mark.

These are only some of the innumerable examples one could cite. One thinks, for example, of the many principles introduced in the field of liability for environmental damage, such as the *principle of preventive action,* or the principle of *who pollutes pays,* and so on, sanctioned by the Single European Act (SEA) and confirmed by the Maastricht Treaty in art. 130 R (after Amsterdam art. 174).

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[45] See the second volume of this *Guide*, chapter V.

We will be encountering many others in the following pages. Certainly they are already sufficient in themselves not only to reinforce what we have been able to gauge regarding the force of impact of Community law on internal law, but also to realize that national law is no longer evolving thanks to domestic academic commentary and internal precedents. Today, each national law evolves at the same rate as that of the other Member States, as well as the law produced by the European Community.

There is a double interaction between the various components of the European Community.

On the one hand, the legal rules and institutions evolved within a particular State sooner or later meet those at Strasbourg, Brussels or Luxembourg where, in their turn, they are taken up and redirected into the legal systems of the other Member States.

On the other hand, the Community organs themselves develop the new rules and institutions as a function of achieving the aims fixed by the Treaties. The Community legal system therefore functions as a transmission chain between the national systems and, at the same time, as a propeller of new laws, legal rules, and judicial models, which impinge on the national scene and demand an ever greater convergence of legal results.

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Chapter III

Harmonization as an Instrument for the 'Reinforced Pre-Accession Strategy'

Key words: Enlargement – Central and Eastern European Countries – Europe Agreements – White Paper – Agenda 2000 – PHARE – ISPA – SAPARD – Accession Partnerships – Regular Reports – National Programs for the Adoption of the *Acquis* – Accession Treaty – Stabilization and Association Agreement – European Partnerships – European Council – European Bank for Reconstruction and Development

1. Foreword

The abandonment of communism, following the historic events of 1989–1991, has encouraged the development of a new form of harmonization and uniformization, which involves the Central and Eastern European Countries (hereinafter referred to as CEECs)[1] in view of their accession to the EU. What is more, it has accelerated the decisive transformation of Europe into a Union, which is no longer exclusively economic.

An analysis of the reasons for the end of communism and the emergence of the post-communist order is beyond the scope of this book.[2] There exist several explanations for the transformation: they address, in different ways, the question of the revolutionary or evolutionary character of the end of communism, and point either to implosion or explosion as the main vehicle of change. Communism collapsed because it could not ensure progress (so called "theory of modernization"), or because it failed to satisfy the hope it had raised ("theory of disappointed hopes"), or because the breakdown of the bipolar world order (so called "theory of globalization").

2. The Enlargement of the European Union to Include the CEECs

For many decades, economic integration was the principal agent for building Europe. The creation of a common market and the gradual bringing together of the States' economics, with the aim of a balanced economic

[1] See above chapter I, § 5.

[2] For bibliographical references see the end of this chapter.

expansion and an increase in the standard of living of the population, were the principal objectives of the Treaties of Rome: the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).[3]

The strategy for constructing a united Europe through economic means has proved very effective since the European Coal and Steel Community (ECSC) was founded in 1952, overcoming the resistance of Member States to surrendering their own sovereignty in certain sectors of the economy, as they were attracted by the benefits resulting from the integration of the markets. However, the idea of achieving a common single market, which would liberalize commercial exchange and remove customs and tariff barriers, has gradually eroded the domestic powers of the Member States, and, as time has passed, has served to pursue the further objective of political & institutional integration among the European States.

The question has become particularly relevant with the fall of the Berlin Wall.

Prior to this, political and economic relations between the European Community and the CEECs were affected by Soviet ideology. The economic system of the Soviet type, in force in the communist countries, obstructed the implementation of commercial relations of a competitive kind under a regime of market forces, while attempts at legal/institutional reform met opposition at a political level, which was impossible to overcome. State ownership of the means of production and central planning of the manufacture and trade, represented two aspects of the same choice: the suppression of the market. The backwardness of the Soviet type of economic system became steadily more marked during the 1950's, creating unfavourable economic and social conditions compared to the market-led economies.

The CEECs operated until the end of the 1980's within limits defined by the sphere of influence of communist ideology and the rigid directives planned for the economic sector, which were imposed by CMEA.

> The Council for Mutual Economic Assistance (CMEA), an abbreviation used in the West to indicate the *Sovet Ekonomičeskoj Vzaimopomošči,* was an intergovernmental organization founded in Moscow in 1949, to which Bulgaria, Czechoslovakia, Poland, Romania, Hungary and the USSR belonged, and which the following later joined: Albania (which in fact left in 1961), Yugoslavia (in 1964 for economic reasons), Outer Mongolia (in 1962)

[3] *Cf.* above chapter I, § 2 and chapter IV.

> and the German Democratic Republic (in 1950). CMEA was created to sustain the development of the planned economies of the Member States, as a response to the Organization for European Economic Cooperation (OEEC), founded in Paris on April 16th 1948 to promote the economic reconstruction of Europe using assistance from the USA guaranteed by the Marshall Plan. In 1961 the OEEC became the Organization for Economic Cooperation and Development (OECD). In a Joint Declaration in 1988, the EC and CMEA established official relations with each other, and agreed to develop cooperation in areas within their respective spheres of competence: see O.J., L 157/35, June 24, 1988.

Hungary, Poland and Czechoslovakia followed a different path, signing *Commercial Agreements* with the EEC before the end of Communism.

> The first EC trade agreements, signed by Hungary and Poland, were essentially commercial and provided for the reciprocal implementation of the "most favored nation clause," the elimination of quantitative restrictions on trade and the liberalisation and free circulation of products. Among other examples, the Council Decision of March 13th 1989, 89/215/EEC, relating to the conclusion of an Agreement between the European Economic Community and the Czechoslovak Socialist Republic on trade in industrial products and of an Agreement in the form of an Exchange of Letters between the European Economic Community and the Czechoslovak Socialist Republic concerning *'Testausschreibung.'* (O.J., L 88, 31/03/1989).

The *rapprochement* of the CEECs to the EEC was sanctioned by the *Europe Agreements*.[4]

As we shall be seeing in the following pages, these Agreements formed the basis of the '*reinforced pre-accession strategy*' and constituted the fundamental legal framework in the negotiation process, which led the CEECs into the internal market.

> The internal market is defined by **Art. 14 TEC** as a space without internal borders, where the free movement of goods, persons, services and capital is guaranteed. The European economic policy which supported the last enlargement process was based on the assumption that the countries in transition would be the more capable of assuming the obligations which were a consequence of joining, the greater the degree of economic integration they could achieve prior to accession.

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[4] See below, §3 a) of this chapter and the table at the end of this chapter.

The Agreements were aimed at regulating the process of commercial and economic integration and promoting political dialog between the European institutions, Member States, and signatory countries to the Agreements, by means of legal provisions which applied to free trade, economic cooperation, and harmonization of the laws.

The convergence between the CEECs' legal systems and the Community legal system was not the principal objective of the Agreements. It was only following the decision of the European Council of Copenhagen (1993),[5] where the criteria that each State must satisfy in order to accede were formulated, that compatibility between the legal systems became one of the main tasks of the negotiation phase of the accession strategy.

It can therefore be seen that, even before the Europe Agreements were drawn up, the legal systems of Central and Eastern Europe had already experienced an autonomous phase of spontaneous and unilateral adaptation, from the communist legal system to that of the Community (for example, in the area of civil and commercial law), without any binding obligation being imposed by supranational or international law. We can, at least with regards to this initial phase, define this *process of adaptation* of the laws of the ex-communist bloc to those of the Community as *voluntary*.

The transition process from planned economy to market economy had also received support from *foreign direct investments* (FDI), two thirds of which still comes from the Member States of the EU. The FDI contributed to the modernization of the applicant countries' economies by means transfering new technology, raising manufacturing standards, transfering know-how, and developing new entrepreneurial activity. The fact that local business had gradually begun to supply new products and services revitalized internal employment prospects.

The increased flow from the FDI, on the other hand, had been encouraged by legal and institutional reforms undertaken in the CEECs, notably in the area of legislation on foreign investments. These reforms provided a new system of guarantees to protect investors, fiscal regimes, and customs incentives, while providing other conditions judged as favorable by foreign investors, which favored forseeability and legal certainty, reducing the bureaucratic apparatus and State intervention in the economy.[6]

However, the outlook was mixed, and foreign investors diversified their investments in the region according to the macroeconomic conditions in each Country: a high percentage of foreign investment was to be found, for example, in the Czech Republic, Hungary, Poland, Slovenia,

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[5] See below, § 5 of this chapter.

[6] See some examples in the second volume of this *Guide*.

and Estonia, which privatized all the sensitive areas of the economy (public services, telecommunications, transport, energy, the financial sector, banking), and which enacted laws on the restitution of lands (of previously confiscated real estate); the percentage of foreign investment was lower, on the other hand, in Slovakia, Romania and Bulgaria, countries with a large rural sector, where privatization proceeded with more difficulty (or is not yet complete), above all in the area of land reform, with negative repercussions in the construction industry.

During the 1990's, the process of enlargement towards the Central and Eastern countries received a further stimulus from the changed outlook regarding European institutions, following the progressive institution of an area of freedom, security, and justice[7] and the approval of the Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission on behalf of their institutions on December 7th 2000 in Nice. The road to the development of the Charter was prepared by the European Council of Cologne (June 1999), which sanctioned the need to render 'visible' the fundamental rights of European citizens, legitimizing them on a formal level. The European Council of Tampere (October 1999) established the composition of the body which was to develop the Charter project: the body nominated itself as a 'Convention.' It was the same European Convention which would have then elaborated the Treaty establishing a Constitution for Europe.[8]

Thirteen countries presented requests for accession to the European Union.[9] Ten of those successfully completed the *accession negotiations* in December 2002 and joined the European Union on 1st May 2004: Poland, Hungary, the Czech Republic, Slovakia, Latvia, Estonia, Lithuania, Slovenia, Cyprus, and Malta.

These countries signed the Treaty of Accession in Athens on April 16th 2003,[10] while the accession negotiations are still in progress with Romania, Bulgaria, and Turkey.[11]

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[7] This is the provision of the art. 2 of the Treaty of European Union modified by the Treaty of Amsterdam, which came into force on May 1st 1999.

[8] See above chapter I.

[9] See the tables at the end of this chapter.

[10] In Internet at: http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/table_of_content_en.htm. Cf. below in this chapter.

[11] Cf. Communication from the Commission to the Council and the European Parliament, *Strategy Paper of the European Commission on progress in the enlargement process*, Brussels, 10/6/2004, SEC (2004) 1199, 1200; Communication from the Commission to the Council and the European Parliament, *Recommendation of the European Commission on Turkey's progress towards accession*, Brussels, 10/6/2004, COM (2004) 656 final.

Furthermore the Commission of the European Union established a new framework for closer relation between the EU and the Western Balkans (Albania, Bosnia & Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Serbia & Montenegro) to be developed through a progressive approach adapted to the specific situation of each country. This new context provides for a wide-ranging partnership, notably through a new category of agreements, the *Stabilization and Association Agreements* (SAA).[12]

> *Cf*. the Commission Communication of 05/26/1999 on the *Stabilization and Association Process with Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania,* COM (1999) 235 final, the *White Paper on European Governance of the European Commission on how to enhance democracy in Europe and increase the legitimacy of the institutions*, COM (2001) 428 final/2, and the Report of Group 6*, Policies for an Enlarged Union—Defining the framework for the policies needed by the Union in a longer-term perspective of 10–15 years taking account of enlargement*, of 06/26/2001, www.europa.eu.int/comm/governance/areas/index_en.htm.

The European Union signed the first SAA with Former Yugoslav Republic of Macedonia on March 26th 2001, which entered into force on April 1st 2004, and the second SAA with Croatia on October 29th 2001, which entered into force on February 1st 2005.[13]

Croatia already applied for EU membership in February 2003. In April 2004, the European Commission issued a positive opinion (*avis*) on this application and recommended the opening of accession negotiations. This recommendation was endorsed by the June 2004 European Council which decided that Croatia is a candidate country and that the accession process should be launched. The December 2004 European Council requested the Council to agree on a negotiating framework with a view to opening the accession negotiations with Croatia on March 2005, provided that there is full cooperation with International Criminal Tribunal for the former Yugoslavia (ICTY). The Former Yugoslav Republic of Macedonia applied for membership as well, and upon Council's request, at the end of 2004 the Commission was preparing an opinion on the application.

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[12] See below, §3.1. of this chapter.

[13] Both documents are available in internet at http://europa.eu.int/comm/external_relations/see/docs/index.htm. See below, §3.3. of this chapter.

The increase in the number of Members of the European Union puts heavy pressure on its functioning mechanisms, given that these were originally conceived for a group of 6 States and for a relatively limited number of areas.

Questions pertaining to modifications of its institutional structure, which were left unresolved at the time the Treaty of Amsterdam was signed, were then faced again at the Intergovernmental Conference (IGC February 2000) and discussed at the European Council of Nice (December 2000).[14] The questions were as follows:

- The increase in the number of members of the Commission and the consequent difficulty in maintaining the collegiate nature of its actions.
- The increase in the number of members of the Council of Ministers and the consequent paralyzing effect on its working methods.
- The increase in the number of members of the European Parliament and the maximum number as established by art. 189 TEC, as well as its function as Community co-legislator.
- The increase in litigation and the consequent effects at the level of composition and functioning of the supranational Courts (the Court of Justice and the Court of First Instance).
- The reform of the decision-making process.
- The extension of reinforced (or enhanced) cooperation, provided by the Treaty of Amsterdam, but hardly implemented at all by reason of the requirement of unanimity for the decisions.

The four enlargements in the history of Europe have involved incremental changes in the institutions (for example, the number of members of the Council, Commission, and Court of Justice, the weighting of majority votes in the Council), and sometimes the creation of new means of intervention (such as the creation of the European Regional Development Fund and the other Structural Funds of the 1970's and 1980's), but there has never been a global revision of the Community institutional system. Those adjustments, which accumulated over time, were no longer adequate.

Thus, the Treaty establishing a Constitution for Europe,[15] approved in Rome on 29 October 2004, has revised the entire institutional system, and:

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[14] *Cf*. above chapter I.

[15] *Cf*. above chapter I.

– Redefined the objectives of the Union.
– Encapsulated the Charter of Fundamentals Rights discussed at Nice 2000.
– Reformed the Union's competences and their exercise.
– Reframed the Union's institutions and bodies, creating new ones (such as the European Council President, the Union Minister for Foreign Affairs, the new configurations of the Council of Minister, which can meet vested as General Affairs Council, or Foreign Affairs Council, or European Council).
– Provided the rules on the number of members of the Union's institutions and the weighting of majority votes within them.
– Provided measures to implement the enhanced cooperation and the democratic life of the Union.

Moreover, the last enlargement has brought other questions of complexity such as the problem of language, caused by the increase in official languages and the consequent problems of translating the laws of the supranational source.

Notwithstanding the existence of difficulties connected with the enlargement of the EU, one can observe that it involves peoples and territories which historically, before the traumatic changes brought about by the establishment of the communist legal order, have shared fundamental values, at least with regard to legal culture.

As far as the strictly legal aspect is concerned, the legal systems of the area share the same common foundations, that of Roman–Germanic law. This has left pronounced characteristics in the respective legal systems of the CEECs, which can be traced in the double adaptation, on the one hand, of legal rules and principles codified by the French Civil Code of 1804, and on the other, of definitions and concepts which constitute the law of non statutory origin developed by professors in German Universities in the 19th Century (the 'Pandectist School'). Thus the CEECs are part of the Civil Law tradition.

In other words, we can trace a line, which reveals a (hidden) continuity between the pre-communist period and the post-communist one. The common foundation has been able to re-emerge largely as a result of the abandonment of the Soviet order, symbolically marked by the revolution of 1989. As a consequence, the CEECs have been able to find at least a partial continuity with the period that preceded the Second World War, at which time they became part of the communist bloc under the USSR.

So we may conclude that in the area of private law (the object of inquiry of this book), the harmonization of laws and the reception of the

Community *acquis*[16] is made easier because of the possibility of recovering the pre-communist legal past, at least from the point of view of concepts and style of judicial thinking, which the CEECs share with other legal systems in the Civil Law tradition.

3. The Legal Frame of Reference

The conditions for enlargement of the European Union are laid down in art. 49 TEU (ex art. 237 EEC Treaty, and ex art. O, of Maastricht Treaty). The rule, in establishing the method for accession of new States to the European Union, lays down that "Any European State may apply to become a member of the Union."

> According to the following procedure set out in the **art. 49 TEU**: "It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members."
>
> In a couple of years, with the entry into force of the Treaty establishing a Constitution for Europe, it will become art. I-58 (and *ff*.). The new article highlights the role of national parliaments in the procedure for accession to the Union and the condition of eligibility to became a Member, which refers to the values mentioned in art. I-2 of the Constitution.

The adjective *European* includes a series of geographical, historical and cultural ingredients, which together define the content of European identity. It is not by chance that a definition is missing from the official text of the Treaty: *European* encapsulates the common historical experience and the sharing of concepts and values that is not easily expressed in a formula or a definition. The European Commission has chosen not to impose boundaries, in the belief that it is impossible (even if it were desirable) to fix frontiers in the European Union, whose borders will be drawn in the years to come.[17]

Article 49 TEU also introduces a *political condition*, contained in the sentence which provides for the respecting of "the principles set out in Article 6(1)," already expressed in the Preamble to the EEC Treaty of

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[16] The Commission intends that harmonization should precede enlargement of the EU (which, in the subject-matter covered in the Treaty of Rome, acts as the European Community) to include the CEECs.

[17] See *Europe and the challenge of enlargement*, in *EC Bull*., *supplement* S.3/92, point 7, p. 11.

1957, according to which the founding States invited the other European populations which shared their ideals to join in their efforts "(…) resolved by pooling their resources to preserve and strengthen peace and liberty." In the Treaty of Amsterdam, the principles of liberty, democracy, of the rule of law, respect for the rights of man, and fundamental freedoms have been inserted by art 6.1 and they have become absolute prerequisites for accession by the new States.

The other requirements for admission to the EU were defined at the *Copenhagen summit*[18] in 1993. The criteria fixed by the European Council (being considered at the present time by the Commission in the course of its work on the Regular Reports on the accession process)[19] are typical of the Community strategy in its conduct of the negotiations for accession.

The criteria are based on the *political dialog clause* between the EU and the candidate countries. In fact, the enlargement requires that each applicant country for accession must satisfy some essentially political conditions (or which are directed at the political economy):

- That it should have achieved institutional stability, such that democracy, the rule of law, the principle of legality and the protection of human rights and minorities are guaranteed.
- That it should have developed a functioning market economy and possess the means to confront competitive pressure from within the market of the EU.
- That it should be capable of taking on the obligations consequent upon being a member of the EU, including the adoption and implementation of the Community *acquis* and compliance with the political, economic and monetary union.

Alongside the *Europe Agreements*, the accession process has developed around the following official documents which will be analyzed in the next paragraphs:

- The *White Paper* on 'Preparation of the associated Countries of Central and Eastern Europe for integration into the internal market of the Union' (1995).
- The 'Institution building' strategy described in *Agenda 2000*, on strengthening the Union and preparing for the enlargement (1997).
- The *PHARE* program which, since 1999, has been accompanied by two other instruments: *ISPA* (Instrument for Structural Policies for

[18] See below, § 5 in this chapter.

[19] See below § 3.6. in this chapter.

Pre-Accession), which provides help for investments in the transport and environment sectors, and *SAPARD* (Special Accession Program for Agriculture and Rural Development), whose aid is dedicated to agricultural and rural development.

– The *Accession Partnerships* (from 1998).

Besides this, the applicant countries have had the opportunity to take part in Community programs already under way. Indeed, such programs are considered a useful way of preparing for accession, since they serve to familiarize the applicant countries and their citizens with the politics and working methods of the Union. All the CEECs are indeed participating in the Community programs, notably in the following sectors: instruction, professional training, youth, culture, research, energy, environment, small and medium business ventures, and health.

The strategy based on the *political dialog clause* between the EU and the associated countries has been strengthened by a new element: the Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council, and the Commission on behalf of their institutions on 7th December 2000 in Nice.

The European Union Charter of Fundamental Rights set out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic, and social rights of European citizens and all persons resident in the EU. These rights were divided into six sections: 1. dignity; 2. freedoms; 3. equality; 4. solidarity; 5. citizens' rights; 6. justice. The Charter has been incorporated in the Treaty establishing a Constitution for Europe, located in Part II. The aim was that of recognizing the same rights and freedoms contained in the Charter, of strengthening the protection of those fundamental rights in light of changes in society, social progress, and scientific technological developments by making those rights more visible in a Constitutional written text. They are based on the fundamental rights and freedoms recognized by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers, and other international conventions to which the European Union or its Member States are parties.

3.1. *Europe Agreements*

The Europe Agreements[20] are a special type of Association Agreements or Treaties made on the basis of art. 310 (ex art. 238) TEC between the European Community and non-Member States, with a view to establishing cooperation in economic and commercial fields. The jurisdiction of the Community over the subject-matter of the Agreements is exclusive, in that the Member States cannot draw up bilateral agreements with third party States without the previous authorization of the European Community.

They have been called Europe Agreements by reason of their particular characteristics: they have been signed with the CEECs and with Turkey, Malta and Cyprus, and they became preparatory instruments for accession to the EU.

By December 1991, the Community concluded the first Europe Agreements with Poland and Hungary but the initial intention of these Agreements seemed to postpone the enlargement of the internal market, maintaining the status of the CEECs as *associate States*. Nevertheless, these Agreements officially opened a political dialog between the associate States and the European Community institutions, and aimed at establishing economic and commercial relations, creating an area of free exchange for products, services, capital, and the free movement of persons, as set out in the respective Preambles.

All the Europe Agreements made with the CEECs have the same structure and provide for:

- The creation of political dialogue designed to assist the associate countries during the transition period (a ten year transition period, from the entry into force of the Agreement), in order to instigate democratic forms of government compatible with those of the Member States of the Union.
- The free movement of persons, goods, capital and the right of establishment.
- The approximation of legislation.
- The regulation of competition.
- The creation of economic, financial and cultural cooperation.

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[20] See the table at the end of the chapter: Europe Agreements: OJ, 1993, L 347/2 (Hungary); OJ, 1993, L 348/2 (Poland); OJ, 1994, L 357/2 (Romania); OJ, 1994, L 358/3 (Bulgaria); OJ, 1994, L 359/2 (Slovak Republic); OJ, 1994, L 360/2 (Czech Republic); OJ, 1994, L 373/1 (Estonia); OJ, 1994, L 374/1 (Latvia); OJ, 1994, L 375/1 (Lithuania); COM 1995, 341, final (Slovenia).

The Agreements provide for the establishment of several collegiate bodies: the *Association Council*, made up of both representatives of the Council and the EC Commission and government representatives from the associate States (often the Foreign Ministers). This body fulfils fundamental functions in the accession process, given that it provides the opportunity to review the bilateral relations that each applicant State has established with the EU through the Europe Agreements. The *Association Committee*, made up of members of the Association Council, prepares the resolutions of the Council and oversees the correct performance of the latter. Finally, the *Parliamentary Association Committee,* composed of members of the European Parliament and the national Parliament of the associated State, has the task of formulating recommendations to the Association Council.

Each Europe Agreement, in Title II on 'General Principles', provides for a transitional period lasting a maximum of ten years, and divided into two successive stages, each in principle lasting five years, starting from the entry into force of the Agreement. Some of the Agreements (such as those with Hungary and the Czech Republic)[21] entered the 'second phase,'[22] which involved a further liberalization of the economy, specifically as far as the right of establishment is concerned.

In any case, these Agreements entered the 'final phase,' because they were incorporated into the Accession Treaty signed in Athens on April 16th 2003.

The Europe Agreements have to be distinguished from the *Stabilization and Association Agreements* (SAA)[23] concluded with the Western Balkan countries, even if they have the same function. The Stabilization and Association Agreements are tools which provide, much as the Europe Agreements did for the candidate countries in Central Europe, the formal mechanisms and agreed benchmarks which allow the EU to work with each country, bringing them closer to the standards which apply in the EU.

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[21] These are the two countries which the Commission has, since 1997, considered the most receptive to adapting their own internal laws to the Community *acquis*. In 1997 the first Opinions were published: *EU Bull., Supplement* 6-15/97, Opinion of the Commission on the request for accession to the EU by Hungary—COM (97) 2001 final; by Poland—COM (97) 2002 final; by Romania, Slovakia, Latvia, Estonia Lithuania, Bulgaria, and the Czech Republic—COM (97) 2003–2009 final; by Slovenia, Cyprus, and Turkey—COM (97) 2010–2012 final.

[22] Respectively in June 2000 and February 2001. The passage to the second phase was not necessary in the cases of Estonia, Latvia, and Lithuania, according to the Agreements signed with them.

[23] See above § 2 in this chapter.

The Stabilization and Association process (SAp) started with the Zagreb Summit on November 24th 2000, by gaining the region's agreement to a clear set of objectives and conditions. In return for the EU's offer of a prospect of accession on the basis of the EU Treaty, the Copenhagen criteria 1993, and assistance programs to support that ambition, the countries of the region undertook to abide by the EU's conditionality and in particular the SAA when signed, as the means to begin preparing themselves for the demands of the perspective on accession to the EU. Thus, all these countries are becoming *potential candidates for EU membership*.

> SAA's contents: Political dialogue; Regional cooperation; Four freedoms, with the creation of a free trade area by 2007; Approximation of legislation to the Community *acquis*, including precise rules in the fields of competition, intellectual property rights, and public procurement; Wide-ranging cooperation in all areas of Community policies, including in the area of justice and home affairs.
>
> The trade provisions of the SAA are asymmetrically in favour of Western Balkans. This means that the EU has granted them unlimited duty free access to the market of the enlarged Union for virtually all products. The only exceptions are baby-beef, fisheries and wine products for which tariff quotas remain. On the Balkans side, tariffs for industrial products will be phased out until 2007. Also tariffs for agricultural products are reduced but remain for a number of sensitive products.

The Europe Agreements also have to be distinguished from the *Cooperation Agreements* signed with the non-Baltic former Soviet Republics. The first countries to make these Agreements on trade and commercial and economic cooperation were the Russian Federation (1997), Kazakhstan, the Ukraine, and Kyrgystan; later Moldavia and Belarus have signed similar agreements with the European Union. In 1999, Armenia, Azerbaijan, Georgia, Uzbekistan, and finally Turkmenistan signed.

These agreements, though following the same model first used in the European Agreements, namely the *political dialog clause*, propose as objective merely the *reinforcement of economic ties* between the EU and the ex-Soviet bloc (see, for example, what is provided by art. 68 of the Agreement with the Russian Federation). The aim is that of creating a wide area of economic cooperation with the EU, where the activity of private companies can exist alongside State-owned ones as a result of privatization, as well as commercial exchange, which is happening more and more frequently.

3.2. *White Paper on 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union'*

This is the document adopted by the European Council of Cannes in June 1995,[24] in which the Commission, following the strategic line formulated by the European Council of Essen in 1994,[25] has laid down the programs, measures, and timetable concerning the approximation of laws between the EU and the CEECs, an indispensable condition for entry into the internal market of the Union.

Addressed to the six countries which, at that date, had already signed the Europe Agreements (Poland, Hungary, the Czech Republic, Slovakia, Bulgaria, and Romania), it has been officially extended also to include the countries which were negotiating these Agreements (the Baltic Republics and Slovenia).

The White Paper was later adopted as one of the instruments upon which the pre-accession strategy, formulated by the European Council of Luxembourg in 1997, is based.

The White Paper contains the Commission's proposal for action by the Community in the area of harmonization of that part of the *acquis* which directly affects the internal market of the EU.

It consists of two parts. The first analyzes the aims, context, and nature of the harmonization initiative, expounding the general underlying policy and indicating how the objectives are to be achieved. The second part, contained in the Annex, is a detailed exposition of the Community legislation concerning the internal market.

> Fields: Economic and financial affairs, Industry, Competition, Social affairs, Agriculture, Transport, Audiovisual, Environment, Telecommunications, Internal market and financial services, Energy, Customs and indirect taxation, Consumer protection.

The Appendix contains recommendations regarding the timescale according to which the CEECs will be able to achieve the conditions necessary for Community legislation to function effectively, once transposed.

The main feature is to have ratified all the conditions expressed at the Copenhagen summit, which the CEECs must satisfy in the process of approximation to democracy and the markets of the Member States of

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[24] See COM (95) 163 final.

[25] See below § 5 for the role of the European Council in the enlargement process.

the EU. In this case too the accession strategy is notable for the *political dialog clause* which guides the political economy of the applicant countries. The White Paper sets out the list of *general conditions for accession* as follows:

– The stability of institutions, such as to guarantee democracy, the rule of law, human rights and respect for minorities.
– The development of a market economy.
– The ability to coexist in a competitive environment such as the internal market of the Union.
– The adoption by the CEECs of the entire Community *acquis*.

The *specific conditions* are set out in the Appendix to the White Paper, which lay down in great detail the conditions necessary to get the legislation working, and operates a double selection: the measures to be adopted in the course of the 'first stage;' the measures to be adopted in the course of the 'second stage.'

To summarize extremely briefly, the White Paper proposes that harmonization of Community legislation be done in two phases and it is for this reason that this internal division is presented. For example, so far as financial services are concerned, the first stage is dedicated to the introduction of basic principles for establishing financial institutions, and the second to the introduction of detailed regulations such as, for example, the reinforcement of the prudential requirements for the investment companies, with the aim of unifying the rules (to conform) to international *standards*. The Commission expects that the applicants adapt and implement the *acquis* as set out in the White Paper (more than 1400 key rules relating to the internal market) before accession. This is what the new Member States did before their entry into the EU.

Up to this point, the predominant role played by the European Community is clear, in conducting the process of integration by means of harmonization of the laws. Later (as we will see in the following pages) the role played by the EC will be counterbalanced by the autonomy given to the CEECs in the development of one of the fundamental instruments of the accession strategy, the *National Program for the Adoption of the Acquis* (NPAA), provided by the *Accession Partnerships* (APs).[26]

[26] See below § 3.e).

3.3. *Agenda 2000. 'For a Stronger and Wider Union—The Challenge of Enlargement'*

Agenda 2000 is the action plan adopted by the Commission in 1997,[27] in reply to the European Council of Madrid (1995), presented at the European Council of Amsterdam (1997). It sets out the directions for the institutional reforms necessary to reinforce the European Union, to protect the internal market—beginning with reform of the agricultural policy and continuing with structural ones—and outlines the financial prospects for the five opening years of the new century.

Attached to Agenda 2000 are the Commission's *Opinions*[28] on the applications for accession from the applicant countries of Central and Eastern Europe, and some recommendations directed to intensifying the preparations of the candidates by means of reinforcing the pre-accession strategy formulated in the White Paper.

Agenda 2000 identified the countries which would be participating in the first group in the enlargement, namely Estonia, Poland, the Czech Republic, Hungary, Slovenia, and Cyprus.

However, at the summit of the European Council of Berlin (1999), a new phase of the enlargement process was inaugurated, summed up in the slogan 'open negotiation with all applicant countries,' to encourage in equal measure all the applicant countries to accept the entire Community *acquis*. As a consequence, the Agenda 2000 policy was modified: the objectives have been extended to include those applicant countries considered in the 'second group' as well, that is, Bulgaria, Latvia, Lithuania, Romania, Slovakia, and Malta.

With the aim of achieving enlargement, the European Commission has therefore refined its method and has proposed new financial means and judicial instruments: from institutional reform to the strengthening of institutional and administrative capacity of the candidate countries by means of 'institution building.'

The Commission has additionally reiterated that privatized enterprises must adapt to the Community *acquis*, achieving intermediate goals (reinforcement of the existing governance structure, environmental protection, etc.) and long-term ones (restructuring of financial markets and financial services).

Among the legal instruments introduced in the document Agenda 2000, the new feature is represented by the *Accession Partnerships* (APs).[29]

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[27] See COM (97) 2000 final.

[28] See footnote 21.

[29] See below § 3.e). On Accession Partnerships see the hypertext MEMO/98/21 on the European Commission website, at http://www.eu.int/comm/off/index-it.htm.

Made, as we shall see, between the EU and the candidate States, these partnerships constitute the legal scheme for both collecting and coordinating the various pre-accession instruments prepared by the European Commission. To sum up, the APs aim to simplify the accession process and, at the same time, to tailor them to meet the concrete needs of each candidate State. They provide in fact, for a work program which each State must take on in view of the enlargement: through the observation of the progress each State makes in coming into line with the *acquis* on internal market, supplied by the Regular Reports of the Commission. The APs involve directly the candidate States as well, which must draw up the *National Programs for the Adoption of the Acquis* (NPAAs) and, in so doing, become familiar with the policy and procedural mechanisms of the EU.

3.4. *PHARE, ISPA and SAPARD Programs*

The PHARE program[30] was originally only destined for Poland and Hungary, but, following the collapse of the communist regimes, given that other countries in the region were in the same condition required to benefit from assistance, the program was extended to cover all the CEECs.

Following the Copenhagen Council of 1993 and the invitation to CEECs to apply for membership, PHARE support was orientated to this aim and became the principal financial instrument of the pre-accession strategy for the ten candidate CEECs. This offered funds to support the countries associated with the EU during the process of economic transformation and the reinforcement of democracy: two-thirds of the money was earmarked for investment directed at improving economic and social cohesion; the remaining third was destined for financing the consolidation of the institutions by means of *twinning,* that is to say, by means of exchanges of personnel and the placing of consultants and administration experts from Member States in the candidate countries, to train specialized staff, to provide help in accomplishing specific projects, and applying the Community *acquis*.[31] Until 2000 the countries of the Western Balkans were also beneficiaries of PHARE. However, as of 2001 the

[30] This is the Community program provided for by EEC Regulation no. 3906/89, in O.J., L 375 of 12/23/1989: see Internet website at: www.europa.eu.int/comm/enlargement/pas/phare/index.htm.

[31] In 2000–2006, Phare is providing some 11 billion euro of co-financing for institution building support through 'twinning' and technical assistance, and for investment support to help applicant countries in their efforts.

CARDS program (Community Assistance for Reconstruction, Development and Stability in the Balkans) has provided financial assistance to these countries.[32]

From 2001 the candidate countries can avail themselves of the experience of the Member States in short to medium-term projects of limited scope by means of a new mechanism called *partial twinning*. Supported by PHARE, each candidate country has been invited to adopt a timetable for reinforcing its own institutions, administrations, and jurisdictions responsible for the implementation of the *acquis,* within the framework of the pre-accession strategy.

The Commission has provided that the PHARE aid-program be backed up by two other new instruments, ISPA[33] (Instrument for Structural Policies for Pre-Accession) in the transport infrastructure and environmental sectors, with an annual budget equal to € 1.040 million, and SAPARD[34] (Special Accession Program for Agriculture and Rural Development) in the rural development and agricultural areas, for which € 520 million per year has been set aside. The special contribution from the European Investment Bank (EIB) can be added to these funds, which has set aside € 8.930 million in the form of loans guaranteed by the European Community.

> See the Council Decision, of December 22nd 1999, granting a Community guarantee to the European Investment Bank against losses under loans for projects outside the Community (Central and Eastern Europe, Mediterranean countries, Latin America and Asia and the Republic of South Africa) (2000/24/EC), (OJ, L 9, 01/13/2000, p. 24):
>
> **Art. 1 (1).** "The Community shall grant the EIB a global guarantee in respect of all payments not received by it but due in respect of credits opened, in accordance with its usual criteria, and in support of the Community's relevant external policy objectives, for investment projects carried out in Central and Eastern Europe, the Mediterranean countries, Latin America and Asia and the Republic of South Africa."

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[32] *Cf.* the European Commission *CARDS Regional Strategy Paper,* that provides a strategic framework for programming the regional envelope of the European Community's CARDS assistance program for the western Balkans in the period 2002–2006; Council Regulation (EC) No. 2666/2000 of 5 December 2000 (CARDS), OJ L 306, 12/7/2000, p. 1.

[33] EC Regulation no. 1267/99 of the Council, O.J., L 161/73, of 06/26/1999.

[34] EC Regulation no. 1268/99 of the Council, O.J., L 161/87, of 06/26/1999.

> The countries covered by paragraph I are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, the former Yugoslav Republic of Macedonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic, and Slovenia.

The executive committee of PHARE, instituted by the same Regulation no. 3906/89, has the task of ensuring that the financial decisions made in the framework of the three pre-accession instruments (PHARE, ISPA and SAPARD) are compatible with one another and with regard to the APs, as provided by the coordination regulation.[35]

Besides this, TAIEX[36] (Technical Assistance Information Exchange Office) continues to supply short-term consultancies: for example the *Translation Coordination Unit* was set up with its support in each of the ten candidate CEECs, to provide the requisite assistance for the translation of primary and secondary EC legislation into national languages of the candidate countries (the mountain of work was estimated at between 60,000 and 70,000 pages to translate of the Official Journal) and SIGMA[37] (the program is managed by the Organization for Economic Cooperation and Development—OECD—and financed by PHARE) supplies consultancies on the reform of public administration and financial control.

The Community help in financing the projects by means of the instruments mentioned was (and still is for the actual applicant and candidate countries), however, conditional upon the CEECs respecting the undertakings provided in each of the Europe Agreements (and now for those conditions provided in each of the Stabilization and Association Agreements*),* to fulfilling the Copenhagen criteria, and the progress made in achieving the specific priorities contained in each Accession Partnership (and in each European Partnership for the Western Balkans). If any of these general conditions is not respected, the Council could decide to suspend financial assistance under art. 4 of Regulation no. 622/98.[38]

In any case, Art. 32 of the Accession Treaty states that no financial commitments shall be made under the PHARE program (save for those

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[35] EC Council Regulation no. 1266/99, O.J., L 161/68, of 06/26/1999.

[36] TAIEX was created in 1995 to help the candidate countries adapt to the Community laws and reach compatibility in all areas as set out in the White Paper. With Agenda 2000, its mandate has been extended to support the reinforced pre-accession strategy: see at http://europa.eu.int/comm/enlargement/pas/phare/programmes/multi-bene/taiex.htm.

[37] See http://europa.eu.int/comm/enlargement/pas/phare/programmes/multi-bene/sigma.htm.

[38] The EC Council Regulation no. 622/98 of 03/16/1998 concerning assistance for candidate countries for accession to the EU, in the context of the pre-accession strategy, which provided the creation of the APs; O.J., L85/1 of 03/20/1998.

otherwise povided for in the Accession Treaty), the ISPA program and the SAPARD program in favor of the new Member States after December 31st 2003. The new Member States shall receive the same treatment as the present Member States with regards to expenditure under the first three headings of the financial perspective, as defined in the Inter-institutional Agreement of May 6th 1999, as from January 1st 2004, subject to the individual specifications and exceptions, or as otherwise provided for in the Accession Treaty. Although 2003 was the final programming year for the new Member States, contracting of projects will continue until 2005 and payments based on these contracts will continue until 2006. However, all countries which previously were eligible for the PHARE program are presently moving towards an Extended Decentralization Implementation System (EDIS), whereby the Commission's *ex ante* approval on project selection, tendering, and contracting is waived in accordance with Council Regulation 1266/1999.[39] This decentralization involves the transfer of responsibility from the Commission to the Contracting Authority of the recipient country. The Contracting Authority becomes responsible for the tendering and contracting as well as the financial and administrative management of the projects. The other financial instruments—ISPA and SAPARD—have followed the same path of decentralization.[40]

3.5. *'Reinforced Pre-Accession Strategy': The Accession Partnerships*

As mentioned above, with Agenda 2000 and following the European Council of Luxembourg (December 1997), where it was decided to reinforce the pre-accession strategy, the Community institutions have accelerated the enlargement process with *Accession Partnerships* (APs).[41]

> At Brussels in March 1998, on the occasion of the meeting between the Foreign Ministers of the fifteen EU countries and their respective colleagues from the candidate countries, the process of enlargement of the EU to include five of the CEECs (Hungary, Poland, Czech Republic, Estonia, Slovenia) and Cyprus was inaugurated. Each country presented its own strategy for integration

[39] See above footnote 35.

[40] *Cf.* respectively the Directorate General for Regional Policy website and the Directorate General for Agrigolture website for further information.

[41] The APs should not be confused with the *Cooperation Agreements* made with the ex-Soviet Union Republics, which do not provide for any future accession by the signatory States to the European Union. See above 5.1.

at the opening session of the accession negotiations. In October 1999, the Commission recommended Member States to open negotiations with the other CEECs (Romania, Slovak Republic, Latvia, Lithuania, Bulgaria) and Malta. See above, in this chapter, 3.3.

The APs are governed by EC Council Regulation no. 622/98, of March 16th 1998.[42]

Article 2 Reg. 622/98 provides that the Council should decide, by qualified majority and on the Commission's proposal, the principles, the priorities, the intermediate objectives, and the conditions contained in the individual Accession Partnership, as well as the later substantial adjustments applicable to them. Therefore, on the Commission's proposal, the EU Council decides the areas for priority action, the financial resources to achieve these priorities, and the conditions for providing assistance in relation to each candidate country.

By EC Council Regulation no. 555/2000, of March 13th 2000,[43] the APs for the Republics of Cyprus and Malta were prepared, identifying a number of priority areas for further intervention in the context of the pre-accession strategy. Finally, on the proposal of the Commission of November 8th 2000, the Council on March 8th 2001 adopted the Partnership for the accession of Turkey.[44]

So far as the CEECs are concerned, having regard to Regulation 622/98, the EU Council adopted the ten *Decisions* which established the principles, priorities, intermediate objectives, and the conditions (identified previously in the Opinions expressed by the Commission in 1997, in relation to each CEEC's candidacy) for each of the ten APs. Later on, the Commission presented detailed contents tailored to the context of the individual applicant.[45]

The *Accession Partnerships 1998* were reviewed and replaced the following year by the *Accession Partnerships 1999*.[46] The latest version of the *Accession Partnerships* is that of *2001*.[47]

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[42] See footnote 38.

[43] O.J., L 68, 03/16/2000, p. 3. The Council decisions 2000/248/EC–2000/249/EC (O.J., L 78, of 03/29/2000, p. 10) follow the regulation.

[44] For Turkey, the first AP was replaced by the second in 2003: see *Accession Partnership 2003* of May 19th 2003, O.J., L145/40, of 06/12/2003.

[45] See Decisions 98/259/EC—98/268/EC (O.J., L 121, of 04/23/1998, p. 1) and *EU Bull*., no. 3-1998, point 1.3.66 *ff*.

[46] The Council adopted, in December 1999, ten new Decisions in relation to each candidate country: Decisions 1999/850/EC–1999/859/EC (O.J., L 335, 12/28/99, p. 1–61).

[47] All the APs and the Regular Reports of the Commission, in relation to each candidate country can be found on the EU website at http://europa.eu.int/comm/enlargement/index.htm.

The APs are the main plank of the *reinforced pre-accession strategy*. They serve to make the EU–CEECs integration process transparent, which, because of its complexity, necessitates a single, organized but flexible document, which leaves room for the following:

- The description of the priority areas for intervention defined by the Regular Reports of the Commission on the progress made by each country towards accession to the EU–internal market, agriculture, fisheries, environment, energy, economic and monetary union, economic and social cohesion, employment and social affairs, transport, justice and home affairs and the consolidation of administrative and judicial capacity.[48]
- The identification of the financial means at the disposition of the CEECs to achieve these priorities.
- The conditions to be applied to the assistance provided in the context of the reinforced pre-accession strategy.

Each AP consists of seven paragraphs, and has the following format: 1. Introduction; 2. Aims; 3. Principles; 4. Intermediate Priorities and Aims (short term and medium term); 5. Programs (PHARE, ISPA, SAPARD, role of the international financial institutions); 6. Conditions; 7. Monitoring.

The priorities and intermediate aims, contained in the APs at point 4, are "short-term" and "medium-term." In particular, these two time periods are necessary so that the accession strategy may be "made to measure" for each applicant country, or else take into account the special circumstances arising from the differing macro-economic situations which exist in each region.

The areas of law the APs deal with are clearly indicated in the so-called *negotiation chapters*.

The negotiations consist of bilateral Conferences on accession between representatives of the Member States and those of each of the applicant countries: a total of 31, which correspond to the number of chapters, the subject-matter of negotiations, which cover all the areas of the *acquis*.

The number and nature of chapters of negotiations to open with each candidate country are decided by the EU, on the basis of the *differentiation principle*, i.e. in relation to the progress made by each individual country in adapting to the accession criteria established at Copenhagen.

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[48] The Europe Agreements had already endeavoured to regulate these sectors, beginning a process of drawing together. Title VII of the Europe Agreements, concerning "economic cooperation" (Art. 71 *ff*), analyzes each area specifically.

> The Commission has decided to apply the principle bearing in mind the fact that some of the applicants have been unable fully to satisfy the Copenhagen criteria. The application of the principle has highlighted tangible differences among the CEECs. Although, in fact, an equal number of chapters were opened with all the candidate countries in response to their negotiation position, the number of those provisionally closed varied from country to country (between 7 and 10).

The principle is strictly applied in deciding how many and which of the chapters of the Community *acquis* are to be opened at the negotiation stage, thereby abandoning the (previous) practice of opening the same number of chapters with all the applicant States.

In this way the state of adaptation to the *acquis* in each area is examined and the specific problems of each legal system in transition are identified.

It is important that the candidate countries respect the commitments in the area concerning the approximation of legislation and the implementation of the Community *acquis* undertaken within the framework of the Europe Agreement, of the screening procedure, and the negotiation process for accession.

However, it should be said that mere formal adaptation of the domestic legislation to the Community *acquis* is not in itself sufficient to ensure its effective application by judicial and administrative bodies; indeed in the latest APs, emphasis has been laid on the reform of public administration, the public sector, and the judicial system.

The differentiation principle has made every country in the region consider carefully its own capacity to conform to the general policy lines formulated by the Commission in the Reports, and has inevitably involved varying degrees of preparedness in dealing with the themes in relation to which the EU presently requires conformity before consenting to accession.

Therefore, the fact that a chapter is missing from the list of priorities defined by the AP may mean a number of things: that adaptation in that sector has already been reached independently of the stages defined to achieve it, or that the sector had already been dealt with in the first AP of 1998 and that the progress made has already been sufficiently satisfactory to allow provisional closure; or else that the open questions in that area are so sensitive that the opening of the chapter has been postponed until such time that the country is in a position to deal with them.

The strategy of opening and closing chapters, albeit provisionally, serves the purpose of making the applicant countries proceed uniformly in the assumption of the entire Community *acquis* before accession.

An *approximation technique* has in fact been adopted, which provides for the provisional closure of the chapter as soon as the parties are in agreement on the positive evaluation of progress made with accession in view. From time to time the decision is made on the basis of the following criteria: 1) full acceptance of the *acquis* in the area in question, 2) an adequate response with respect to further requirements of the Union, 3) no request for transition periods on adaptation.

> In relation to this, the Commission has already concluded in Agenda 2000 that periods of transition, but no derogation, might be allowed in fully justified cases, in order to allow the progressive integration of the new States by a certain date. Today the Commission, while maintaining that so far, where aspects to single market are concerned, the legal measures must be rapidly implemented, it has made a concession to brief periods of transition. For aspects which, on the other hand, require considerable adaptations and a notable effort, including heavy financial commitment (in sectors such as environment, energy and infrastructure), the transitional provisions could even be extended for a longer period of time, so long as the applicants can show that the adaptation is on-going in any case and that they maintain the commitment to respect the stages of progress.

The closed chapters are then, in time, provisionally reopened at precise intervals to include parts of the *acquis* newly adopted, which have not yet been the subject of negotiation.

The chapters may be closed provisionally (or closed again, having been re-opened) only when the institutions of the European Union have verified that the provisions made by the applicants are adequate with respect to the commitment undertaken, in terms of preparation for accession.

Negotiations concluded or in train have shown that importance is increasingly attached to the provisional closure of the chapters, which is considered to be a tangible sign that an understanding has been reached, as well as of the recognition on the part of the Community institutions of the efforts made and results achieved. The fact remains that provisional closure implies that the commitment undertaken to oversee progress in each sector remains alive, until such time as the definitive closure, at the moment of accession.

As things stand, the rhythm of the accession negotiations depends on which country is being considered. Each of the applicant countries, in fact, has made its own choices regarding aims and priorities, and currently finds itself in a differing stage of integration with respect to the others. These choices mirror the particular political and economic realities

with respect to growing commercial relations with the EU and reflect the list of legal priorities provided in the Europe Agreements, with approximation in view.

As a result, each country has proceeded according to its degree of preparedness, and was the object of a personalized evaluation, joining when it was capable of fulfilling the obligations that this evaulation brought with it. All this was to avoid the risk that the Accession Treaty might not be approved,[49] because it would be concluded with insufficiently prepared countries. The Treaty was signed in Athens on the 16th of April 2003, and the new Member States joined the EU on the 1st of May 2004, once the accession Treaty was ratified.

Bulgaria and Romania, which are an integral part of this enlargement process launched in 1997, are completing the accession process, with the objective of becoming members in January 2007.

For the purposes of our *Guide to European private law,* the negotiation chapters of major interest of the *acquis* are the following:[50]

– The 1st chapter, on the free movement of goods.
– The 2nd chapter concerning the free movement of persons.
– The 3rd chapter regarding the free movement of services.
– The 4th chapter on the free movement of capital.
– The 5th chapter on company law.
– The 6th chapter in relation to competition.
– The 23rd, on consumer protection and health: it has been provisionally closed with respect to all applicant countries.

Their achievement, both in the case of last enlargement and for the rest of CEECs' applicants such as Romania and Bulgaria, is monitored within the framework of the Europe Agreements.

> As underlined by the European Council of Luxembourg, it is important that the Europe Agreements continue to constitute the legal framework in which the adoption of the *acquis* may be evaluated, according to the same methods and independent of the fact that the negotiations have taken place. The Association Committee (within each Europe Agreement) examines all the developments, progress made, and problems encountered in achieving the priorities and intermediate objectives fixed by the Accession Partnerships, as well as more specific issues proposed by the subcommittees.

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[49] See § 4, this chapter.

[50] The analyzis of the areas of law which correspond to the chapters cited above is carried out in the second volume of *A Guide to European Private Law*.

As we mentioned above, the reinforced pre-accession strategy in the case of the Western Balkans is grounded on different fundamental sources. The general framework is that of the *Stabilization and Association Agreements* (instead of the *Europe Agreements*), and the progress achieved by the applicants for accession is monitored by the *European Partnerships* (instead of the *Accession Partnerships)*.[51] Indeed, the Thessaloniki European Council of June 2003 reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries and stated that "the Western Balkan countries will become an integral part of the EU, once they meet the established criteria, *inter alia* through the introduction of *European Partnerships*."

The European Partnerships for Albania, Bosnia & Herzegovina, Croatia,[52] former Yugoslav Republic of Macedonia,[53] and for Serbia & Montenegro (including Kosovo as defined by the United Nations Security Council Resolution 1244 of June 10th 1999), are provided by the Council Regulation (EC) No. 533/2004.[54] The Commission was then invited to submit the first set of European Partnerships to the Council for approval. At the end of 2004, it drafted the Proposals of Council Decisions on the principles, priorities, and conditions contained in the European Partnership with each country of the Western Balkans area, which are still to be approved.

3.6. *APs and Regular Reports of the Commission*

The updating of the APs comes about on the basis of indications made by the Commission in the *Regular Reports* which are submitted every year to the EU Council.

The European Council of Cardiff in June 1998 welcomed the Commission's confirmation that it would submit its first Regular Reports on each candidate's progress towards accession at the end of 1998. The task

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[51] *Cf*. above § 2 and § 3, this chapter.

[52] Croatia has already applied for EU membership in February 2003, and in June 2004 the European Council decided that Croatia is a candidate country and that the accession process should be launched. See also § 2 above, this chapter and chapter I.

[53] The Former Yugoslav Republic of Macedonia applied for membership as well, and at the Council's request, at the end of 2004 the Commission was preparing an Opinion on the application.

[54] Council Regulation (EC) No 533/2004 on the establishment of European Partnerships in the framework of the Stabilisation and Association process (in O.J., L 86, 03/24/2004, p.1). The Regulation sets out that the Council is to decide, by a qualified majority and following a proposal from the Commission, on the principles, priorities, and conditions to be contained in the European Partnerships, as well as any subsequent adjustments.

undertaken by the Commission, to report from time to time to the European Council on the progress made by each applicant country in the preparations for accession, produced four editions of *Regular Reports* (1998–2002)[55] containing the necessary recommendations with the aim of organizing bilateral government meetings. In the case of last enlargement 2004, the Regular Reports have been reissued until the signing of the *Accession Treaty*.

From 2003, the Commission has been reporting to the European Council on the progress made by Bulgaria, Romania, and Turkey. Even in the case of the Western Balkans, the updating of the (*to be approved*) European Partnerships for Albania, Bosnia & Herzegovina, Croatia, former Yugoslav Republic of Macedonia, and for Serbia & Montenegro (including Kosovo) comes about on the basis of indications made by the Commission in similar Reports, notably in the *SAp Annual Reports*, which are submitted every year to the EU Council.[56] The Regular Reports are informal instruments, not binding, quasi-legal sources which may prepare the way for the actual legal sources, by selecting the principles and rules which then inspire supra-national law.

> The Regular Reports could be considered as *soft law*: they nevertheless contain legal rules and create uniform laws. Their effect depends on pressure of a political and economic sort from the institution which produces them. In support of these instruments it is said that they are flexible and rapid enough to keep up with practical necessities. The mandatory element is missing, and compliance with them is voluntary in character. They are "practical legal rules" which emphasise the element of persuasion and demonstrate a very low level of compulsion, but a high indication of observance.

Their function has been and still is to gradually spread awareness of progress achieved by the applicants for accession, either among the Member States of the Union or among the applicant countries themselves.

Structured as *Opinions*, these Reports have analyzed (and indeed still analyze), in the case of each country, the respect paid to political conditions (democracy, rule of law, human rights, protection for minorities) and to economic ones (market economy, ability to deal with competition

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[55] See the Regular Reports 2002 for each candidate country at http://europa.eu.int/comm/enlargement/report2002/.

[56] In 2004, the Commission issued a *Third SAp Annual Report* for each Western Balkan country, available at http://europa.eu.int/comm/external_relations/index.htm.

and the market forces within the Union) mentioned by the European Council of Copenhagen 1993. Each Report sets out the conclusions regarding the possible accession of each applicant country, in relation to the extent that the Community *acquis* has been adopted.

The Reports' structure, which is the same for all the countries concerned, is divided into several parts:

Part *A)* describes the relationship between the associated state and the EU, within the framework of the Europe Agreements.

Part *B)* considers the accession criteria and analyzes how far each associated state satisfies (or fails to satisfy) the required politics, economics, and capacity to take on the obligations resulting from accession, such as the acceptance of the Community *acquis*.

Part *C)* reviews the progress made with respect to the preceding year.

Part *D)* here the Commission formulates recommendations, in the light of the analysis carried out, as to how the APs and the National Programs for the Adoption of the Acquis (NPAAs)[57] should be modified, so as wholly to satisfy the accession criteria.

The Commission makes use of many sources of information in the preparation of the Regular Reports:

- Those supplied by the candidate States through government channels of information.
- Those gathered from the *Common Positions*[58] expressed during negotiations.
- Those derived from screening, i.e. the analytical examination of the Community *acquis* adopted.
- Those taken from the meetings held between the EU and the Association Council in the context of the Europe Agreements.
- Those contained in the NPAAs, transmitted to the Commission from each applicant State.

The Reports generally place emphasis upon the efforts which still have to be made, in each sector, by each applicant State with accession in view.

The Commission fixes priorities, intermediate stages, and targets defined in conjunction with the interested States, the achievement of

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[57] See § 3 g), this chapter.

[58] The EU Treaty (art. J.2, (2), art. J.3, n. 1–4) has added two types of legal acts that belong to the intergovernmental spheres and, more specifically, pillar II. They are called *Common Position* and *Common Action*. Concluded by the Council, they do not need to be adopted by Member States and have a degree of binding effect upon the Member States, but not directly on individuals.

which determines the scale of financial assistance, the progress of negotiations in course, and the opening of new negotiations with other States. Once each applicant country has satisfied all the predetermined conditions, then it is up to the Commission to send a recommendation to the Council to start negotiations and conclude the Accession Treaty.

3.7. *APs and National Programs for the Adoption of the Acquis (NPAAs)*

Each AP lays down precise obligations which the applicant country must assume with respect to the EU. These obligations operate on two levels: that of the democratic functioning of the national institutions, and that of macroeconomic stabilization. With the aim of achieving these ends, each applicant country is invited to adopt a *National Program for the Adoption of the Acquis* (NPAA).

Hungary and the Czech Republic in particular were the first[59] to present their NPAAs.

The NPAAs describe in detail the action necessary to reach the priority objectives for accession fixed by the APs, indicating the resources (human and financial) and the planned timetable for their joining, to which are often added other priorities, defined by the applicant countries themselves.

All the NPAAs follow the structure of the Regular Reports of the Commission, adhere to the same explanatory scheme and analyze the same issues. They may be distinguished from one another according to how they represent the differing national socio-economic realities.

The NPAAs are revised and modified each year, by each applicant country and submitted to the Commission in order to be referred to the Council.[60] It is fundamental that the NPAAs of the applicant countries be updated each year, in harmony with the Regular Reports and the APs, so that they do not become merely an inventory of the enlargement requirements, but rather, a detailed and realistic presentation of the existing administrative structures and financial resources, by means of which it may be possible to measure the distance which separates those administrative and judicial institutions from the implementation of the Community *acquis*.

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[59] The first version of the National Program for the preparation of the Czech Republic to accede to the European Union was approved by the Czech government on March 11th 1998; that of Hungary on March 26th 1998.

[60] The Czech Republic and Poland presented the revised version on 05/31/1999, while Hungary's revised NPAA was completed on 07/06/1999.

In the light of the progress achieved by each applicant country demonstrated in the NPAAs, the APs have been revised several times:[61] the successive versions from 1998 have further focused on the targets, bearing in mind the achievement of the aims by the Regular Reports of the Commission.

The APs of 1999 and those of 2001 open with a reminder of what was decided in the European Council of Luxembourg in December 1997, where the desire to promote the instrument of NPAAs in the reinforced pre-accession strategy was manifested.

> Among the measures set out in the European Council of Luxembourg in December 1997, the following should be noted: the NPAAs, the medium-term economic priorities, the Pact on organised crime, the National Development plans, and other sector plans necessary to participate in the ISPA and SAPARD programs (before accession) and to participate in the structural Funds (once Members of the Community). Although all these instruments are quite different to one another, each is prepared and activated according to specific procedures. The aforesaid instruments, while not forming an integral part of the AP, include priorities, which must, however, be compatible with it.

As the first APs did in 1998, so the successive ones demonstrate, within a single framework, the progress made by each applicant country for accession to the European Union, the areas for further intervention identified in the Regular Reports of the Commission, the financial instruments available to achieve these priorities and the conditions to which the EU assistance is subject.

4. The Accession Treaty

The negotiations to sign the Accession Treaty began as soon as a Common Position between Applicant States and Member States was reached.

The results of the accession negotiations figure in the *Accession Treaty*, which consists, as in the past, of a single legislative instrument containing the results of the various accession conferences.

The enlargement was approved by the European Council and Parliament, which took account of the final opinion of the Commission on the outcome of the negotiations. The Treaty, which resulted from the accession negotiations, was officially signed in Athens on April 16th 2003 by the interested parties: all the fifteen Member States, on the one hand,

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[61] See Art.2 of Reg. 622/98 cited above, footnote 38.

and the ten Applicant States on the other, and ratified by the contracting States in conformity with the respective constitutional requirements.[62] The difference lay in the fact that failure to ratify the Accession Treaty by one of the 15 Member States could result in the prevention of the Treaty coming into force, whereas the failure to ratify on the part of one of the candidates could only mean that the Treaty would not have come into force respective to that State.

The new Member States joined the EU on May 1st 2004, once the accession Treaty was ratified.

Ratification, in nine of the ten acceding countries, took place on the basis of *popular referenda*.[63]

The Treaty consists of three essential parts: I) *Treaty of Accession*; II) *Act of Accession* III) *Final Act*.

The new Members of the Union are listed in the first part; further, the Council of the Union has the option of modifying the texts of the Treaty where it not have come into force with respect to one or more States (the hypothesis of failure of a candidate country to ratify the Treaty).

> **Art. 1 Accession Treaty**. "The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic hereby become members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented."

> **Art. 2 Accession Treaty. "(1)** This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic by 30 April 2004 at the latest. **(2)** This Treaty shall enter into force on 1 May 2004 provided that all the instruments of ratification have been deposited before that date. If, however, the States referred to in Article 1(1) have not all deposited their instruments of ratification in due time, the Treaty shall enter into force for those States which have deposited their instruments. In this case, the Council of the European Union, acting unanimously, shall decide immediately upon such adjustments as have become indispensable to Article 3 of this Treaty, to Articles 1, 6(6), 11 to 15, 18, 19, 25,

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[62] The text of the Treaty of Accession is available in Internet at: http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/

[63] On referenda and ratifications *cf*. the table at the end of this chapter.

> 26, 29 to 31, 33 to 35, 46 to 49, 58 and 61 of the Act of Accession, to Annexes II to XV and their Appendices to that Act and to Protocols 1 to 10 annexed thereto; acting unanimously, it may also declare that those provisions of the aforementioned Act, including its Annexes, Appendices and Protocols, which refer expressly to a State which has not deposited its instrument of ratification have lapsed, or it may adjust them. **(3)** Notwithstanding paragraph 2, the institutions of the Union may adopt before accession the measures referred to in Articles 6(2) second subparagraph, 6(6) second subparagraph, 6(7) second and third subparagraphs, 6(8) second and third subparagraphs, 6(9) third subparagraph, 21, 23, 28(1), 32(5), 33(1), 33(4), 33(5), 38, 39, 41, 42 and 55 to 57 of the Act of Accession, Annexes III to XIV to that Act, and Protocol 2, Article 6 of Protocol 3, Article 2(2) of Protocol 4, Protocol 8 and Articles 1, 2 and 4 of Protocol 10 annexed thereto. These measures shall enter into force only subject to and on the date of the entry into force of this Treaty. **(4)** […]."

In the second part, there is the *Act of Accession* proper, which is further set out in sub-paragraphs:

- *Principles*, concerning the essential definitions regarding the Treaty itself.
- *Adjustment* to the EU, EC, and Euratom Treaties, concerning institutional modifications and the territorial context for their application (subjects covered by the work of the Nice Conference).
- *Permanent measures*, concerning permanent implementation measures of all secondary acts of Community law currently in force, namely the *acquis communautaire*: to facilitate knowledge of these provisions, the whole of the *acquis* has been gathered together and divided into various Annexes (referred to under arts. 20 & 22 of the Treaty).
- *Temporary measures*, these are of transitory nature, concerning both institutional aspects and those of substantive law (arts. 24 *ff*. of the Treaty).
- *Implementations*, concerning provisions for the setting up and functioning of the institutions, in particular those dealing with the composition of the Commission and the increase in the number of the ECJ judges and the Court of First Instance.

In the third essential part of the Treaty, the *Final Act,* the Annexes are set out, which concern the conditions of accession and contain the adjustments to the Treaties on which the European Union is founded, the Protocols and the Joint Declarations on Europe, on the ECJ and on other issues.

Joint Declaration: One Europe:

"Today is a great moment for Europe. We have today concluded accession negotiations between the European Union and Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. 75 million people will be welcomed as new citizens of the European Union. We, the current and acceding Member States, declare our full support for the continuous, inclusive and irreversible enlargement process. The accession negotiations with Bulgaria and Romania will continue on the basis of the same principles that have guided the negotiations so far. The results already achieved in these negotiations will not be brought into question. Depending on further progress in complying with the membership criteria, the objective is to welcome Bulgaria and Romania as new members of the European Union in 2007. We also welcome the important decisions taken today concerning the next stage of Turkey's candidature for membership of the European Union. Our common wish is to make Europe a continent of democracy, freedom, peace and progress. The Union will remain determined to avoid new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union. We are looking forward to working together in our joint endeavour to accomplish these goals. Our aim is One Europe."

s**Joint Declaration on The Court of Justice of the European Communities**:

"Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General in accordance with Article 222 of the EC Treaty and Article 138 of the Euratom Treaty. Otherwise, the new Member States will be integrated into the existing system for their appointment."

5. The Central Role Played by the European Council in the Enlargement Process.

The activity of the *European Council,* where the heads of government from the Member States (and, in the cases of France and Finland, the heads of state; moreover, among its members the Council counts the President of the European Commission as an *ex-officio* member) meet at least twice a year, consists of providing the political direction of the European Union.

> The European Council was instituted in the final *Communiqué* of the Paris summit of December 1974 and met for the first time in 1975 in Dublin. It replaced the practice of European Conferences at the summit, which took place in the years from 1961–1974. The institution was formally recognized in the Single European Act, and was definitively established in the Treaty of the European Union.

Under art. 4 TEU: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."

For this reason, the European Council without a doubt fulfils a central role in the enlargement of the Union to the East.

The European Council may, however, take on a much more strategic and forward-looking role. The extraordinary European Council held at short notice on September 21st 2001, after the terrorist attacks on the United States produced some conclusions and a plan of action, thus demonstrating its potential. Instead of reacting to political problems raised by the Councils at a technical level in the course of the six-month cycle of the EU presidency, the EU leaders could set themselves the target of determining the course of politics in a much more active way, to define their own agenda (including the technicalities which they are ready to discuss), to plan the activity of the EU in the future (controlling its forward movement), to issue only clear and concise press releases when necessary and, if necessary, to provide indications or instructions to the national authorities for the pursuit of agreed European policies. In this way the European Council would act as a council of national ministers, operating with collective responsibility by defining future strategy at European level and coordinating the most favorable response of the EU and the individual nations to changes in circumstances.

From a formal point of view, the European Council is not yet an EU institution, although the European Convention has worked on this point,[64] as it is now highlighted in the Constitution for Europe.

> **Treaty establishing a Constitution for Europe: Art. I-19:** "The Union's Institutions.
> **(1)** The Union shall be served by a single institutional framework which shall aim to:
> – Advance the objectives of the Union.

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[64] *Cf.* above chapter I and below chapter IV. It should be noted that it was the European Council itself which decided to gather together the main participants in the debate on the future of the Union, and to set up the so called 'European Convention.'

– Promote the values of the Union.
– Serve the interests of the Union, its citizens and its Member States, and ensure the consistency, effectiveness, and continuity of the policies and actions which it undertakes in pursuit of its objectives.

(2) This institutional framework comprises:
– The European Parliament.
– The European Council.
– The Council of Ministers.
– The European Commission.
– The Court of Justice.

(3) Each Institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it. The Institutions shall practice full mutual cooperation."

Its conclusions do not usually have the force of law and are not subject to review by the Court of Justice. Nonetheless, the participation of the President of the EU Commission has the function of coordinating between the European Council and the Commission itself. This cooperation consists in the fact that the Commission debates Reports, Opinions, Communications, and other political documents during the European Council summits.

The activity carried out by the European Council during the last ten years has consisted of expounding the policy line which determines the accession process.

At the Lisbon summit of the European Council on the 26th and 27th of June 1992, the Commission made its conclusive report defining the criteria for accession. European identity was expressed at that session in terms of three conditions; the existence of a democratic constitution and respect for human rights, the assumption of Community law by the candidate State as well as its concrete implementation.[65]

The question was considered in the Edinburgh summit in December 1992, which opened negotiations with the applicant EFTA States: the Commission drew up provisions (a *list of conditions*) which the CEECs would have to satisfy in the light of future accession to the EU.

With the European Council of Copenhagen on June 21st & 22nd 1993,[66] to which Jacques Delors gave the emblematic title 'Entering the 21st Century,' it was decided that every associate State of Central and Eastern Europe could become a member of the EU, thus establishing

[65] See *EC Bull*. no. 6-1992, point I. 1.
[66] See below § 3 in this chapter. *EC Bull*. no. 6-1993, point I.13.

openly a direct link between the Europe Agreements and accession to the Union.

It was also agreed that accession could take place as soon as the applicant country was judged to be able to take on all the obligations implicit in the Europe Agreement, demonstrating achievement of all the political requisites and economic requirements.[67] It was at Copenhagen that the heads of state and government fixed the conditions which must be fulfilled by each applicant State (so called *Copenhagen criteria*).

At the European Council of Essen in December 1994 the enlargement process was officially opened to the six countries which had concluded *Europe Agreements*.

In order to provide worthwhile assistance in the context of the pre-accession strategy, the Commission, during the European Council of Cannes in May 1995, presented the *White Paper* 'On the preparation of the associated Central & East European countries for integration into the internal market of the Union.'[68] The European Council of Madrid in December 1995 concluded that the harmonious integration of the CEECs represented a challenge for the Union and asked the Commission to prepare a collective document able to respond to the needs revealed by the accession requests. The document *Agenda 2000* 'For a stronger and wider Europe'[69] was presented by the Commission in the course of the European Council held in Amsterdam in June 1997, with the Opinions of the Commission on the accession requests attached.

The European Council of Amsterdam of June 1997, which concluded the intergovernmental Conference (IGC) by adopting the Treaty of Amsterdam, gave the Council of European Union (General Affairs and External Relation Office) the task of examining the details of the *Commission's Opinions*, available in July 1997, and to present a detailed report to the European Council of Luxembourg in December 1997.

On October 6th 1997 the foreign ministers of the Fifteen welcomed positively the French initiative of a *European Conference*[70] destined to accompany the enlargement process, structured as a multi-lateral forum,

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[67] See *EC Bull*. no. 6-1993, point 1.3.12.

[68] See below § 3.2. in this chapter.

[69] See below § 3.3. in this chapter.

[70] The European Conference met for the first time in London on March 12th 1998, involving the Member States of the EU as well as all the candidate countries for accession and linked to it by an Association Agreement. Turkey, an applicant for accession since 1987, did not wish to participate. Since then, the Conference has met every year in the presence of the heads of State or of government, along with the President of the Commission and, if necessary, at the ministerial level.

where political consultation, particularly in common foreign and security policy, justice and home affairs, as well as regional and economic cooperation, can take place.

The European Council of Luxembourg of December 1997 established that the *Accession Partnership*[71] would be the new instrument and the main plank of the reinforced pre-accession strategy. At that session the Council accepted the applications of ten countries. Negotiations began in March 1998 with an initial series of six countries: Cyprus, Estonia, Hungary, Poland, the Czech Republic, and Slovenia. In the meanwhile, Malta renewed its own application (September 1998) and the European Council of Cardiff re-started the European strategy of preparation for accession with Turkey.

Following the opening of negotiations for accession for Cyprus, Hungary, Poland, Estonia, the Czech Republic, and Slovenia, the European Council took note of the fact that many chapters of the Community *acquis* had already been subject to a screening process. The analytical examination of the *acquis* was also initiated with respect to Bulgaria, Latvia, Lithuania, Romania, and Slovakia.

The Commission confirmed that it would present the first Reports on the evaluation of progress from each applicant country *en route* to accession by the end of 1998. Following a request by the European Council, the Reports also included Cyprus and Turkey. On November 4th 1998 the Commission adopted the twelve *Regular Reports*.[72]

The European Council of Berlin of March 1999 approved the financial framework for the period 2000–2006, making provision for political reform and the requisite reserve funds for pre-accession and accession. In this way the EU defined a precise framework for the financial aspects of enlargement, establishing a sufficient basis so that the accession of the ten new members could happen in 2004.

In December 1999, the European Council of Helsinki reaffirmed the importance of the enlargement process, in the sense that there should be equality between all the thirteen applicant States (including Turkey). Accordingly, negotiations for accession were opened in respect of the so-called second-round countries as well: Bulgaria, Latvia, Lithuania, Romania, Slovakia, and Malta, and a new accession strategy founded on 'open negotiation with all applicant countries' was inaugurated, to motivate all the applicant countries in equal measure to accept the entire Community *acquis*. The European Conference of Helsinki recalled the fact

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[71] See below § 3.5. in this chapter.

[72] See below § 3.6. in this chapter.

that respect for the political criteria fixed by the European Council of Copenhagen was a pre-condition for the start-up of accession negotiations.

In February 2000 the Council decided to organize some *Intergovernmental Bilateral Conferences* in view of the start of negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria, and Malta, on the conditions for accession to the European Union, as well as the adaptations which will subsequently be carried over into the Treaties. The European Council also announced the adoption of appropriate measures which would permit the Intergovernmental Conference to revise the Treaties (ICG officially convened in February 2000). The negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria, and Malta were officially set in motion on February 15th 2000.

In December 2000, the *Nice Conference* backed the institutional modifications necessary so that, from the end of 2002, the Union would be able to welcome those applicant countries which were ready and allow them to participate in the European elections of 2004. The Member States took up the Common Position, which would be adopted at the accession conferences so far as the reapportioning of seats at the European Parliament is concerned, the weighting of the votes, the composition of the economic and social Committee, and the composition of the regional Committee for a Union of 27 Members. The Council also decided that Europe's future should be the subject of a wide-ranging and in depth debate, in which the applicant countries would take part as well.

The European Councils of Santa Maria da Feira and Gothenburg, in June 2000 and June 2001 respectively, emphasized the vital importance for the applicant countries to demonstrate their ability in implementing the *acquis,* and indeed requested that greater efforts should be devoted to reforming the administrative and judicial structures and the public functions in general.

The European Council of Santa Maria da Feira reaffirmed the *principle of differentiation*, the basis of which is that the various applicants for accession retain the possibility of recouping their position with respect to those who had started negotiations earlier. In addition at Gothenburg, the applicant countries were invited to take on the economic, social, and environmental goals of the EU and to develop a sustainable economy which is at the same time highly competitive.

In the Declaration of the European Council of Laeken in December 2001, it was established that the European institutions should be brought closer to the citizens and the *democratic legitimacy and transparency* of the present institutions increased.

To this end (they said) it was necessary to introduce a clearer distinction between the three areas of competence: those exclusively of the Union, those of the Member States, and those shared between the Union and the Member States; moreover, it was important to evaluate at what level the areas of competence work most efficiently and how to implement, in this connection, the principle of subsidiarity. It would also be necessary to open a debate on the question of the advisability of introducing a distinction between legislative provisions and implementation measures, and of the advisability of reducing the number of legislative instruments and reforming the legislative framework (including non-binding instruments such as opinions and recommendations).[73]

The European Councils of Barcelona, Seville, and Brussels, held in March, June, and October 2002 respectively, emphasized the importance of ratifying the *Treaty of Nice* for the future of Europe. At Copenhagen, in December 2002, efforts were directed at completing the drafting of the *Accession Treaty*, so that it could be submitted to the Commission for its opinion, and then to the European Parliament for its assent, and to the Council, with a view toward signing the Treaty in Athens on April 16th 2003.

At Thessaloniki, in June 2003, the European Council affirmed that this process would have to be completed in time for the ten new Member States to join the Union, on May 1st 2004. Following the signature of the Accession Treaty, an event which finally happened on May 1st, the results of referenda in Malta, Slovenia, Hungary, Lithuania, Slovakia, Poland, and the Czech Republic lent additional momentum to the ratification process.

The European Council also welcomed the commitment of the Turkish government to carry forward the reform process, in particular the remaining legislative work in criminal law, and supported the on-going efforts made in order to fulfil the Copenhagen political criteria for opening accession negotiations with the Union. The Accession Partnership 2003 constitutes the cornerstone of EU–Turkey relations, in particular to the decision taken by the Brussels European Council in December 2004, when it concluded that Turkey fulfils the Copenhagen political criteria and the EU will open the accession negotiations without delay. The same European Council emphasized that Cyprus' accession to the Union is creating favorable conditions for the two communities to reach a comprehensive settlement of the Cyprus problem. The Union strongly supports the continuation of the UN Secretary General's mission of good offices in accordance with the relevant UN Security Council Resolutions.

[73] See the Constitution for Europe, chapter I, § 3.

Finally, the same Thessaloniki European Council of June 2003 reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries and stated that the these countries will become an integral part of the EU, once they meet the established criteria, through the introduction of *European Partnerships*. Croatia had already applied for EU membership in February 2003, and in June 2004 the European Council decided that Croatia is a candidate country and that the accession process would be launched.

The ten new Member States were encouraged to keep up their efforts, in order to be fully prepared to assume the obligations of membership by accession. This also included the necessary translation/adaptation of the Community *acquis*.

Bulgaria and Romania are part of the same enlargement process. The objective is to welcome these States as Members in 2007 and, to this end, the pace of negotiations will be maintained. These are continuing on the same basis and principles that applied to the ten new Member States, with each candidate judged on its own merits. With a view to making a success of enlargement, the monitoring of these preparations has been intensified on the basis of Reports submitted regularly by the Commission. Building on significant progress achieved, the Union supports Bulgaria and Romania in their efforts to achieve the objective of concluding negotiations and signing the Accession Treaty in 2005.

6. The Activity of the European Bank for Reconstruction and Development

Regional and international financial institutions have always been active in promoting the growth of pluralist democracies and market economies for countries in transition: here we refer in particular to the activities of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (known as the World Bank-WB).

Moreover, cooperation on the reforms which were beginning in all the ex-communist States was sought by private and public Western institutions alike: the Council of Europe, UNCITRAL,[74] OECD,[75] govern-

[74] See the website http://www.uncitral.org/.
[75] See the website http://www.oecd.org/.

ment agencies, Universities, national bodies such as the German GTZ,[76] the French MICECO,[77] the SCCPL,[78] the Soros Foundations, the ABA,[79] and so on.

The legal assistance supplied by all these organizations and institutions in cooperating has revealed a new kind of interaction among the differing legal traditions (between *Common law* and *Civil law*) and between legal systems at different levels (*uniform international law* and *EC law)*.

Some scholars have criticized the rhetoric of neutrality regarding the assistance provided by these international credit organizations and private/public Western institutions in proposing and later transplanting legal models to countries in transition.[80] Indeed we the authors believe that the rules offered cannot be neutral, but that the allocation of resources always, in any case, implies a political evaluation.

As a result, the attempt to leave the political aspect out of *legal transplants* is paradoxical because it does not reflect the reality of the transition process, overlooking in the first place the political choices and the complex game of (competing) interests which stands behind modern instances of offer and acceptance of legal concepts and rules.

We wish here to take note of the existence of two distinct patterns in the dynamics of *supply* and *borrowing* of legal rules and models: the first concerns the slant which the proponents of the law place on the legal technicalities within the reform process of the legal system; the second,

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[76] *GTZ* (German Technical Cooperation Agency) at: www.gtz.de/lexinfosys/.

[77] This is the French inter-ministerial mission for Central and Eastern Europe.

[78] The Scientific-Consultative Centre for Private Law (SCCPL) was established in the CIS during the 1990s'. Prof. A.L. Makovskii was appointed and coordinated the group of national and foreigner legal scholars. The SCCPL worked mainly on Model Laws for the CIS, in the field of private and commercial law. From the Leiden Institute and the Dutch Centre for International Legal cooperation, this arrangement with the SCCPL has involved Prof. F.J.M. Feldbrugge (until 1998, head of the Leiden Institute), Prof. W.B. Simons (Director of the Leiden Institute), and Justice W. Snijders (the then Vice-President of the Dutch Supreme Court). Additional source of ongoing advice and expertise came from Prof. R. Knieper of Bremen University and the German Government's *GTZ* agency. Furthermore, several other North American institutions have also assisted the SCCPL upon occasions, such as IRIS (University of Maryland) or McGill University in Montreal. In particular, this assistance has brought CIS lawyers in close contact with, among others, Prof. R. Summers (Cornell), J. White (University of Michigan), P. Maggs (University of Illinois), and H. P. Glenn (McGill).

[79] The American Bar Association coordinates one of the best-known judicial assistance programs in America, the CEELI (Central and East European Law Initiative), a network of legal consultants who go on site to assist governments in the tasks of reform, above all in drawing-up laws.

[80] For more detail, the reader is referred to the bibliography cited at the end of this chapter. On legal transplants see chapter I, § 8 and chapter II.

often subordinate to (and masked by) the first, concerns the political criteria inherent in the legitimacy of choosing the type of reform.

As we have seen, the reception of the Community *acquis* by means of the process of transposing EC law within the candidate countries, a process which results in the adoption of the EC legal model, reveals many aspects of policy underlying the national and trans-national political strata.

The disclosure of the political criteria which are conditioning the transition process of the CEECs, already mentioned in the preceding paragraphs (the *political dialog clause* upon which the actions of the European Community institutions are based), is a feature of the activity carried out by the *European Bank for Reconstruction and Development* (EBRD).

The EBRD was created to help the transition process towards multipart democracy and the CEECs market, until steady progress could be made in the promotion of private enterprise and entrepreneurial activity. The Agreement signed on May 29th 1990 by 39 countries, the European Union and the European Investment Bank (these latter together hold 51% of the capital of the EBRD) was the first international institution of which the Eastern bloc countries and the West are members.

> Originally the Member States and recipients of the loans were Bulgaria, the Czech Republic, the Slovak Republic, Hungary, Poland, Romania, the USSR, and Yugoslavia. Later the Republic of Macedonia, Slovenia, Albania, Moldavia, Georgia, and recently Bosnia–Herzegovina joined. In 1995 the Bank operated in the following countries: Albania, Armenia, Azerbaijan, Byelorussia, Bulgaria, Croatia, the Czech Republic, Estonia, the Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldavia, Poland, Romania, the Russian Federation, the Slovak Republic, Slovenia, Tajikistan, Turkmenistan, the Ukraine, and Uzbekistan. 60% of the funds of the EBRD are destined to finance privatization. The loan agreements began in April 1991.

As far as the structure of the Bank is concerned, it has a Council of Governors, a Council of Administrators, a President and several functionaries.

Each member of the Bank is represented on the Council of Governors by a Governor (or his deputy), revocable at any time. The said Council in its turn elects the President, with powers of proposal and guidance, as well as the Council of Administration, responsible for the management of the general operations of the Bank. In particular, the Council of Administration prepares the work for the Council of Governors and develops policy in relation to credits, guarantees, shareholdings and issue of loans, which are for the attention of the latter, following the general directives

of the Council of Governors; lastly it approves the accounts of the Bank. The required quorum for the more important decisions—absolute majority for the approval of single loans, $^2/_3$ for political choices and $^3/_4$ for decisions regarding investment programs—ensures the working efficiency of the Bank

It should be pointed out that its nature and activity distinguishes the EBRD decidedly, with respect to other international credit organizations, characterizing the first in the Europeanist sense and noting that its mandate is politico–economic, resembling, however, that of the EU.

The Preamble and the Art. 1 of the EBRD Statute establish a *political clause*:

> **EBRD Preamble**: "The contracting parties, Committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics; Recalling the Final Act of the Helsinki Conference on Security and Cooperation in Europe, and in particular its Declaration on Principles; Welcoming the intent of central and eastern European countries to further the practical implementation of multiparty democracy, strengthening democratic institutions, the rule of law and respect for human rights and their willingness to implement reforms in order to evolve towards market-oriented economies; Considering the importance of close and co-ordinated cooperation in order to promote the economic progress of central and eastern European countries to help their economies become more internationally competitive and assist them in their reconstruction and development and thus to reduce, where appropriate, any risks related to the financing of their economies; Convinced that the establishment of a multilateral financial institution which is European in its basic character and broadly international in its membership would help serve these ends and would constitute a new and unique structure of cooperation in Europe; Have agreed to establish hereby the European Bank for Reconstruction and Development (hereinafter called "the Bank") which shall operate in accordance with the following:
>
> **Art. 1** "Purpose: In contributing to economic progress and reconstruction, the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the central and eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics."

The Establishing Agreement of the EBRD provides that the aim of the Bank is to encourage the transition towards a free market, and to pro-

mote private entrepreneurial initiative in the CEECs, when they engage in the implementation of the principles of democracy, multi-party politics, the rule of law, respect for human and economic rights. The Agreement sets out the fundamental principles for the development of democratic government, which was spelled out in the final Act of the Helsinki Conference on Security and Cooperation in Europe.

The difference with respect to the International Monetary Fund or the World Bank lies in the fact that there is no such clause relating to political conditions that can be found in the Statutes of these latter two credit organizations.

On the contrary, the World Bank and its officers "shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned."

> **IBRD Establishing Agreement (as amended in 1989): Art. 1**
> "Purposes. The purposes of the Bank are: (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the re-conversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries. (ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources. (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories. (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first. (v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in bringing about a smooth transition from a wartime to a peacetime economy. The Bank shall be guided in all its decisions by the purposes set forth above."
>
> **Art. 4, section 10.** "Political Activity Prohibited. The Bank and its officers shall not interfere in the political affairs of any

> member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

The IMF Establishing Agreement (as amended) does not explicitly prohibit the interference in the politics of Member States, but permits it by default, laying down that the IMF must respect the internal social-politics of member countries and sustain sound economic growth (the so called *sustainable development clause*).

> **IMF Establishing Agreement: Art. 1**. "Purposes. The purposes of the International Monetary Fund are to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy. To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation. To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade. To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members. The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article."
>
> **Art. 4, section 1.** "Recognising that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates."

The EBRD, defined by many as "the first post-Cold War institution," or "the first institution of the new order," exists to help in the economic reconstruction of the CEECs by promoting and developing private entrepreneurial activity, favoring in its loan system the following categories:

– To private enterprise, with no restrictions.
– To State enterprises which operate in the market according to the rules of competition:
– To businesses which are being privatized, in the hands of public agencies, which need funds to ease the transition to private ownership.

The Bank also facilitates access to domestic and international finance and lends technical assistance in the reconstruction of infrastructure. Joint ventures with foreign partners have been the main beneficiaries of bank loans. An explanation may be found in the fact that access to finance depends on the evolution of the liberalization process, and many believe that external intervention can revive the economies in transition.

The operations favoring the private sector confer a different status on the EBRD, so that its activity is distinguished from that of the Multilateral Development Banks (MDBs). In fact, these Banks operate for the most part in the public sector, dealing with governments.

The EBRD also provides legal assistance for the drafting of legal rules. This is an example of how the supply of legal models makes *legal change dependent* on the *dynamics* of the *offer* and on technicalities of the *reception*.[81] Early in the 1990s, it became evident that CEECs needed particular support in the area of secured transactions. A Round Table discussion at the First Annual Meeting 1992 of the EBRD in Budapest clearly indicated that most countries either did not have any rules on secured transactions at all or had to rely on outdated rules from pre-communist regimes.

After that meeting, the Bank set up its *Secured Transactions Project* and produced a first working draft for a *Model Law on Secured Transactions*.[82] The EBRD formulated a legal framework for secured transactions as a key requirement in creating an investor-friendly climate. An investor who knows that s/he has legally recognized rights to turn to her/his debtor's assets in case of non-payment may assess the investment risk quite differently. It may influence her/his decision on whether or not to invest; it may also change the terms on which s/he is prepared to invest (typically by lowering the interest rate on a loan).

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[81] On legal transplants see chapter I. §8 and chapter II.

[82] See in Internet at http://www.ebrd.com/pubs/sectrans/modellaw/modlaw0.htm.

One principle which guided the drafting of the Model law was to produce a text that is compatible with the *Civil law* concepts, which underlie many CEECs' legal systems, and at the same time to draw on *Common law* systems which have developed many useful solutions to accommodate modern financing techniques. The Model law thus represents a supra-national model; but it so happened that the definitions were drafted in general terms, in order to differentiate the language of the Model Law from particular national legal systems. *Macro-transnational notions* (or *hyper-notions* or *vague notions*),[83] due to their vagueness and consequent flexibility, can influence local laws without interfering with particular cultural and social contexts. In particular, vague notions are useful in pursuing legislative policies and to reach a consensus on items in legislative agendas. In fact, once these concepts are received in borrowing countries, they lose their original empirical meaning and take on a symbolic relevance. In this way, *a priori* legitimated models, based on concepts widely recognized as development market factors, became tools with which to pursue legal reforms.

Vague notions, however, may cause problems in adopting the Model Law and they do not completely satisfy the interests of economic actors who would prefer a fully 'common law-based' or 'civil law-based' text. Nonetheless, since it was published in early 1994, the Model Law has been widely circulated and has served as a catalyst for defining the essential requirements of a national law in a modern market economy.

[83] A vague notion is a notion where the boundaries of its application are not clearly delineated, such as *rule of law* or *corporate governance*.

Table 1: CEECs

Country	Signature of the Europe Agreements	Entry into force	Application for Accession to the EU	Starting date of Accession Negotiations
HUNGARY	Dec. 16 1991	Feb. 01 1994	1994	April 1998
POLAND	Dec. 16 1991	Feb. 01 1994	1994	April 1998
ROMANIA	Feb. 01 1993	Feb. 01 1995	1996	February 2000
BULGARIA	Mar. 08 1993	Feb. 01 1995	1995	February 2000
CZECH REPUBLIC	Oct. 04 1993	Feb. 01 1995	1996	April 1998
SLOVAK REPUBLIC	Oct. 04 1993	Feb. 01 1995	1996	February 2000
LATVIA	Jun. 12 1995	Feb. 01 1998	1995	February 2000
ESTONIA	Jun. 12 1995	Feb. 01 1998	1995	April 1998
LITHUANIA	Jun. 12 1995	Feb. 01 1998	1995	February 2000
SLOVENIA	Jun. 10 1996	Feb. 01 1999	1996	April 1998

Table 2: Other Countries and the EU Membership

Country	Signature of the Europe Agreements	Entry into force	Application for Accession to the EU	Starting date of Accession Negotiations
CYPRUS			July 03 1990	April 1998
MALTA			July 16 1990	Accession Negotiation two years (1996–1998)
TURKEY	Association Agreement 1963		Apr. 14 1987	Failure to achieve the political and economic requirements of Copenhagen

Table 3: Referendum on EU Accession (as of May 1 2004)

Mar. 08 2003	Malta Referendum	Jun. 13–14 03	Czech Republic Referendum
Mar. 23 2003	Slovenia Referendum	Sep. 14 03	Estonia Referendum
Apr. 12 2003	Hungary Referendum	Sep. 20 03	Latvia Referendum
May 10–11 2003	Lithuania Referendum	July 14 03	Cyprus ratified the Treaty according to its domestic procedures
May 16–17 2003	Slovakia Referendum		
Jun. 07–08 2003	Poland Referendum		

Table 4: Western Balkans and the EU Membership

COUNTRY	Signature of the Stabilisation and Association Agreements	Entry into force to the EU	Application for Accession	Starting date of Accession Negotiations
CROATIA	October 29 2001	February 1 2005	February 21 2003	2005
MACEDONIA (FYROM)	March 26 2001	April 1 2004	2004	2005
ALBANIA	January 31 2003 Officially launched negotiations for a SAA between the EU and Albania. These negotiations are presently ongoing.			
BOSNIA & HERZEGOVINA	Following substantial completion of the Road Map, the European Commission conducted a Feasibility Study in 2003, identifying sixteen priority reforms on which significant progress would allow the Commission to recommend to the Council the opening of negotiations on a SAA with B.H.			
SERBIA AND MONTENEGRO	Following the adoption of the Constitutional Charter and of the Internal Market and Trade Action Plan in August 2003, the Commission decided to start working on its SAA Feasibility Report. The Feasibility Report looks into the possibility to open negotiations on a SAA on the basis of different criteria, such as the degree of compliance with SAp political and economic conditions, the existence of a single trade policy and a single market, the progress on sectoral reforms and on those institutions at the state level necessary to implement a SAA.			

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CHAPTER IV

Institutions and Sources of Community Law

Key words: EU Institutions – Charter of Fundamental Rights of the EU – Community Competence – National Competence – Subsidiarity – Sources of Community Law – Direct effect – Supremacy – Treaty provisions – Regulations – Directives – Decisions

1. Foreword

Every legal system evolves continuously. Sometimes the *change in the law* occurs with full awareness, it is explicit, expressed and noted by everybody. It does not, however, always happen like that.

Sometimes, the change brought about by a new statute, or by a legal principle being overruled, happens without any clamour, almost unnoticed. This occurs when the change is not so socially relevant as to justify more attention, because it does not answer to the social needs of the citizens. However, in some cases, the apparent lack of public interest is, in fact, a result of scarce knowledge of the new features introduced by the new rules, of the historical reasons which are behind the change, and the potential repercussions which they may have later on the legal system.

The adaptation of domestic laws to EC law may occur with greater or lesser awareness. One thinks, for example, of the effect which the new rules have on national laws, rules on unfair terms, on contracts negotiated away from business premises, and those regarding product liability.

Nobody doubts that the Community was the originator of these new rules, which fits into a much bigger Community scheme for consumer protection, that there exists, in the first place, Community Directives of which these rules represent the implementation.

A consequence of this widespread awareness is that whoever is faced with a difficulty in interpretation, arising in a court which must decide an issue in the course of a ruling or in academic discussion, will be led to an examination of the corresponding Community Directive as well, to reconsidering the initial "*having regard to* / *whereas*" preamble, and to reading not just the national but also the European academic commentaries.

For this reason, it is fundamental that the interpretation of a domestic provision which, in its turn, represents the implementation of a directive, should always take place in the light of the *aims* and *objectives* of the Community law, as well as the *principles* constituting the EC legal system. If knowledge of the EC origin of the domestic law is missing, it is difficult to achieve interpretative conformity.

However, the fact is that in each Member State the judges are inclined to interpret the law according to their own interpretative methods, typical of their own legal system and often with no reference to the Community origin of the domestic provision.[1] There is therefore a real risk of fragmentary harmonization happening as a result, the risk of as many working rules developing as there are Member States, and consequently of defeating the object of achieving *harmonization*.

There is therefore a need for collaboration among academics, the judiciary, and also civil servants—the lawyers themselves, and consultants—who have to take on the role of interpretation and enforcement of the law. For this to happen, a new mentality must develop which allows departure from the narrow domestic ambit, in order to undertake study methods, research and interpretation which transcend national boundaries. This is necessary in that the *process of Communitarization*[2] is no longer merely to be hoped for, but is now a reality which cannot be overlooked.

2. European Integration

The European Community has undergone profound changes over the fifty-plus years of its existence.[3] The Community aims, the role and composition of the institutions, the pre-emption of Member States, as well as the exclusive jurisdiction of the European Community in some sectors, are the features which have shaped the Community's development, witnessed in particular by the *Single European Act*, the *Treaty of*

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[1] In the first chapter considerable attention was paid to the fact that the Community legal activity, directed towards the harmonization of the laws of the Member States, is proceeding in a way which can hardly be called systematic, being partial and often incomplete (see chapter I).

[2] See chapter II.

[3] This book will be dealing in outline only with the evolution of the common market through the various Treaties which have modified the Treaty of Rome and the institutional scheme of the European Community. The reader is referred for further information to the specialized bibliography on the subject, already cited at the end of chapter I and of this chapter.

Maastricht, to some extent by the *Treaty of Amsterdam,* and some landmark judgments from the *Court of Justice*.

These decisions are real milestones marking the evolution of the EC, which originated from the political will that began to emerge at the end of the 1960's.

As far as the Community objectives are concerned, the initial aim was the creation of a common market in various economic sectors, progressively operating on the basis of the four fundamental liberties (*free movement of goods, persons, services and capital*).

While the liberalization of the capital sector and the free movement of persons and services have progressed rather slowly, the major advances have happened in the area of the free movement of goods, due to the elimination of customs barriers and measures of equivalent effect. These measures include the setting of common customs' tariffs in regards to relations with countries outside the EC, or the application of competition rules which are designed to prohibit all those agreements between undertakings that could interfere with the free play of competition, as well as the abuses committed by undertakings which find themselves in a dominant position in the marketplace, and the economic aid which states provide for their own undertakings. Furthermore, we must not forget the achievement of the common agricultural policy, which was one of the main activities of the EEC, designed to stabilize the negative effects on undertakings from endemic instability of markets and prices.

The aims were widened to include, first of all, the strengthening of *social policy,* the development of a *common foreign policy*, the adoption of measures in the field of *research and technological development* and, above all, of *environmental protection* (Single European Act):

> The Single European Act, signed at Luxembourg on February 17th and at the Hague on February 28th 1986, represents the first real and important reform of Community rules envisaged by the Treaty of Rome, to which entire chapters have been added.

The point was reached when a new entity—the European Union—representing the highest level of integration between the Member States, was established (Treaty of Maastricht):

> The Treaty of Maastricht, signed on February 7th 1992 and which came into force on November 1st 1993, altered the institutional layout of the Community and gave rise to the European Union, which represents far-reaching cooperation between Member States in areas that are not only strictly economic. In fact, besides amending the three founding Treaties (and notably the EEC Treaty), the Treaty of Maastricht brought with it the new Treaty of the European Union (TEU).

> It is symbolic that Title II of the Maastricht Treaty, in stating the modification of the provisions of the EEC Treaty, lays down that the expression *European Economic Community* is to be substituted by the expression *European Community*.

The Treaty of Amsterdam cemented this Union and improved upon the objectives, tasks and scope of the European Community.

> The Treaty of Amsterdam, which brought about several significant changes to the Treaty of Maastricht, was signed on October 2nd 1997 between the Heads of State and Governments of the Member States, and came into force on May 1st 1999. This represents a further step towards European integration: it improved on the commitments undertaken by Member States in the areas of cooperation in foreign policy and security, as well as judicial policy, and it established cooperation in the criminal field. As a result of its coming into force, the entire renumbering of the original Treaty of Rome has had to be undertaken, with practical consequences which cannot be ignored.

The objective is, now, no longer achieving a single market which hinges exclusively on trade and manufacturing factors, but also creating a community of *European citizens*, that is to say a community of people who, while naturally within a pluralist context typified by the variety of legal systems which are part of it, are united by common aims and interests.

The attribution of citizenship in the European Union for everyone who belongs to one of the Member States (art. 2 TEU and art. 17 *ff*. TEC) is making Europe an increasingly political entity, and not merely an economic one.

Its symbolic and idealized value has been widely commented upon, together with the institutionalization of the Common Foreign & Security Policy (Title V of the Treaty of Maastricht) and the cooperation in the fields of Justice & Home Affairs (Title VI, which became, with the Treaty of Amsterdam, provisions on Police and Judicial Cooperation in Criminal Matters).

The latest Treaty signed marked the end of a cycle and perhaps the end of an era (Treaty of Nice).

> The Treaty, signed at Nice on February 26th 2001 and published in the Official Gazette of March 10th 2001, came into force on February 1st 2003, after ratification by all the Member States.

Beside the institutional changes (new division of seats in the European Parliament, new composition of the Commission, new definition of qualified majority within the Council, new apportioning of jurisdiction between the Court of Justice and the Court of First Instance, which becomes the *common law judge* for all direct actions, particularly proceedings against a decision—Art. 230 TEC, action for failure to act; Art. 232 TEC, action for damages; Art. 235 TEC—with the exception of those which will be attributed to a specialized chamber and those the statute reserves for the Court of Justice itself), the new Treaty achieves a total reorganization of the provisions relating to "closer" or "reinforced" cooperation, with the aim of achieving three objectives:

– To ease the conditions necessary for closer cooperation to work.
– To make the procedure less complex.
– To extend closer cooperation to include the area of the so-called 2nd pillar (police and judicial cooperation in criminal matters) as well.

The Treaty of Nice has not incorporated the *Charter of Fundamental Rights of the European Union*,[4] which was, however, the subject of a joint declaration by the Council, the European Parliament, and the Commission.

The declaration of fundamental rights by the European institutions, however, found its place within EU legal sources: it has been included in the Treaty establishing a Constitution for Europe, Part II, entitled *Charter of Fundamental Rights of the European Union*.[5] Thus, it acquired its importance for at least three reasons.

First and foremost, for the fact that the institutions (both supra-national and national) will be obliged to conform to the Charter, the Court of Justice will apply it when interpreting the law and when it has to adjudicate upon the validity of Community acts, just as the national judges will have to do when called upon to apply EC law. The recognized rights will, therefore, always be subject to judicial review, even if it is in an indirect way. With the prospect of last and future enlargements,[6] the Charter of Fundamental Rights seems important for defining common values and basic rights, also in view of the fact that the democratic systems of the candidate countries are of recent origin.

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[4] See the website http://www.europarl.eu.int/charter/default_en.htm.

[5] See below § 3 chapter I, and § 2 chapter III.

[6] The number of Member States of the Community, which has gone from the original six to twenty-five at the present time, will certainly increase in 2007, with the further enlargement to include Bulgaria and Romania, and will probably reach to involve some Western Balkans countries and Turkey in the near future. See chapter III.

In the second place, the adoption of the Charter is taking the same direction as followed in the case of the reinforcement of the institutional framework and Community policies: the reform, to be truly complete, should be done in such as way that it is recognized by the citizens of the Union, directly and without intermediaries, as a list of rights which can be effectively protected and enforced before the institutions of the EC itself. In other words, an inextricable link exists between the fundamental rights and the rules governing the institutions' activity, and of necessity they have a reciprocal relationship with one another.

Thirdly, the Charter can be seen as the core of what will be the European Constitution: with its entry into force in the next couple of years, the detailed laws of which the Treaties are filled will be transformed into a subordinate range of laws, which could then be more easily altered as necessary, without requiring the unanimous modification procedure of the Member States.

Therefore the political and judicial context in which Community jurisdiction is presently exercised, has changed many times and will be undergoing further transformation.

2.1. *Community and National Competences*

The Treaty reforms of the last fifteen years have greatly increased Community prerogatives. The so-called *new sectors* of Community competence concern culture (art. 151, *ex* art. 128, TEC), public health (art. 152, *ex* art. 129, TEC), consumer protection (art. 153, *ex* art. 129A, TEC), trans-European networks (art. 154, *ex* 129B, TEC), industry (art. 157, *ex* art. 130, TEC), research and technological development (art. 163, *ex* art. 130F, TEC), environment (art. 174, *ex* art. 130R, TEC), development cooperation (art. 177, *ex* art. 130U, TEC), social security and social protection of the workers, the improvement of the working environment to protect workers' health and safety, and representation and collective defence of the interests of workers and employers, including co-determination, (art. 137 TEC, *ex* art. 118, especially the new formulation following the Treaty of Nice).

As a result of the widening of the Community's areas of competence, some of the provisions in the Treaties, which could slow down or actually block Community initiatives on the part of dissenting States, have been reviewed.

In this way, the Single European Act had already brought in some important changes to the voting system within the Council by the substitution of the requirement of unanimity to that of *qualified majority* in some important areas, for example the harmonization of legislation regarding

the implementation and functioning of the internal market (art. 95 TEC, *ex* art. 100A), social policy, economic and social cohesion, and others as well.

> The number which constitutes a qualified majority is presently fixed at 62 votes (out of a total of 87). The allocation of numbers of votes for each State varies according to its importance in the European ambit and is indicated in art. 205 (2) TEC (*ex* art. 148). Italy, France, Germany and the United Kingdom have 10 votes each.
>
> From January 1st 2005, according to what has been laid down by art. 3 of the Protocol on European enlargement annexed to the Treaty of Nice, both the criteria for the adoption of the acts of the Council (which must have at least 169 votes in favour), and the number of votes allocated to each State have changed (Italy, France, Germany, and the United Kingdom have 29 votes).

Voting by qualified majority has, by the Treaty of Amsterdam, become the general rule, while, by the Treaty of Nice, the cases requiring unanimity are reduced to approximately half the previous number. Among the articles concerned in this change, art. 133 TEC (ex art. 113), on the common commercial policy and art. 161 TEC (ex art. 130D), on the economic and social cohesion policy should be noted.

The evolution to which we have briefly referred, characterized by numerous modifications of the original Treaty of Rome, has been accompanied by a series of rulings by the European Court of Justice. These decisions have provided interpretations of Community law, which have allowed it greater efficiency within the national legal systems and sanctioned the supremacy of the law of the Community over domestic law.

Here, we are making particular reference to those rulings which affirmed the supremacy doctrine, later accepted by the Constitutional Courts and Supreme Courts of the national legal systems, with the consequence that domestic laws which are incompatible with the Treaty or a Community Regulation must be disregarded by every judge in the national courts, whether or not it concerns laws which preceded or followed the Treaty or Regulation.[7]

We are also referring to the rulings of the Court of Justice which have attributed direct effect to some Directives with certain characteristics,[8] through teleological interpretation of art. 249 (*ex* art. 189) TEC.

All these factors taken together have brought about both an increase

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[7] See further the following §§ in this chapter.

[8] See below, chapter V.

in the Community's jurisdiction (from a *quantitative* point of view), as well as a greater capacity (from a *qualitative* point of view) on the part of Community law to infiltrate the national legal systems, binding judges as to the choice of applicable law.

The reaction from some quarters (even among the most convinced Europeans), which views the excessive interference in internal affairs unfavorably, has re-ignited the old issues of sovereignty of the national States, and has resurrected the distinction, never entirely suppressed, between the federalist tendency on the one hand, and conservative nationalism on the other. However, even at the negotiation stage of the founding Treaty of the European Union, some States had manifested the intention not to accept an increase in the Community's jurisdiction to cover new areas, if (at the same time) a principle were not established to the effect that the Community action would assume a subsidiary role compared to that of the national State, and, in some cases, to that of the subnational governments or regions (such as, for example, the *Länder* in Germany or the *Comunidades Autonomas* in Spain).

2.2. *The Principle of Subsidiarity*

In an effort to resolve this problem and to contain the impressive regulatory activity of Brussels, the Treaty of Maastricht (art. G.5) has enunciated the principle of subsidiarity, which was later inserted into art. 3B of the Treaty of European Community, finally becoming art. 5 TEC, under the new numeration introduced by the Treaty of Amsterdam.

The principle had already been formulated in art. 130R (4), (now art. 174 TEC), modified by the Single European Act, in relation to the new jurisdiction to be given to the Community in the field of environmental protection. The Treaty of Maastricht restated the principle in a more decisive and solemn way.

The principle of subsidiarity is not the creation of Community politicians or academics.

It was used for the first time by the member for the national *Diet of Frankfurt*, bishop De Ketteler, to reinstate local prerogatives in opposition to Prussian centralism and bureaucracy. The principle was then reformulated in the encyclical of Pope Pious XI, *Quadrigesimo Anno*, in 1931, to limit the exercise of public power in regard to social entities such as associations, corporations, trade unions, etc.

The article is divided into three parts, each of which expresses an autonomous principle, but which integrates with the others, so furnishing a more precise meaning of itself.

> **Art. 5 TEC. "(1)** The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. **(2)** In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. **(3)** Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

The first clause reaffirms the principle of *conferral* (also called '*attributed*' or '*enumerated powers*'), which lays down that the Community may act solely within the limits of jurisdiction granted to it by the Treaty and the scope contemplated by that Treaty.

The third clause sets out the principle of *proportionality*, which had already been taken as constituting an integral part of the Community legal system. It entails the idea of a proper balance between means and ends. The Member States are indirectly recognized as having general jurisdiction in all areas, even where that overlaps with exclusive or competing jurisdiction of the Community. In fact Community intervention must always be limited to the *objectives* to be achieved and may not overstep these limits without trespassing wrongfully upon State prerogatives.

The second clause sets out the principle of *subsidiarity* (in French *subsidiarité*) of Community action, to be understood as an implicit subdivision between *exclusive* (attributed or conferred) and *concurrent* (competing or shared) competence.

Exclusive competence is that attributed exclusively either to Community institutions or to Member States (for example, art. 30 TEC, *ex* art. 36, on the prohibition or restriction on importation for reasons of public morality, public order, public security or public health; art. 295 TEC, *ex* art. 222, on the rules regarding property) by the Treaty.

Concurrent competence is that which may be exercised both by the Member States and the Community, with the caveat that when a particular subject-matter is governed by Community rules, the States may not further derogate from these to the point that they are abrogated.

However, the exclusive competence expressly attributed to the Member States remains available to them, just as the full range of competence which *has not been expressly* granted to the Community remains with the Member States.

It should be noted that there is no Treaty or Community Act that contains a rule listing which areas are *exclusive* or *reserved*. It is therefore

necessary to refer to the whole body of provisions for every sector (competition, agriculture, commerce, transport, etc.) and evaluate the limits on the power of intervention, one by one.

The attributions and their extent may be inferred from various factors, such as the objectives to be achieved, the decision-making process, and the institution involved.

For example, the Community has extremely wide powers in relation to the prohibition of quantitative restrictions between Member States (arts. 28 *ff*. TEC, *ex* art. 30 *ff*.), or in the area of agricultural policy (art. 32 *ff*., TEC, *ex* art. 38 *ff*.), or in the sector of movement of capital between Member States (art. 56 TEC, *ex* art. 73 B), or again in the competition area, (arts. 81& 82 TEC, *ex* arts. 85 & 86) and the common commercial policy. On the other hand, the areas of concurrent competence are those which concern, for example, public health (art. 152, *ex* art. 129 TEC), consumer protection (art. 153, *ex* 129A TEC), environmental protection (arts. 174, *ex* 130 R and *ff*., TEC), development cooperation (arts. 177 and *ff*., ex 130 U and *ff*., TEC).

In other cases the formulation of the Treaty provisions leave interpretative doubts as to the real extent of the powers attributed to the Community. In this sense, art. 94 TEC (*ex* art. 100) and art. 95 TEC (*ex* art. 100A) are emblematic in that, if given a wide interpretation, they permit Community intervention in every sector, given that any action may, in the last analysis, have an effect on the functioning of the internal market.

The principle of subsidiarity, according to art. 5 TEC, provides legitimacy for Community intervention in areas of non-exclusive (or concurrent) jurisdiction "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States." In the cases which do not come under the exclusive competence of the Community, it may intervene only if the States, by means of single actions, are unable to operate efficiently (*'sufficiency test'*: Member States can sufficiently achieve a given set of objectives) or if the objectives in view may be more efficiently achieved at Community level (*'value-added test'*: the Community can better achieve these objectives).

Obviously, where exclusive competence is concerned, on the other hand, Community action is deployed to its full extent. If the principle of subsidiarity were not limited just to concurrent competence, Community action could be constantly confined and obstructed even in the achievement of essential Community objectives.

The function of the principle of subsidiarity should be to settle the competition (and confusion) between the areas of Community and domestic competence, a problem which, as we have seen above, has always characterised the difficult relations existing between the Community and

some Member States. However, its capacity to operate in this way is somewhat doubtful.

The Amsterdam Protocol no. 30 on the application of the principles of subsidiarity and proportionality[9] set out the guidelines which the Community should use when examining compliance with subsidiarity. Provision 5 of the Protocol fixed essentially two criteria for justifying Community action: a first one based on the *'transnational dimension,'* which cannot be satisfactorily regulated by action from Member States; a second one based on the *'market distortion'* which the lack of Community action could cause (for example in the field of competition, social cohesion, etc.).

Although these two criteria have been formulated, the principle of subsidiarity remains a very elastic and *vague notion*, which does not offer a clear-cut answer to the question of whether the Community should act or not act.

In practice, the principle of subsidiarity leaves open as many different interpretations as there are meanings which could be attributed to it. The principle is so ambiguous that it is invoked both by supporters of more decided intervention on the part of the Community, as well as the defenders of greater national autonomy, as a shield for the prerogatives of the Member States (and of their sub-national governments or regional administrative entities, such as the German *Länder,* the Spanish *Comunidades Autonomas,* or the Italian *Regioni,* and so on) before the Community itself.

It is a strongly political principle, rather than a judicial or technical one, particularly if read in conjunction with two other principles set out in the first and third clauses of art. 5. In other words, it is a legal principle without mandatory nature.

The choice of putting into the Treaty of Maastricht a shape-shifting expression like the principle of subsidiarity, to define Community jurisdiction with respect to that of the Member States, is not random, just as the use in art. 5 of expressions such as "sufficiently achieved objectives" or "better achieved," is not by chance, nor the result of poor drafting of the Treaty.

The option of a model for the division of power between the Community and Member States which could readily adapt to the changing conditions (mainly political) of the moment was a conscious one, which favors the federalist development of the Community when the States

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[9] Protocol (No 30) annexed to the Treaty establishing the European Community by the Treaty of Amsterdam of October 2 1997, in O.J., C 340, 11.10.1997, p. 105.

agree to it, and, conversely, satisfying nationalist needs when an insuperable obstacle is met.

It is worth recalling that the Treaty of Maastricht left intact art. 235 (now art. 308 TEC), as a safeguard for the Community institutions whenever there is doubt as to whether a particular Community action is, in fact, within the limit of its jurisdiction.

> **Art. 308 TEC**. "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

The rule (commonly called *implied powers clause*) provides that when a Community action should prove necessary in order to achieve one of the Community objectives, without the Treaty having expressly provided the requisite powers, the Council shall, on a unanimous vote, take the appropriate measures. The Council has made wide use of this provision, justifying its intervention on the grounds of avoiding doubts on interpretation regarding the extension of powers given to it by the terms of the Treaty.

The Community rules are silent about who is to exercise control over the observance of the principle of subsidiarity, or whether such control may be of a political or judicial kind. But there is no reason to deny jurisdiction to the Court of Justice, to which recourse could be had under art. 230 TEC (*ex* art. 173) (so-called actions for the *review of the legality* of acts of Community institutions) or art. 234 TEC (*ex* art.177) (so-called *preliminary rulings*):

> **Art. 230 TEC**. "**(1)** The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. **(2)** It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. **(3)** The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives. **(4)** Any natural or legal person may, under the

same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. **(5)** The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

Art. 234 TEC. "**(1)** The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. **(2)** Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. **(3)** Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

Until now, both the Court of Justice and the Court of First Instance have had few occasions to consider the principle of subsidiarity, and when they have, they have dealt with it superficially:

ECJ Judgment of the Court of Justice, Case C-233/94, *Germany* v. *Council and European Parliament,* (1997) ECR I-12405:

"**(§22)** The German Government claims that the Directive must be annulled because it fails to state the reasons on which it is based, as required by Article 190 of the Treaty. It does not explain how it is compatible with the principle of subsidiarity enshrined in the second paragraph of Article 3b of the Treaty. The German Government adds that, since that principle limits the powers of the Community and since the Court has power to examine whether the Community legislature has exceeded its powers, that principle must be subject to review by the Court of Justice. Moreover, the obligation under Article 190 to state the reasons on which a measure is based requires that regard be had to the essential factual and legal considerations on which a legal measure is based, which include compliance with the principle of subsidiarity. **(§23)** As to the precise terms of the obligation to state reasons in the light of the principle of subsidiarity, the German Government states that

the Community institutions must give detailed reasons to explain why only the Community, to the exclusion of the Member States, is empowered to act in the area in question. In the present case, the Directive does not indicate in what respect its objectives could not have been sufficiently attained by action at Member State level or the grounds which militated in favour of Community action. **(§24)** As a preliminary point, it should be pointed out that in the context of this plea the German Government is not claiming that the Directive infringed the principle of subsidiarity, but only that the Community legislature did not set out the grounds to substantiate the compatibility of its actions with that principle."

ECJ Judgment of the Court of Justice, Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, (1996) ECR I-5755. The UK argued that the Council, in enacting a directive setting minimum standards of worker protection with respect to time on the job, failed to respect the principle of subsidiarity.

The Court of Justice ruled: "**(§ 46)** The applicant further maintains that the Community legislature neither fully considered nor adequately demonstrated whether there were trans-national aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the EC Treaty or significantly damage the interests of Member States or, finally, whether action at Community level would provide clear benefits compared with action at national level. In its submission, Article 118a should be interpreted in the light of the principle of subsidiarity, which does not allow adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time vary very widely between Member States. The applicant explains in this context, however, that it does not rely upon infringement of the principle of subsidiarity as a separate plea. **(§ 47)** In that respect, it should be noted that it is the responsibility of the Council, under Article 118a, to adopt minimum requirements so as to contribute, through harmonization, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a (1), is primarily the responsibility of the Member States. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of

the detailed implementing provisions required largely to the Member States. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the principle of proportionality (…) **(§ 54)** … a measure will be proportionate only if it is consistent with the principle of subsidiarity. The applicant argues that it is for the Community institutions to demonstrate that the aims of the directive could better be achieved at Community level than by action on the part of the Member States. There has been no such demonstration in this case. **(§ 55)** The argument of non-compliance with the principle of subsidiarity can be rejected at the outset. It is said that the Community legislature has not established that the aims of the directive would be better served at Community level than at national level. But that argument, as so formulated, really concerns the need for Community action, which has already been examined in paragraph 47 of this judgement."

ECJ Judgment of the Court of First Instance (First Chamber) of 21 February 1995, Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v. Commission of the European Communities*, (1995) ECR II-289:

"**(§ 330)** As regards breach of the principle of subsidiarity, the Court finds that the second paragraph of Article 3b of the EC. Treaty had not yet entered into force when the decision was adopted and that it is not to be endowed with retroactive effect. **(§ 331)** It must also be noted that, contrary to the applicants' assertion, the principle of subsidiarity did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed. **(§ 332)** It follows that the applicants' complaint of breach of the principle of subsidiarity must be rejected."

2.3. *The Constitution for Europe and the New Rules*

The current Treaty establishing a Constitution for Europe proposes, among other things, a new definition of the *principle of conferral*, according to which the EU can only exercise those powers conferred on it by the Member States (Art. I-11). The text includes a *definitive list* of exclusive competences (Art. I-13) and a *list of examples* of shared ones (Art. I-14). In addition, it has introduced a *further category* covering areas of supporting, coordinating, or complementary action (Art. I-17), in the sense that the Union may intervene to complete the action of the Member State, without displacing the State's competence. In this category can be found economic and employment policies, common foreign and security poli-

cy, including the progressive framing of a common defence policy, which are governed by distinct provisions (Arts. I-12 (3) (4), I-15 and I-16).

> **Art. I-13 Constitution for Europe:** "Areas of exclusive competence. **(1)** The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy, for the Member States whose currency is the euro, (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. **(2).** The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."

> **Art. I-14 Constitution for Europe:** "Areas of shared competence**. (1)** The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17. **(2)** Shared competence applies in the following principal areas: internal market; social policy, for the aspects defined in Part III; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport and trans-European networks; energy; area of freedom; security and justice; common safety concerns in public health matters, for the aspects defined in Part III**. (3)** In the areas of research, technological development and space, the Union shall have competence to carry out actions, in particular to define and implement programmes; however, the exercise of that competence may not result in Member States being prevented from exercising theirs. **(4)** In the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy; however, the exercise of that competence may not result in Member States being prevented from exercising theirs."

> **Art. I-17 Constitution for Europe:** "Areas of supporting, coordinating or complementary action. **(1)** The Union shall have competence to carry out supporting, coordinating or complementary action. The areas of such action shall, at European level, be:
> (a) protection and improvement of human health;
> (b) industry;
> (c) culture;
> (d) tourism;

(e) education, youth, sport and vocational training;
(f) civil protection;
(g) administrative cooperation."

Moreover it gives a new, sharper, definition to the *principles of proportionality and subsidiarity*, under which the EU shall only act if a policy cannot be implemented at national, regional, or local level.

Parliaments of the Member States thus become the watch-dog over the EU legislative process, with the right to intervene and protest about legislative proposals that would violate the principle of subsidiarity (arts. I-11 *ff.* Constitution for Europe). Each Parliament, in fact, should receive copies of the draft laws from the Commission, and can send a reasoned opinion, within six weeks, to the Presidents of the European Parliament, the Council, and the Commission, upon the conformity or otherwise of the draft with the principles of subsidiarity and proportionality. Whenever the reasoned opinions drawing attention to the failure to respect these principles represent at least 1/3 of all the votes exercisable by the national Parliaments, the Commission will be obliged to reconsider the draft. This multi-level governance system, in which diversity and autonomy are valued, creates problems for the legitimacy of the EU and for the appropriateness of its intervention. It will be necessary to find a balance between the new federal Community, on the one hand, and the attachment of citizens to individual Member States and their Parliaments, on the other.

Art. I-11 Constitution for Europe: "Fundamental principles. **(1)** The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. **(2)** Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States**. (3)** Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol. **(4)** Under the

principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution."

3. The Institutional Actors of European Integration

There are, in summary,[10] four institutions of fundamental importance in the production and application of Community law, which are therefore involved in the harmonization of the private law of the Member States: the European Parliament, the Council of the European Union, the European Commission, and the European Court of Justice.

The *Council of the European Union* (art. 202 and *ff* TEC, *ex* art.145) is the decision-making institution: if we adopt the defining criteria normally used within the national boundaries of each State, we can say that this institution has the role of 'legislator' and represents the national interests of the Member States. It is indeed made up of government ministers of the Member States. The Council acts upon proposals from the Commission. The Presidency is taken in turns, every six months, by the Member States. The voting, depending on the subject under discussion, is by simple majority, qualified (according to the vote-weighting criteria) or unanimous decision (under the terms of Nice, the decisions to be taken by unanimous vote have been reduced).

The Council is assisted by a General Secretariat, under the responsibility of a Secretary-General.

Since 1965, the Council has made use of the Committee of Permanent Representatives of the Member States (so called COREPER from the French acronym), a body made up of diplomatic representatives at the Community, which perform some of the Council's tasks and permits closer contact between the Commission and the Council.

The rules governing the action of the Council of Ministers of the EU will change with the entry into force of the Treaty establishing a Constitution for Europe.

Art. I-23: Constitution for Europe: "The Council of Ministers. **(1)** The Council of Ministers shall, jointly with the European Parliament, enact legislation, exercise the budgetary function and

[10] For further reading see the bibliography given at the end of this chapter. Aside from this, remember that the EU, in order to spread information about its own institutions and their tasks and objectives as widely as possible, makes use of the huge potential of the Internet to reach individual users: see the official website in the languages of the 25 Member States at www.europa.eu.int.

carry out policy-making and coordinating functions, as laid down in the Constitution. **(2)** The Council of Ministers shall consist of a representative of each Member State at ministerial level for each of its formations. Only this representative may commit the Member State in question and cast its vote. **(3)** The Council shall act by a qualified majority except where the Constitution provides otherwise."

Art. I-24: Constitution for Europe: "Configurations of the Council of Ministers. **(1)** The Council shall meet in different configurations**. (2)** The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. **(3)** The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent. **(4)** The European Council shall adopt by a qualified majority a European decision establishing the list of other Council configurations. **(5)** A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council**. (6)** The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities. **(7)** The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established by a European decision of the European Council. The European Council shall act by a qualified majority."

Art. I-25: Constitution for Europe: "Definition of qualified majority within the European Council and the Council. **(1)** A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. **(2)** By way of derogation from paragraph 1, when the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union. **(3)** Paragraphs 1 and 2 shall apply to the European Council when it is acting by a qualified majority. **(4)** Within the

> European Council, its President and the President of the Commission shall not take part in the vote."

The Council of the European Union does not intervene directly in the enlargement process, but takes part in the negotiations through its Committee, which approves the contents of the Union's Common Positions,[11] which are then later adopted by the Council.

This Council ought not to be confused with the *European Council*, an institution not originally provided for by the founding Treaties, but which originated in an informal way with the Heads of State and Government of various Member States meeting twice a year, with the aim of furthering political cooperation between Member States,[12]

Formal recognition was made explicit in the Treaty of Maastricht. According to the present art. 4 TEU, "the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof." The second clause of art. 4 formalizes a procedure, which has been tried and tested for many years: the Council, at least twice a year, reunites the Heads of State and Government and the President of the Commission.

The fundamental difference between the Council of the European Union and the European Council is that the latter is not yet an institution of the Union.[13] It carries out activity of a political kind, but has no decision-making powers (no jurisdiction has been given to it), except in the cases provided by the Treaty of Maastricht: it is for the European Council to establish the convergence criteria within the EMU, and indeed this is what happened in May 1998; it is for this institution to define the general principles and guidelines and shared strategy in the common foreign and security policy, on the basis of which the Council of Ministers shall act.

Other areas have been assigned to the European Council by the Treaty of Amsterdam (as amended by the Treaty of Nice). The European Council may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1): principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law; it may decide to suspend certain rights deriving from the application of the EU Treaty to the Member State in question, including the voting rights of the representative of the government of

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[11] *Cf.* chapter III.

[12] *Cf.* also chapter III, § 5.

[13] The Constitution for Europe changes the rule, see below in this §, and above chapter III, § 5.

that Member State in the Council (art. 7 (2) TEU). In the employment field, the European Council receives an annual report on the employment situation and on the basis of this it draws up guidelines which the Member States have to take into account in the development of their respective employment policies (art. 128 TEC).

As we have said above, the current Constitution for Europe proposes a new institutional framework for the Union, which comprises the European Council and the European Council President:

> **Art. I-21: Constitution for Europe:** "The European Council. **(1)** The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions. **(2)** The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The Union Minister for Foreign Affairs shall take part in its work. **(3)** The European Council shall meet quarterly, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council. **(4)** Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus."
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> **Art. I-22:Constitution for Europe:** "The European Council President. **(1)** The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end his or her term of office in accordance with the same procedure. **(2)** The President of the European Council: (a) shall chair it and drive forward its work; (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council; (c) shall endeavour to facilitate cohesion and consensus within the European Council; (d) shall present a report to the European Parliament after each of the meetings of the European Council. The President of the European Council shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the Union Minister for Foreign Affairs. **(3)** The President of the European Council shall not hold a national office."

The *European Commission* is the executive body of the Union.

Article 211 TEC (*ex* 155) gives it the task of implementing the rules contained in the EC Treaty, the regulations, the directives and the decisions produced by the other institutions, the task of formulating recommendations and opinions on issues relating to the Treaty, of exercising decision-making powers, and of proposing measures which will then be adopted by the Council and the European Parliament. Besides these, it exercises other powers, which are conferred on it by the Council to apply the rules which emanate from the latter. It is made up of 20 members nominated on the grounds of their general competence by the governors of the Member States, to be approved by the European Parliament. It is organized in General Directorates, which cover the main areas of the law.

> **Art. I-26: Constitution for Europe:** "The European Commission. **(1)** The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Constitution, and measures adopted by the institutions pursuant to the Constitution. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. **(2)** Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Constitution provides otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Constitution so provides. **(3)** The Commission's term of office shall be five years. **(4)** The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. **(5)** The first Commission appointed under the provisions of the Constitution shall consist of one national of each Member State, including its President and the Union Minister for Foreign Affairs who shall be one of its Vice-Presidents. **(6)** As from the end of the term of office of the Commission referred to in paragraph 5, the Commission shall consist of a number of members, including its President and the Union Minister for Foreign Affairs, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number. The members of the Commission shall be selected from among the nationals of the

Member States on the basis of a system of equal rotation between the Member States. This system shall be established by a European decision adopted unanimously by the European Council and on the basis of the following principles: (a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one; (b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States. **(7)** In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article I-28(2), the members of the Commission shall neither seek nor take instructions from any government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks. **(8)** The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article III-340, the European Parliament may vote on a censure motion on the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the Union Minister for Foreign Affairs shall resign from the duties that he or she carries out in the Commission."

Art. I-27: Constitution for Europe: "The President of the European Commission**. (1)** Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he or she does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure. **(2)** The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in Article I-26(4) and (6), second subparagraph. The President, the Union Minister for Foreign Affairs and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Coun-

cil, acting by a qualified majority**. (3)** The President of the Commission shall: (a) lay down guidelines within which the Commission is to work; (b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body; (c) appoint Vice-Presidents, other than the Union Minister for Foreign Affairs, from among the members of the Commission. A member of the Commission shall resign if the President so requests. The Union Minister for Foreign Affairs shall resign, in accordance with the procedure set out in Article I-28(1), if the President so requests."

Art. I-28: Constitution for Europe: "The Union Minister for Foreign Affairs.

(1) The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the Union Minister for Foreign Affairs. The European Council may end his or her term of office by the same procedure**. (2)** The Union Minister for Foreign Affairs shall conduct the Union's common foreign and security policy. He or she shall contribute by his or her proposals to the development of that policy, which he or she shall carry out as mandated by the Council. The same shall apply to the common security and defence policy. **(3)** The Union Minister for Foreign Affairs shall preside over the Foreign Affairs Council. **(4)** The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall ensure the consistency of the Union's external action. He or she shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the Union Minister for Foreign Affairs shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3."

The Commission plays a significant part in the enlargement process,[14] although it is not formally involved as a participant in the negotiation process. Within the Commission, the work is coordinated by the Directorate General for Enlargement. It takes part in the screening process, the on-going review procedure of the harmonization of the legal rules of the applicant countries in relation to Community law, which is based on the acceptance of the *acquis communautaire*. It also presents and coordinates the preparation of the Common Position of the European Union; it

[14] *Cf.* chapter III.

produces the Regular Reports on the progress of the applicant countries for accession. The Commission represents the interests of the whole Union and therefore, indirectly, is charged with representing the interests of the candidate countries in that they are future Member States of the Union.

The *European Parliament* is directly elected by the citizens of each Member State.

The reforms introduced by the Single European Act and Maastricht have increased the influence of Parliament in the Community legislative process. Article 192 TEC (ex 138 B) gives Parliament the right to participate in the process leading to the adoption of Community acts, through advisory opinions and other consultative activities, or else directly exercising its powers under the procedures laid down in arts. 251–252 TEC (*ex* 189 B–189 C).

The most common procedure is *co-decision* (in French *la codécision):* this legislative procedure provides that Parliament and the Council should have an equal role: the approval of both is necessary in order for a Community rule to be adopted. The procedure is based on two readings, which provide for the approval of a common position by both of the bodies. In the case of lack of agreement on any amendment proposed, a Conciliation Committee meeting is convened (a body composed of 30 members, divided into two delegations, respectively from the Council and Parliament). The aim is to achieve a compromise on a joint text by a certain date. Should the contrary occur, the legislative draft proposal is not adopted.

With ratification and coming into force of the Treaty of Nice, the co-decision procedure should apply at least in every case where the Council votes by qualified majority—but the advisability of extending this co-decision procedure to other areas, in order to strengthen the role of the European Assembly as joint legislator, is still being debated.

In other cases the procedure of *assent* (in French *avis conforme*) applies: the Community act must be approved by an absolute majority of the Members of Parliament, which must either approve or reject the act, but may not alter it. This procedure applies, for example, to the accession agreements of the prospective Member States. These agreements of a constitutional nature, which introduce modifications to the Treaty, must also be ratified by each contracting State, according to their respective constitutional procedures, in order to come into force.

Article 276 TEC (*ex* 206) gives the European Parliament the power to approve or reject the Commission's budget; art. 201 TEC (*ex* 144) gives it the power to force the resignation of Commission members on a censure motion; art. 197 TEC (*ex* 140) recognizes the right to a response to

questions asked of the Commission. Moreover the European Parliament can receive petitions from any natural or legal person residing in one of the Member States, according to the provisions of art. 194 TEC (*ex* 138 D): the Parliament has appointed a special institution, the *Ombudsman,* who is entitled to accept complaints from citizens of the Union (art. 195 TEC, *ex* 138 E).

The Treaty of Amsterdam partially faced the problem of the composition of Parliament, establishing explicitly that the number of members cannot exceed 700 (art. 189 TEC, ex art. 137). Later, this was increased to 732 by the Treaty of Nice and provision was made for the new division of seats, which took effect on January 1st 2004, following enlargement.[15]

> **Art. I-20: Constitution for Europe.** "The European Parliament. **(1)** The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Constitution. It shall elect the President of the Commission. **(2)** The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats. The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a European decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph**. (3)** The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot. **(4)** The European Parliament shall elect its President and its officers from among its members."

The European Parliament also has a significant role in the enlargement process: it is kept informed of the progress of the negotiations and gives its assent to the adoption of proposals for enlargement presented by the Council and to the resulting accession Treaty/ies.

The *European Court of Justice* ensures that Community law is interpreted and applied in the same way in each Member State. It is composed of one judge per Member State, assisted by eight Advocates-General (arts. 221–222 TEC, as amended by the Treaty of Nice).

The main functions of the Court of Justice are as follows:

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[15] See the Protocol on the enlargement of the European Union, chapter III.

– To provide *judicial review* in respect of all the acts of the Council, the Commission, and the European Parliament (art. 230 TEC, *ex* 173, as amended by the Treaty of Nice).
– To give *preliminary rulings* concerning the interpretation of the Treaty provisions, the validity and interpretation of acts of the institutions of the Community and of the ECB, and the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide, which the national courts find themselves having to apply (art. 234 TEC, *ex* 177). The preliminary rulings represent the expression of the exclusive jurisdiction of the Court of Justice, which is designed to avoid the situation of national judges giving different interpretations to Treaty provisions and other legal Community acts, which must be uniformly applied within the national legal systems.
– To determine whether a Member State has *failed to fulfil* an obligation under the Treaty (arts. 226–227 TEC, *ex* 169–170).

Since 1989,[16] the Court of Justice has been flanked by the *Court of First Instance*, composed of 15 judges, with jurisdiction over all actions brought by natural or legal persons of the Member States against the Community institutions (arts. 230 & 232 TEC, ex 173 & 175).

The most relevant reforms brought about by the Treaty of Nice concern the *composition* of the Court of First Instance (according to the new art. 224 TEC, the Court should include at least one judge per Member State, and the number of judges shall be indicated by the Statute of the Court of Justice) and its *jurisdiction* (which has been fixed by new art. 225 TEC). According the latter provision, the Court of First Instance "shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236, and 238 TEC, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding. The decisions given by the Court of First Instance may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute."

To sum up, the Court of First Instance has jurisdiction in Community law with precise reference to: actions for annulment (against acts of the Community institutions, art. 230 TEC); for failure to act (against inaction by the Community institutions, art. 232 TEC); for damages (for the reparation of damage caused by an unlawful act of or failure to act by a

[16] Decision of the Council 88/591, 1988 OJ L 319/1.

Community institution, art. 235 TEC); in matters concerning the civil service (disputes between the Community and its officials, art. 236 TEC); in the field of contractual liability (disputes concerning public- or private-law contracts concluded by the Community, art. 238 TEC).

Moreover, the Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under art. 234 TEC, in specific areas laid down by the Statute of the Court of Justice. With the instruction that if the Court of First Instance should hold that the case in question requires a decision of principle which could compromise the unity and coherence of Community law, it may (not "must") refer the case to the Court of Justice for a ruling.

Another important new feature after the amendments introduced by the Treaty of Nice, is the modification of art. 220 TEC. It provides that, under certain conditions (listed in art. 225a TEC), *judicial panels* may be attached to the Court of First Instance, with the task of determining at first instance certain classes of action or proceeding brought in specific areas, for example in the field of intellectual property. Art. 359 states that decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance.

It should be added that, in this context too, the European Constitution, once it has come into force, will introduce some novel features, changing the whole judicial system. Under the new order, the Court of Justice of the European Union will comprise the Court of Justice, the General Court and specialized courts. These European courts will be interpreting rules and principles which constitute essential reference points that cannot be disregarded by either judges or legal professionals, including those in the field of private law. The provision in the text of the European Constitution, according to which the case law produced by this court system *is the source of interpretation of the Constitution's provisions and of the whole body of law of the Union*, is especially significant in this regard.

Within each Member State a parallel system will evolve, comprising a twin-peaked jurisdiction to which the citizen may turn: the first with the respective Supreme Courts at the top (*Corte di Cassazione, Cour de Cassation, Tribunal Supremo, House of Lords*, *Bundesgerichtshof*, etc.), and the second with the Court of Justice at the top. In areas of exclusive national competence, with the task of ensuring the uniform application of the law, the domestic Supreme Court will be at the summit of justice. On the other hand, in the areas of Community competence (both exclusive and shared) the Court of Justice will be the arbiter of the uniform application of the law.

Art. I-29: Constitution of Europe: "The Court of Justice of the European Union**. (1)** The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. **(2)** The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The judges and the Advocates-General of the Court of Justice and the judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles III-355 and III-356. They shall be appointed by common accord of the governments of the Member States for six years. Retiring judges and Advocates-General may be reappointed. **(3)** The Court of Justice of the European Union shall in accordance with Part III: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Constitution."

Art. III-358: Constitution of Europe: "**(1)** The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles III-365, III-367, III-370, III-372 and III-374, with the exception of those assigned to a specialised court set up under Article III-359 and those reserved in the Statute of the Court of Justice of the European Union for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding. Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute. **(2)** The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts. Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute of the Court of Justice of the European Union, where there is a serious risk of the unity or consistency of Union law being affected**. (3)** The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article III-369, in specific areas laid down by the Statute of the Court of Justice of the European Union. Where the

General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling. Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected."

Art. III-359: Constitution of Europe: "**(1)** European laws may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. They shall be adopted either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission. **(2)** The European law establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it. **(3)** Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the European law establishing the specialised court, a right of appeal also on matters of fact, before the General Court. **(4)** The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously. **(5)** The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the consent of the Council. **(6)** Unless the European law establishing the specialised court provides otherwise, the provisions of the Constitution relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 there-of shall in any case apply to the specialised courts."

4. The Sources of Community Law and their Effect

As is known, besides the Treaty of Rome (as amended by the subsequent Treaties) with its rules of various kinds, whether programmatic or prescriptive and immediately applicable, there are other institutionalized legislative acts, which contain legal rules addressed to the Member States or directly to the citizens. Academic commentators in Europe are used to drawing a distinction between so-called *primary legislation*, which consists of laws developed with the direct participation of the States (founding Treaties of the EEC, CECA and EURATOM, and amending Treaties,

such as the Single European Act, Maastricht, Amsterdam, Nice, the accession Treaties for the new States and so on), and so-called *secondary legislation*, developed by Community institutions (regulations, directives and decisions) and including the rulings of the Court of Justice and the Court of First Instance.

According to art. 249 TEC (*ex* art. 189), the acts with binding force are regulations, directives, and decisions, although it is worth noting that the legal framework is going to change under arts. I-33 and *ff.* of the Constitution for Europe. In particular, the text of the Constitution subdivides the legal acts of the Union into *two categories* (art. I-33), one containing the *legislative acts* (art. I-34) and the other, the *non-legislative acts* (art. I-35). The following form part of the first group: *a)* the *'European law'* of general application, obligatory in all its aspects and directly applicable in all the Member States, recognized as equal to the current Regulations; *b)* the *'European framework law'* (the same as Directives), binding onto States certain results to be achieved, and leaving to the competence of the national bodies the choice of form and means. In the second category are the following: *a)* the '*European regulations,'* non-legislative acts of general application; and *b)* the '*European decisions,'* non-legislative acts, binding in character, which replace, with an increased sphere of application, the former decisions. Finally, a decidedly new feature, the '*delegated European regulations*' (Art. I-36) through which the Commission, on the specific mandate of the 'European law' or the 'European framework law,' may intervene to complete or amend certain non-essential elements.

> **Art. 249 TEC** defines these acts and determines their effectiveness**: "(1)** In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions**. (2)** A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. **(3)** A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. **(4)** A decision shall be binding in its entirety upon those to whom it is addressed. **(5)** Recommendations and opinions shall have no binding force."

> **Art. I-33: Constitution for Europe: "**The legal acts of the Union. **(1)** To exercise the Union's competences the institutions shall use as legal instruments, in accordance with Part III, Euro-

pean laws, European framework laws, European regulations, European decisions, recommendations and opinions. A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States. A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force. **(2)** When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question."

Art. I-36: Constitution for Europe: "Delegated European regulations. **(1)** European laws and framework laws may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power. **(2)** European laws and framework laws shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows: (a) the European Parliament or the Council may decide to revoke the delegation; (b) the delegated European regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the European law or framework law. For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority."

Art. I-39: Constitution for Europe: "Publication and entry into force**. (1)** European laws and framework laws adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council of Ministers. In other cases they shall be signed by the President

> of the institution which adopted them. European laws and European framework laws shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication. **(2)** European regulations and European decisions which do not specify to whom they are addressed, shall be signed by the President of the Institution which adopts them. European regulations, and European decisions when the latter do not specify to whom they are addressed, shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication**. (3)** European decisions other than those referred to in paragraph 2 shall be notified to those to whom they are addressed and shall take effect upon such notification."

Currently, the acts with binding force are:

Regulations

General application, of binding nature and having direct applicability are the characteristics which distinguish the regulations from the other two types of acts.

Directives

Not of general application, subject to notification, of binding nature and not having direct applicability are, theoretically, the characteristics of the directives.

In this case it is worth mentioning that a directive is binding as to the result to be achieved, leaving the form and the method open to the Member States.

Decisions

Of binding nature and subject to notification are the elements which characterize the decisions.

While the principle of *general application* has not given rise to particular problems,[17] that is not the case with regard to their *binding nature* and *direct applicability*, as they have been interpreted by the Court of Justice. These features have not been readily accepted by Member States.

In general terms, it is worth mentioning that the binding effect does not depend on an "external act" to complete it; the rules must be obeyed as they stand, by all the end-users.

Some regulations, such as the one on the European Economic Interest

[17] The concept is analogous to that which characterizes continental statutes, which are addressed to non-specified end-users, or who are only specified in an abstract way.

Grouping (EEIG), require national legal provisions for concrete implementation. This does not remove their mandatory nature, just as in the case of those acts which require further measures for implementation, but which do not thereby lose their binding character.

The concept of direct applicability means both that there is no need for transposition of the legal provisions from Community law into national law, and the fact that States are not permitted to modify the rules laid down in the Community act when implementing it.

We should also stress that the ECJ has used the expression *direct applicability* or *direct effect* indiscriminately. In much of the literature, the expressions carry different meanings. A Community provision will be considered *directly applicable* within the domestic law if it becomes an element of the national legal order without a formal incorporation through a national act. In this sense it has an affinity with the international law term '*self-executing*.' A Community rule has *direct effect* (expression not mentioned in the Treaty) if it creates rights for private parties and not merely obligations for the Member States. The consequence is that private parties can enforce these rights against Member States in national courts.

When the Treaty instituting the European Constitution comes into force, at the conclusion of ratification proceedings in all the 25 Member States, another step forward will have been taken: indeed, Art. I-6 of the Treaty affirms that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have *primacy* over the law of the Member States."

The next paragraphs will be dedicated to reconstructing the various evolutionary phases of the principles of supremacy and of direct effect, highlighting the fundamental stages through which they passed to arrive at their formulation. This reconstruction does not only have historical value, but is useful to predict the future phases of an evolutionary process with CEECs, Malta, and Cyprus as part of this process thereof, which is still going on and is a long way off its final stage.

5. Direct Effect of Treaty Provisions

The first step towards the affirmation of autonomous effect (that is, without the mediation of the national legislative bodies) of Community law was taken with the ruling of the Court of Justice on February 5th 1963 in the *Van Gend & Loos* case.[18]

[18] ECJ Judgment, C-26/62, *van Gend & Loos v. Netherlands Inland Revenue Administration* (1963), ECR I-3.

A Dutch company complained that its own State had imposed customs duties on importation, thereby infringing art. 12 (now art. 25 TEC) of the Treaty of Rome. This article provides that Member States must avoid imposing new customs duties, or charges of equivalent effect, on importation and exportation. The national judge, called upon to resolve the conflict between the Dutch company and the Dutch Customs administration, stayed the proceedings and requested a preliminary ruling from the Court of Justice under art. 177 (now art. 234 TEC) on the interpretation and effect to be given to art. 12 of the Treaty, on an evident conflict with a domestic provision.

The Luxembourg judges responded to the request for an interpretation addressed to the Court regarding the effect to be given to art. 12 (now art. 25) of the Treaty, by affirming that:

> ***Van Gend & Loos* ruling***:* "(…) The wording of article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. The implementation of article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation."

Moreover, the Court itself emphasized that the fact that articles 169 (now art. 226) and 170 (now art. 227) TEC[19] enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations, does not mean that individuals cannot plead these obligations.

For this reason, every national judge, at whatever judicial level, has the duty to apply directly those Treaty rules which, by their very nature, have direct effect.

Adopting a teleological approach, the Court ensures that the national judges themselves, at whatever judicial level, have a duty to safeguard each individual's rights under the Treaty.

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[19] Articles 169 and 170 (now arts. 226 & 227 TEC) allow only the Commission and the Member States to bring cases before the Court of Justice for alleged failure on the part of a Member State to fulfil its obligations under the Treaty.

According to the Court, it is not even essential that it should be the Court which ascertains the infringement and declares that it should be remedied. This means that the national judge must disregard the incompatible domestic law. In fact, individual citizens can directly test the obligations deriving from Community Treaty provisions, before national courts.

> ***Van Gend & Loos* ruling** "(…) The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the community are called upon to cooperate in the functioning of this community through the intermediary of the European Parliament and the economic and social committee. In addition the task assigned to the Court of Justice under article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals (…)."
>
> "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."

Community law therefore not only imposes obligations on individuals, but is also intended to confer rights upon them.

The principle has, since then, been applied in numerous other cases:

> See, for example, the following rulings:
> – Court of Justice, October 26th 1971, *Eunomia di Porro e C.*

v. Ministry of Education of the Italian Republic, C-18/71, ECR I-811;
– Court of Justice, June 28th 1978, *Patrick Christopher Kenny v. Insurance Officer*, C-1/78, ECRI-1489;
– Court of Justice, March 27th 1980, *Amministrazione delle finanze v. Denkavit italiana*, C-61/79, ECR I-1205.

6. Supremacy of Treaty Provisions over Domestic Law

The affirmation of the principle of direct effect, on the basis of which every national judge *can* and *must* apply Treaty provisions, did not, however, provide support for arguments in favour of the alleged *supremacy of Community law* over domestic law which is incompatible with it.

Community legislation (Treaties, regulations, etc.) is silent on the point. From this perspective, there are two kinds of problems which can present themselves.

In the first place, there may be conflict between *pre-existing domestic law* and *subsequent Community law*.

In the second place, the diametrically opposed case may present itself, where there is conflict between *subsequent domestic law* and *pre-existing Community law*.

Obviously, the solution to the two proposed problems require arguments which are very different from one another. Indeed, it concerns profoundly different hypotheses, which need distinct treatment.

The solution of the first issue has not caused particular problems. Applying the principle that a successive law impliedly repeals the preceding law, it has been quite easy to accept the idea that a domestic law may be repealed by a subsequent Community law.

In the opposite hypothesis, however, when it is the domestic law which comes into force after the Community law with which it is in conflict, the application of the ancient principle *lex posterior derogat anteriori* may present an obstacle to the enforcement of Community law.

The principle of the *supremacy of Community law,* in particular *of the Treaty provisions*, over domestic law of the national States was forcefully affirmed by the Court of Justice in the well-known ruling in *Costa v. Enel* of July 15th 1964,[20] in response to a decision going in exactly the opposite direction, which had come from the Italian Constitutional

[20] C-6/64, (1964) ECR I-1129. The principle was detailed in later cases: ECJ Judgment of June 21st 1974, C-2/74, *Jean Reyners v. Belgian Stat*e, (1974), ECR I-631, and ECJ Judgment of April 8th 1976, C-43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, (1976) ECR I-455.

Court (*Corte Costituzionale*), a few months earlier, in the same case of *Costa v. Enel*.[21]

In this ruling, the Italian Constitutional Court had affirmed that the national judge could never have disregarded the Italian statute concerning the nationalization of electricity, even if it had been in conflict with the Treaty, since, given that the two sources were on an equal footing, the subsequent Italian law should prevail over the pre-existing Treaty provisions which were of earlier date.

The decision of the Italian Court, designed as it was to defend any possible encroachment on the unconditional supremacy of the State, had seriously endangered the achievement the single European market, not to mention the credibility of the Community and its institutions.

The Court of Justice's intervention in the case of *Costa v. Enel*, with a view to re-establishing an acceptable situation concerning the basic premise of the common market, was therefore both fundamental and timely; it had been approved in the meantime by means of a *preliminary ruling* under art.177 (now art. 234) TEC.

As it had become one of the best-known rulings of the Court, the Community judges did not let slip the opportunity to refute the theses of the Italian *Corte Costituzionale* (a theses which had been propounded by the Italian Government itself in its arguments at the hearing in Luxembourg, affirming and specifying, with full reasoning, the principle of the *supremacy of Community law*, and in particular the *Treaty*, over domestic law).

According to the Court, the EEC Treaty, as opposed to other international treaties, instituted its own legal system, which was integrated into those of the States, which national judges are bound to observe. The EEC thereby formed a Community legal order with its own institutions, legal personality, and capacity, capable of being represented at the international level:

> ***Costa v. Enel* ruling**: "(…) The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."
>
> "(…) The court, ruling upon the plea of inadmissibility based on article 177, hereby declares: as a subsequent unilateral measure cannot take precedence over Community law, the questions

[21] *Corte cost*., March 7th 1964, no. 14, in *Foro it*., 1964, I, 465.

> put by the *giudice conciliatore*, Milan, are admissible in so far as they relate in this case to the interpretation of provisions of the EEC Treaty (…)."
>
> The Court also rules: "**(1)** Article 102 contains no provisions which are capable of creating individual rights which national courts must protect. **(2)** Those individual portions of article 93 to which the question relates equally contain no such provisions. **(3)** Article 53 constitutes a community rule capable of creating individual rights which national courts must protect. It prohibits any new measure which subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertakings. **(4)** Article 37 (2) is in all its provisions a rule of Community law capable of creating individual rights which national courts must protect. In so far as the question put to the court is concerned, it prohibits the introduction of any new measure contrary to the principles of article 37 (1), that is, any measure having as its object or effect a new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade."

A similar reluctance to accept the principle of supremacy of Community law over Treaty provisions was found, among the original Members, in France. Here, as in Italy, the "clash of power" was strongly evident because the French legal system divides the judiciary into two hierarchies of courts: 1. a system of ordinary courts, dealing with civil, commercial and criminal matters; 2. a system of separate administrative courts, which decide the disputes over the exercise of public authority. Each pyramid has its own rules of functioning and its court of last resort, the *Cour de Cassation* for ordinary judicial courts, and the *Conseil d'Etat* for the administrative ones. A separate *Conseil Constitutionnel*, which decides whether or not a statute or a Treaty are consistent with the French Constitution, was created in 1958.

The French *Cour de Cassation* was willing to disregard a French statute which conflicted with Community Treaty provisions, even if the statute has a later date. It happened in the case of *Jaques Vabre* of 1974.[22]

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[22] *Cour de Cassation*, May 24th 1975, *Administration des Douanes v. Societé Cafes Jaques Vabre & J. Weigel et Cie Sarl* , 2 CMLR 336, 1975.

The *Procureur Général* (an official who performs a function in the *Cour de Cassation* analogous to that of Advocate-General in the European Court of Justice) cited the ECJ case *Costa v. Enel* extensively, referring to the pre-eminence of Community law over internal law. The *Procureur* also cited the *Conseil d'Etat*, which in the controversial case of *Semoules de France*[23] held that the administrative courts could not review the conformity of a French statute to a prior Treaty. He finally described how the other Member States had received Community law in their national legal systems, observing a "European legal consciousness within the national Courts of the primacy of Community law."

The French Supreme Court followed the reasoning of the *Procureur* and accepted the primacy of Community law on the ground of art. 55 of the French Constitution.

More than ten years later, the *Conseil d'Etat* rallied to the position of the *Cour de Cassation* in the case of *Nicolo* of 1989[24] and in the *Boisdet* case of 1991,[25] where the *Conseil* extended the supremacy principle to Community regulations, denying any effect to a French statute on account of its conflict with an earlier Community regulation.

7. Direct Effect of Regulations

Having once judicially established the supremacy of Community law over national laws by reference to the Treaty provisions, the Court of Justice then applied analogous principles to confirm both *direct effect* and the *supremacy of Community regulations* over domestic law.

With regards to direct effect, one of the earliest and most detailed decisions was the case of *Orsolina Leonesio* of May 17th 1972,[26] where the principle was formulated. The Court of Justice laid down that no law of a Member State could obstruct the immediate applicability of a Community provision, nor (it followed) direct effect, i.e. the immediate exercise of the rights which the said provision accorded to individuals.

The Italian Government, sued for having failed to make payments to a farmer from certain funds as provided by a Community regulation, defended the action by contending that a citizen could not benefit from

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[23] *Conseil d' Etat*, March 1st 1968, *Sindacate général de fabricants de semoules de France*, 1968, in *Recueil Lebon* 149, 1970, 2 CMLR 395.

[24] *Conseil d'Etat* October 20th 1989, *Nicolo*, in *Recueil Lebon*, 190, 1989.

[25] *Conseil d'Etat*, September 24th 1990, *Boisdet,* in *Recueil Lebon* 250, 1991, 1 CMLR 3, 199.

[26] ECJ Judgment, May 17th 1972, C-93/71, *Orsolina Leonesio v. Ministero dell'Agricoltura e Foreste della Repubblica italiana* (1972), ECR I-287.

any such right, since the regulation could not be effective until the Italian State had passed the act setting aside the funds necessary for this purpose. The Court did not accept the Italian Government's arguments for the following reasons: involving as it did rights of credit from the State, these arise when all the conditions required by the regulation are satisfied, with no possibility of their activation being subordinated at national level by implementation provisions, which are different from those laid down by the regulation itself.

> ***Orsolina Leonesio* ruling**: "**(§ 21)** (…) if the objection of the Italian government were upheld it would have the result of placing farmers in that state in a less favourable position than their counterparts in other Member States in disregard of the fundamental rule requiring the uniform application of regulations throughout the Community. Moreover, regulations no. 1975/69 and 2195/69 lay down exhaustively the conditions on which the creation of the individual rights in question depend and these do not include considerations of a budgetary nature. **(§ 22)** So as to apply with equal force with regard to nationals of all the Member States, Community regulations become part of the legal system applicable within the national territory, which must permit the direct effect provided for in article 189 to operate in such a way that reliance thereon by individuals may not be frustrated by domestic provisions or practices."

The binding nature and direct applicability of the regulations, in fact, mean not only that the States cannot modify the regulation, but above all that each regulation produces immediate effects: this means that they impose rights and obligations directly and immediately on the end-users, which may be States or the citizens themselves.

All this also implies—and this is the most relevant aspect of the relationship between the Community and the national legal systems—that *every national provision which is incompatible with the regulation must be considered of no effect*.

Nowadays it is clear that regulations are to be considered for all purposes domestic law and that, therefore, must be applied by every judge at every level of the administration of justice.

The concepts of the binding nature and direct applicability of regulations as formulated in art. 249 TEC (*ex* art.189) and interpreted by the Court of Justice, have, sooner or later, to reckon with the principle of sovereignty, which no Member State has ever been willing to give up. Indeed, in order for the assertion that Community law may not be abro-

gated or amended by domestic law without making the latter ineffective to have any sense, one cannot avoid touching upon the thorny issue of the *supremacy of Community law over national law.*

8. Supremacy of Regulations over Domestic Laws

After having expressly established the direct effectiveness of regulations within Member States, the Court of Justice took one last necessary step, which consisted of affirming their *supremacy over national laws*.

Only following this final recognition could the entire Community legal system claim to be all-powerful and the Community legislation not to be subject to derogation with respect to any other source of domestic law.

It is understandable that this last stage, separating the Community as conceived by the judges of the Court of Justice on one side, and on the other, the prevaricating positions on the part of a large number of the judges of the Member States, Germany, France, and Italy in particular, proved to be one of the most resistant and difficult to overcome.

Once again, as had happened as far as the supremacy of the Treaty over domestic law was concerned, a long-distance conflict was enacted between the Court of Justice and the national Constitutional Courts.

The Italian Constitutional Court, in a pair of rulings,[27] had laid down that while the conflict between a previous national law and a later Community one would have to be resolved by the immediate disregarding of the former by an ordinary judge, on the other hand the conflict between a previous Community law and a later national one would have to be decided by the Constitutional Court, the only legitimate forum for deciding the merits of the possible disregarding of a domestic provision which was in conflict with Community law, by reason of the violation of art. 11 of the Italian Constitution.

In the *I.C.I.C.* ruling of October 30th 1975,[28] the judges of the Italian Constitutional Court affirmed in writing that:

> "(…) as far as later domestic legislation is concerned, passed by statute or instruments having the same binding nature, this Court

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[27] It concerns the *Corte cost*., December 27th 1973, no. 183, *Frontini et al. v. Amministrazione delle Finanze*, which (among other things) was the first ruling of the Court to recognise the supremacy of regulations over preceding domestic law, and *Corte cost*., October 30th 1975, no. 232, *I.C.I.C. Spa v. Ministero del Commercio con l'Estero*.

[28] *Cf. Corte cost*., October 30th 1975, no. 232, *I.C.I.C. Spa v. Ministero del Commercio con l'Estero, cit*. previous footnote.

> holds that the law as it stands does not confer upon an Italian judge the right to disregard it (…). It does not even appear possible to give the possibility of disregarding later domestic legislation as a result of a choice between Community and domestic law, which the Italian judge is allowed to do from time to time, on the basis of an evaluation of their respective resistance (*sic*). In that hypothesis, the Italian judge would have to have the power to identify the only provision validly applicable, which would be the same as admitting s/he had the power of ascertaining and declaring the absolute lack of jurisdiction of the national legislature, albeit limited to certain areas, a power which, as the law currently stands, the judge certainly has not got."

It followed that, regarding successive national laws of this kind, the judge could do nothing other than raise the issue of constitutional legitimacy and wait for the judgment of the Court.

In the face of such a decisive and peremptory argument on the part of the Italian Constitutional Court, the Community judges were concerned with refuting this theory as soon as possible.

On March 9th 1978, in the equally well-known case of *Simmenthal,*[29] the Court of Justice affirmed some fundamental principles which have since become reference points for many other decisions, both in the Luxembourg Court itself, as well as many national courts.

First of all, something which at first sight seems a marginal issue, but is, in fact, extremely relevant, was emphasized, namely the fact that *direct applicability* of Community law are to be taken as meaning that such acts must be capable of being effective as soon as they come into force. If the opposite happens, a disparity of treatment between Community citizens would be created, whereby a Member State might or might not implement the Community provision correctly, something which is quite irreconcilable with the scope and objectives of the Community.

In the second place, and precisely as a consequence of the principle set out above, the said Community acts, having the attribute of direct applicability, are an immediate source of rights and obligations not only with regards to the State, but also as with every judge whose task it is, being part of a State organization, to ensure that Community rules are applied.

It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set

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[29] ECJ Judgment, March 9th 1978, C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, (1978) ECR I-629.

aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[30]

The key emphasis in these decisions is on the principle of direct effect. The Court does not wish to be seen creating new areas of jurisdiction for national courts and so it frames its Judgments in a negative way: national courts must ignore or must not apply national rules which form an obstacle to the immediate applicability or direct effectiveness of EC law. However, the outcome of these cases is that the function and jurisdiction of many national courts change, even where the national jurisdictional limitations are of a constitutional nature.[31]

The long conflict between the Court of Justice and the Italian Constitutional Court which began, as we have seen, in 1964, ended twenty years later with the ruling by the latter in the *Granital* case of June 8th 1984.[32] By this ruling, the Italian Constitutional Court found a solution which, while avoiding reference to the sovereignty of States and failing formally to affirm the supremacy of Community law over national law, represented a more than acceptable compromise, which in fact allowed Community law to maintain complete efficiency, just as the Court of Justice had wished for a long time. The Italian Court held that the two systems, the Community and the national one, are *autonomous* and *distinct* systems, albeit *coordinated* according to the *division of jurisdiction* established and guaranteed by the Treaty. It would not, therefore, be a question of the prevalence or supremacy of one system over another, any more than it would matter whether the domestic law predated or postdated the regulation.

Therefore the regulation is always applied, whether it follows or precedes the national statute incompatible with it. And the national judge who has to apply it *may* possibly, if he considers it necessary, ask for assistance on interpretation from the Court of Justice, under art. 234 (*ex* art. 177) TEC, to ascertain the interpretation of the regulation.

Like the Italian Constitutional Court, its German counterpart, the *Bundesverfassungsgericht* (*BverfG*), was reluctant to give up its powers of control over the national legal system. Many times it expressed reservation about the supremacy of Community law and, in particular, of the Regulations, asserted by the Court of Justice.

The German Federal Constitutional Court in the so-called *Solange I*

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[30] *Cf.* ruling in *Simmenthal*, § 21.

[31] See *Factortame* litigation in chapter V.

[32] *Corte cost.*, June 8th 1984, no. 170, *Granital Spa v. Amministrazione delle Finanze*, in *Foro it.*, I, 2062, 1984 (commentary by Tizzano).

(*solange* meaning *as long as*) ruling of 1974[33] stated that it would refrain from an internal judicial review of Community law, *as long as* the latter respected fundamental rights as defined in the Basic Law (*Grundgesetz*).

In particular, the German court observed that Art. 24 of the German Constitution does not allow Germany to surrender the identity of prevailing constitutional order or undermine essential structural parts of the Constitutions, such as fundamental rights. Such a protection of human rights and constitutional values against possible infringements by Community law is reserved to the German Federal Constitutional Court itself.

The German Court reversed its precedent in the *Solange II* ruling of 1986.[34] *Wünsche,* a German importer, was denied a license to import mushrooms from Taiwan under an import license system dating back to the 1970's. On hearing Wünsche's arguments, the German Supreme Administrative Court (*Bundesverwaltungsgericht)* referred the question of the system's legality to the Court of Justice, but refused to refer Wünsche's constitutional claims, including the right to a fair hearing. Thus Wünsche brought a constitutional complaint before the German Federal Constitutional Court. The Court, analyzing the question of how those fundamental rights were to be protected (as a consequence of the special prominence of human rights provisions in Germany's post-war Constitution), accepted the doctrine of the supremacy of Community over national law.

However, in the subsequent *Maastricht* ruling of 1993,[35] the Federal Constitutional Court held that, in the field of fundamental rights, the two jurisdictions—the national and European ones—have complementary roles, which have to be performed in a relationship of cooperation.

Thus the primacy of Community measures over national constitutional law and the exclusive role of the Court of Justice in determining the validity and effects of Community law were tested by the Court of Justice in the so called *banana litigation,*[36] concerning the protection of fundamental rights of national exporters of bananas in contrast with the

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[33] German Constitutional Court, May 29th 1974, Case 2 *BvL* 52/71*, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermitt*el, 2 *CMLR* 540, 1974.

[34] German Constitutional Court, October 22nd 1986, Case 2 *BvR* 197/83,*Wünsche Handelsgesellschaft,* 3 *CMLR* 225, 1987.

[35] German Constitutional Court, October 12th 1993, *Brunner and others v. The European Union Tre*aty (so called *Maastricht Judgment*), Case 2 *BvR* 2134/92 & 2159/92, 1 *CMLR* 57, 1994.

[36] ECJ Judgment Case C-280/93, *Germany v. Council*, (1994), ECR I-4973. The "banana saga" has been studied by legal scholars in Europe: *cf.* the bibliography at the end of this chapter.

Council Regulation 404/93. There is a long story of special-interest lobbying behind Regulation no. 404/93 which established an EC common organization of banana markets in favour of growers closely attached to French, Spanish and Portuguese importers. This was to the detriment of 'third country,' mostly U.S. owned, growers established in Central America, from where German importers had enjoyed a regime of tariff-free imports. There is no doubt that the Regulation hit German importers particularly hard. They were *de facto* banned or severely restricted from importing third country bananas at the preferential tariffs which had made them particularly popular with German consumers. Prior to this point there had been little or no restriction on such imports.

> ***Germany v. Council*** ruling: "(§…) (**4**) In pursuing the objectives of the common agricultural policy, the Community institutions must secure the permanent harmonisation made necessary by any conflicts between those objectives taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made. Thus the Community legislature, which in matters concerning the common agricultural policy has a broad discretion corresponding to the political responsibilities given to it by Articles 40 and 43 of the Treaty, could thus, without infringing Article 39 of the Treaty, establish a common organisation of the market in bananas intended to safeguard the income of the agricultural community concerned by guaranteeing the existing level of Community production and providing for suitable machinery for increasing its productivity, to stabilise the market by safeguarding Community production and regulating imports, and, by that machinery supplemented by the mechanism for increasing the import quota if necessary, to assure the availability of supplies. A breach of Article 39 cannot result from the fact that in certain Member States the establishment of the common organisation may have had the effect of increasing prices. The substitution for national arrangements characterised by considerable price differences of a common organisation inevitably results in an adjustment of prices throughout the Community; the objective of ensuring reasonable prices for consumers must be considered at the level of the common market as a whole; and priority may be given temporarily to other objectives by the Community legislature. (**5**) The fact that Regulation No 404/93 on the common organisation of the market in bananas pursues objectives of agricultural policy as well as a development policy in favour of the ACP States does not mean that it cannot be based on Article 43 of the Treaty alone. First, Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the produc-

tion and marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty, even where other objectives are pursued at the same time. Secondly, the creation of a common organisation of the market requires, alongside the regulation of Community production, the establishment of an import regime to stabilise the markets and ensure sales of Community production if, as in the case of bananas, the internal and external aspects of the common policy cannot be separated, it being understood that the institutions, when making use of their rule-making powers, cannot disregard the international obligations entered into by the Community under the Lomé Convention. **(6)** The first paragraph of Article 42 of the Treaty recognises both the priority of the agricultural policy over the objectives of the Treaty in the field of competition and the power of the Council to decide to what extent the competition rules are to be applied in the agricultural sector. **(7)** The regime of trade with non-member countries in the common organisation of the market in bananas established by Regulation No 404/93, in particular the tariff quota for imports and the way it is subdivided, does not constitute a breach of fundamental rights and general principles of law. With respect to the prohibition of discrimination, it is true that two different categories of traders (those who previously operated on open national markets and were able freely to obtain supplies of third-country bananas, and those who operated on protected national markets and were ensured the possibility of disposing of Community and traditional ACP bananas despite their higher price) are not affected in the same way by those measures, since the former now find their import possibilities restricted, whereas the latter may now import specified quantities of third-country bananas. However, that difference in treatment appears to be inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of traders before the establishment of the common organisation of the market, and permits the striking of a balance between the two categories of traders, necessary for ensuring the disposal of Community production and traditional ACP production, which the common organisation must ensure. The same considerations justify the restriction on the freedom of traders who previously operated on open markets to pursue their trade or business, the substance of that right not being impaired. With respect to those traders' right to property, the loss of market shares does not impact that right, since the market share held before the establishment of a common organisation of a market constitutes only a momentary economic position exposed to the risks of changing circumstances and is not

> covered by the right to property. Similarly, a position on the market resulting from an existing situation cannot, especially if that situation is contrary to the rules of the common market, benefit from protection on the basis of acquired rights or legitimate expectation. Finally, with respect to the principle of proportionality, it cannot be considered that there was a breach in that the objectives of supporting ACP producers and guaranteeing the income of Community producers could have been achieved by measures having less effect on competition and on the interests of certain categories of traders, since there is nothing to show that the Council, which in establishing a common organisation of the markets had to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility, adopted measures which were manifestly inappropriate having regard to the objective pursued. (…)."

The German importers, however, continued their litigation by turning to the German courts. They were surprisingly successful here, despite the clear wording of the *banana judgment* of the European Court of Justice.

To sum up with regard to supremacy, the Court held that *every national provision which is incompatible with the regulation must be considered of no effect*.

Not only this, but another principle as well is now firmly settled, that is that *a domestic law in possible conflict with a Community regulation must be disregarded by every judge, without the necessity of waiting for the Constitutional Court to declare that it is unconstitutional*.

Finally, it is clear that a *Community regulation prevails over domestic law even when the latter postdates the regulation*.

This schematic reconstruction of the nature and effect of regulations reflect the long labor which accompanied this recognition and which has seen the *Court of Justice* on one side, and the *Constitutional Courts* of the Member States on the other, fighting it out on judicial ground in a trial of strength lasting about twenty years and which finished with the definitive affirmation of the principles which we have set out above, principles which today are the cardinal rules, now generally agreed, of the relationship between domestic and Community law.

9. The Directives

If the solution of the problems concerning the effective capacity of the regulations to operate directly within the Member States was not easily achieved, the situation regarding the directives and their effectiveness is even more complex.

Their ill-defined character and contradictory aspects have ensured that varying (and sometimes diametrically opposed) opinions have been expressed by the Community on the one hand and the Member States on the other, above all on the much-debated question of the direct effect of the directives.

The problem of the defence of the States' sovereignty is, as always, at stake, in the face of alleged violations of their jurisdictional sphere by the Community.

The difficult formulation of art. 189 (3) (now art. 249 [3]) TEC,[37] which puts the *binding nature* of the result next to *discretion* as to the means of achieving it, has not prevented European academics from concurring in the view that, as distinct from the regulations, obligatory in every element, directives do not give rise to any obligation (or right) to be undertaken (or enjoyed) by any person, whether natural or legal. Directives, as distinct from regulations, are not directly applicable within Member States, but only have an "indirect effect," through the implementation measures which the States may consider advisable to adopt.

This way of thinking is prevalent in Community academic circles. Even national Courts, as well as the Court of Justice have subscribed to it, even though this theory has, with time, been adjusted with a view to modifying a principle whose excessive rigidity has proved counterproductive.

Indeed, it should be remembered that although directives normally fix a date within which the Member State must comply, they do not provide for any remedy in the case on non-compliance by the State.

In other words, once the date for adaptation has expired, it is not possible for the directive to bring about the desired effects, until an express domestic legislative provision is passed for its implementation. The Treaty provides no other means to make effective the rules of a directive, which are not part of national legislation.

It is, however, true that once the date has expired, both the Commission (art. 226 TEC, former art. 169), as well as every Member State (art. 227 TEC, former art. 170) can bring an action in the Court of Justice to ensure compliance and, therefore, constrain the State to adopt the procedures necessary to apply the Community law.

It is also true, though, that there is no possibility of obtaining mandatory execution of the judgment from the Court of Justice, nor are the sanctions provided by the Treaty, such as to constitute a sufficient deterrent to induce the State to adopt the necessary measures.

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[37] See § 4 in this chapter.

The 'delicacy' with which the Treaty deals with States who have not complied is exemplary. On the basis of arts. 226–228 TEC, when a State fails to fulfil its obligations, the Commission first confines itself to inviting the State to submit its observations; only then can it give an opinion addressed to the State. If the State continues the violation, the Commission may bring the matter before the Court of Justice. If the latter can recognize the failure to fulfil an obligation by the State, the State shall be required to take the necessary measures to comply with the judgment. If, notwithstanding the Court's intervention, the State persists in its behavior, the Commission may only issue another reasoned opinion giving the reasons why it maintains that the State has not complied with the sentence of the Court. If the State does not comply with the Commission's opinion within the time fixed by it, the Commission may once more have recourse to the Court of Justice, specifying the amount of the lump sum or the penalty which the State must pay to the Community's treasury, which may only be imposed by the judgment of the Court of Justice.

In any event, the sanctions provided do not constitute a remedy for the end-users of the directive's rules, that is, those who suffer damage deriving from the fact that the State has not implemented the rules contained in the directive.

It is precisely this alleged intrinsic nature of directives, their inability to be imposed immediately and directly within the Member States, which has induced the Court of Justice to develop some principles and alternative criteria in order to arrive at results not far from what would have happened had the State implemented the directives.

The *direct effect* which some directives would have *naturally* had, the duty of national judges to interpret domestic law *in conformity with* the directives which have not been implemented, and the *duty of the State to pay compensation* to citizens for damage arising from the failure to implement the directives, are the three judicial principles upon which the present development of the concept of directives is being based, and upon whose correct application the very future development of Community law depends.

The complex issues arising from the application of the three principles are such as to require separate consideration, which will be made in Chapter V.

10. The Decisions of the Commission

According to art. 249(4) (*ex* art 189(4)) TEC,[38] decisions too have the same binding character as the regulations and directives, and contribute to the creation of the complex collection of Community rules which we are examining.

However, as distinct from regulations and directives, decisions are addressed to one or more individual subjects, whether they be the States, regional entities in general, companies, business undertakings, or natural persons. Decisions, therefore, do not have a legislative stamp, but an individual character, and are used not to harmonize or standardize the national laws, but rather to provide concrete implementation for Community rules on a case by case basis, particularly on the subject of competition among undertakings and State aid for them.

They almost always concern acts emanating from the Commission, extremely important from a practical viewpoint, in that their contents can profoundly affect the behaviour of the undertakings and their economic position. However, they are restricted to individual acts, addressed to clearly defined subjects, which are limited to ensuring the application of Community rules of a more general kind.

Consequently, the efficacy of decisions is different in kind from that of regulations and directives.

In this way, if the decision is addressed to individuals or undertakings, it has immediate effect on the addressee, exactly as if a regulation were involved. If it contains the obligation to pay a sum of money, it shall be enforceable according to the rules of civil procedure in force in the State or territory of which it is carried out (art. 256 TEC, *ex* art. 192).

If on the other hand the decision regards a Member State, it follows the same path as the directives:[39] in principle they require the State to adopt the necessary measures to execute them. However, when directives have a sufficiently precise and unconditional content, as usually happens, they are of immediate effect and require no State provisions for compliance.[40]

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[38] See § 4 in this chapter.

[39] See chapter V.

[40] ECJ Judgment, October 6th 1970, C-9/70, *Franz Grad v. Finanzamt Traustein,* (1970), ECR I-825.

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CHAPTER V

The Adaptation of National Laws to Community Law

Key words: Directives – Transposition/Implementation – Failure to implement – Incorrect Implementation – Remedies – Non-implemented Directives – Vertical Direct Effect – Horizontal Direct Effect – Interpretation 'in conformity' with Community Law – Member States' Liability – Damages

1. Foreword

Community law now constitutes an integral part of domestic law within the Member States. However, the two principle embodiments of Community law generate different situations which cannot be overlooked: whereas the *Treaty provisions* and the *Regulations* have *immediate direct effect* on coming into force, the *Directives*, on the other hand, *must be implemented* by the national legislature before becoming directly effective, in order to satisfy the requirements of the founding Treaty. In fact, owing to some principles which have been developed by the Court of Justice and accepted by Member States, there are some directives which national bodies are bound to apply even in the absence of a national measure of implementation.[1] The directives allow the States a period of time (varying from few months to several years) to develop implementing laws, whether this be by statute, decree, or whatever other provision is considered suitable. The national measures of implementation shall have the same legal force as those applicable in the Member State in regard to the subject matter of the directives.

The problem arises from the fact that the large number of Community directives being issued every year, and the mixed nature of the mechanisms for adopting laws in many Member States, means that the time allowed for debate and approval of the implementing legislation is prolonged beyond reason.

The Member States face real difficulty in adapting domestic law to the legislative output of the Community.

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[1] See below, this chapter, § 8.

2. The Transposition of Directives: the Italian 'Community Act' as an Illustration

Community law does not impose a uniform procedure on the Member States in order to make the directives become part of domestic law within each legal system. The States are free to develop whatever *adoption procedure* best suits the kind of legal system they have.

Let us take Italy as an example. For many years the Italian State came last among the Member States regarding the time taken to adopt the directives. This record has meant the Italian State has had to respond to a very long series (around 30% of the total) of enforcement actions before the Court of Justice (*ex* art. 169, now art. 226 TEC).

The Commission's enforcement role is general. As a result of an amendment to art. 228 TEC, the Commission may seek and the Court of Justice may impose a pecuniary fine where a Member State is found not to have complied with a previous judgment of the Court of Justice condemning it for the same violations.[2]

The situation, however, changed some years ago. The problem of chronic tardiness which marked out the Italian legal system has largely been resolved thanks to the solution provided by the Act of March 9th 1989, no. 86, the so-called *Community Act* (*Italian*: *legge comunitaria* or "*La Pergola*" Act).[3]

This statute introduced a special procedure to ease the implementation of Community directives, on the basis of which, at the beginning of each year, the Minister for the Co-ordination of Community policies, having verified the state of conformity of the domestic legal system with the Community one, submits a draft proposal to the Italian Government (Council of Ministers) containing "*proposals for fulfilling the obligations deriving from Italy's membership of the European Community*" (*Community Act draft*). The draft proposal sets out all the directives regarding whether the time-limit for implementation has, or is about to, run out, which should be implemented, usually by means of legislative decrees, in the course of the year. The Community Act draft must be submitted to the Italian Parliament for approval, and becomes an ordinary statute, which is a sub-constitutional source of law.

This annual approval of the Community Act is an important event in the Italian legal system. Indeed, the statute is not limited to listing the

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[2] See this chapter, § 8.

[3] Named after the Minister for the Co-ordination of Community policies, Antonio La Pergola. In *Gazz.Uff.* March 10th 1989, no. 58.

directives which are to be implemented by means of delegated powers to Government, but in some case itself provides for the immediate implementation of certain directives, many of which indeed concern private law:

> See for example, the reform of unfair contract terms, which involved the addition to the Italian Civil Code of articles 1469-*bis* to 1469-*sexies*, which was directly embodied in art. 25 of the *Community Act of 1994,* and required no further activating legislation; the new rules governing consumer credit, with the introduction of the effective global rate, and the right of withdrawal, were contained in arts. 18–24 of the *Community Act for 1991,* and later amalgamated in the "*Testo Unico*" of September 1st 1993, no. 385, a collection of legislation regarding banking and credit. Cf. *The Harmonization of Civil and Commercial Law in Europe,* chapters I and III.

The Community Act may contain four kinds of provisions:

- Provisions which *directly modify or repeal domestic law* which are in conflict with regulations or directives (also where this is a result of a judicial ruling from the Court of Justice based on art. 234, *ex* art. 177 TEC).
- Provisions which constitute the *immediate implementation* of directives.
- Provisions which give *delegated powers to Government* to implement the directives (usually listed in an appendix) by means of statutory decrees (*decreti legislativi*) which must confirm principles and criteria established by Parliament in the delegating act, in accordance with arts. 76–77 of the Italian Constitution.
- Provisions which authorize Government to implement other directives by *governmental decrees* (usually this concerns subjects not covered by a saving clause, *riserva di legge*).

Every year the Community Act has several appendices containing the lists of directives (and possibly regulations as well, when circumstances require it) to be implemented according to the instrument previously selected among those set out above.

This system therefore permits a periodic adaptation of domestic law to Community law over a relatively short time, owing to the fact that a major part of the implementing provisions are adopted by means of *delegated legislation*.

The Community Act sometimes contains other measures not directly implementing Community law as such, but in any case aimed at improv-

ing the implementation mechanisms of the national system to the Community system.

The Community Act also confers power on the Government to make provisions which give effect to the rulings of the Court of Justice, specifying that the Government "must ensure that it is in conformity with the principles and criteria laid down in the rulings." The express provision of the obligation to conform to the interpretations of the European Court of Justice is fundamental, from the point of view of the current debate concerning the relationship between Community and national law, as well as to the efficacy of the judicial rulings of the Court.

Finally, the responsibility for Italy's participation in the European Union and the process of European integration is given to the *President of the Council of Ministers*, who acts through a special department in the Council of Ministers' Presidency.[4]

The *Community Act for 1995–1997* (statute of April 24th 1998, no. 128),[5] that *for 1998* (statute of February 5th 1999, no. 25),[6] and that *for 1999* (statute of December 21st 1999, no. 526)[7] consolidated the Italian implementation mechanism. Some novelties with respect to the *La Pergola* act of 1989 are, for example, the new procedure for collaboration between Government and Parliament in the elaboration of the Community Act, which must be laid before Parliament by January 31st of each year; the modifications to the reports system which the Government is bound to present to Parliament every six months, setting out the principles which govern Italy's participation in the Community law-making process; the procedure for communicating Community act drafts to Parliament, the Regions and the Provinces has also changed. Furthermore the role of Regions in the implementing process has been strengthened with the new Constitutional reform of 2001.[8] The new art. 117 of the Italian Constitution governs the three fundamental principles concerning the participation of the Regions in the formation and implementation of Community law: participation in the '*ascendant*' phase of Community

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[4] See the legislative decree July 30th 1999, no. 303 (in *Gazz. Uff., Suppl. Ord.*, September 1st 1999, no. 205).

[5] In *Gazz. Uff. Suppl. Ord.,* May 7th 1998, no. 88.

[6] In *Gazz. Uff. Suppl. Ord.*, February 12th 1999, no. 35.

[7] In *Gazz. Uff. Suppl. Ord.*, January 18th 2000, no. 13.

[8] *Legge costituzionale* "*Modifiche al titolo V della parte seconda della Costituzione*" (Constitutional act) October 18th 2001, no. 3, in *Gazz. Uff. Suppl. Ord.,* October 24th 2001, no. 248. Participation by the Regions was later governed by art. 5 of the *Legge La Loggia, "Disposizioni per l'adeguamento dell'ordinamento della Repubblica alla legge costituzionale 18 ottobre 2001, n. 3" (*Act June 5th 2003, no. 131) in *Gazz. Uff. Suppl. Ord.*, June 10th 2003, no. 132.

law (the process leading to the adoption by the Community institutions of certain Community acts) which is achieved through the Committee of the Regions, permanent representation at the EU, and the Italian State-Regions Committe (*Conferenza Stato-Regioni*); participation in the '*descendant*' phase of Community law (the process required to implement Community provisions in areas where legislative power, either exclusive or shared, is provided for in respect of the Regions or the Autonomous Provinces of Trento and Bolzano); paricipation in '*substituted State power,*' in order to respect Community obligations to implement directives, where this is within the competence of the Regions or the Autonomous Provinces though they have made no provision for it (however, provisions and rules passed by the State in substitution become inapplicable where the Regions or Autonomous Provinces exercise their own power of implementation over Community directives).

3. Remedies for Failure to Implement, or Incorrect Implementation of the Directives

The normal process for implementing directives takes the form of adopting *ad hoc* legislation, but the procedure does not always function correctly, in spite of the institutional instruments which exist for the purpose.

The main problem in relation to the implementation of a directive into the national legal systems of Member States arises from three concomitant factors:

- The States can fail to fulfil their obligations under art. 249 (*ex* 189) TEC in transposing the new rules contained in the directives; as a consequence, the directives are not always implemented in due time and correctly.
- Not every Member State is willing to accept legal rules and models imposed at Community level, but which derive from a different legal system.
- The Treaty has not vested instrumental powers in the Community institutions which are adequate both to ensure the proper implementation of directives and to punish the failure to comply with a specific provision of directives.

As we have seen in the previous chapter, the problem now seems to have been definitively resolved at least in relation to the regulations.

As a result of the unanimous recognition of the principle of the supremacy of Community law over national law, affirmed by the European Court of Justice, and the principle of the Community's exclusive jurisdiction in particular areas, accepted, albeit with some reluctance by the

German and Italian Constitutional Courts and the French Supreme Court and Administrative Courts, every national body must immediately disregard any domestic provision (of whatever nature) which is in conflict with a *Community regulation* (the principle of *direct effect of regulations*).

The main difficulty, however, concerns the *directives* which, according to the Treaty provisions set out in art. 249 TEC, bind only the Member States as to the results to be achieved. They do not bind individual citizens or civil servants, judges or any other persons, unless they have been previously implemented by the legislature in so transforming Community provisions into domestic law.

It frequently happens, in fact, that a Member State:

– Fails to adopt any implementing provision whatever, within the time-limit.
– Adopts a formal implementing provision, which, however, fails substantially to conform to the aims and objectives of the directive.

The lack of uniform legal measures at the supranational level, aimed at ensuring the correct transposition and application of directives within the Member States, has induced both European academics and Community jurisprudence to develop alternative strategies to overcome the Member States' inertia in transposing the directives.

In the succeeding paragraphs we will be examining what has happened in "emergency cases," where national laws had failed to implement directives either punctually or correctly.

Since the 70's, the rulings of the Court of Justice have given rise to a new doctrine, based on conditions which must be satisfied in order for the directives to have the so-called *direct effect*. The essential point is the possibility for an individual to invoke provisions of non-implemented or mis-implemented directives, in order to protect her/his interest, even where the provisions do not create rights, i.e. confer substantive rights to individuals.

We will see a series of rulings from the Court of Justice, which have extended the doctrine of direct effect, to the point of including provisions contained in directives which have not been implemented, or have been incorrectly implemented.

In broadening the concept of direct effect, the most far-reaching step has been the explicit recognition of a legality review, in which national Courts must determine whether the competent national authorities, in adopting the disputed measures, have observed the limits of their discretions as set out in relevant Community provisions.

The case law of the Court of Justice and its *contextual approach* (i.e. testing the conditions for the specific purposes of the case), within which

the doctrine of direct effect of directives has begun to operate, has been described and commented upon by European scholars, some of whom have not hesitated to doubt the efficacy of the concept of direct effect, even proposing a definitive renunciation of it.[9]

3.1. *Directives which Implement Treaty Provisions that are already Binding*

The doctrine of direct effect of directives was developed at the beginning of the 1970's for first type directives.

We can summarize the principle as follows: when a directive implements an obligation already provided by Treaty provisions (which are directly effective), the directive may have direct and immediate effect within national legal systems, after the expiry of time-limits, even where the Member States have failed to adopt adequate implementing measures within that time.

This principle, formulated in the first instance in relation to certain Treaty provisions,[10] was extended to include directives following the ruling in *S.A.C.E.* of December 17th 1970.[11] It concerned an alleged violation of Community Law on the part of the Italian State for failure to implement Directive no. 68/31, which fixed the timetable for the abolition of existing customs duties and charges having an equivalent effect relating to the importation of certain goods. The Directive was merely giving effect to an express Treaty obligation (art. 9 and art. 13 (2), on the abolition of charges of equivalent effect). Since the Italian State had not respected the time-limits for implementation, the S.A.C.E. company requested, in the Court of *Brescia*, reimbursement of the sum wrongly paid to the State.

The national judge referred for a preliminary ruling under art. 177 (now art. 234 TEC) the issue as to whether the directive was directly applicable within the Italian legal system, even in the absence of its implementation, and whether, as a consequence, the undertaking had a right to reimbursement. The Court was bound to decide as it did: indeed, it had to take account of the fact that a negative ruling (on the presumption that Member States' sovereignty with regard to the Community was absolute and inviolable) could have constituted a dangerous precedent,

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[9] See the bibliographical references at the end of this chapter.

[10] The leading decision is *Van Gend & Loos*, ECJ Judgment February 5th 1963, C-26/62 (1963) ECR I-1.See chapter IV.

[11] ECJ Judgment December 17th 1970, *SpA SACE v. Finance Minister of the Italian Republic*, C-33/70 (1970) ECR I-1213.

able to impede the implementation of the common market and the failure of the Community ideal itself.

> The Court replied to the referring judge's question with this reasoning:
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> ***SACE* ruling: "(§ 15)** Directive no 68/31, the object of which is to impose on a Member State a final date for the performance of a Community obligation, does not concern solely the relations between the Commission and that State, but also entails legal consequences of which both the other Member States concerned in its performance and individuals may avail themselves when, by its very nature, the provision establishing this obligation is directly applicable, as are articles 9 and 13 of the Treaty. **(§ 18)** The obligation to eliminate the duty for administrative service contained in Directive no 68/31 of the Commission of 22 December 1967, in conjunction with articles 9 and 13 (2) of the Treaty and with decision no 66/532 of the Council has direct effect in the relations between the Member State, as the party to whom the directive is addressed, and its subjects and confers on them from 1 July 1968 rights which the national courts must protect."

The main point of the ruling was the affirmation that directives which have not been implemented, but nonetheless which clarify the extent of Treaty provisions, do not require transposing by means of a domestic implementing measure. The directive, in this case, can give rise to individual rights for citizens, which are protected by the national courts at all levels.

3.2. *Directives of a Prohibitory Nature*

The ruling in the *S.A.C.E.* case represents the first step towards the recognition of direct effectiveness on directives.

The second step concerns directives imposing a negative obligation, prohibiting the adoption of certain national provisions. There would be no sense in not treating as immediately effective a prohibition imposed by Treaty provisions, which by their very nature, require no implementing measures.

The appearance in the Court of Justice of numerous other examples of failure to implement Community law has obliged the Court to define the terms of the doctrine of direct effect, specifying both content and methods of application.

Thus, four years later, in the *Van Duyn* case of December 4th 1974,[12] the Court was asked to decide another question, substantially analogous to the *S.A.C.E.* case, but with different facts.

The case concerned the behaviour of the British government in refusing entry and residence permits to a Dutch citizen, based on a provision of domestic law. Ms Van Duyn believed this British law to be in conflict with Council Directive no. 64/221 on the subject of residence of foreigners, which prohibited Member States from adopting any restrictive measures whatsoever for public order reasons. This directive limits the scope of the exceptions stated in art. 48 (3) (now art. 39 (3)) TEC.

The point taken by the U.K. lawyers was unexceptionable, which was that since art. 189 (now art. 249) TEC expressly attributes disparate effectiveness to regulations and directives, it is correct to assume that the Council, in issuing a directive rather than a regulation, had intended to introduce a provision of different effect in respect of a regulation, and, therefore, not directly effective. But equally unexceptionable was the reasoning of the Court of Justice:

> ***Van Duyn* ruling**: "**(§12)** If, however, by virtue of the provisions of article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law. Article 177, which empowers national courts to refer to the court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals."

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[12] ECJ Judgment December 4th 1974, *Yvonne Van Duyn v. Home Office*, C-41/74 (1974), ECR I-1337.

A similar argument had already been used previously, in the *Grad* case,[13] concerning the extension of immediate effect of decisions.

The principle objection having been removed in this way, and since the previous ruling in *S.A.C.E* could not be applied, as Directive no. 64/221 did not represent a implemented measure of an obligation already provided by the Treaty, the Court held that a directive can have direct and immediate effect within Member States when, by its very nature, it does not require the intervention of any act on the part either of the institutions of the Community or of Member States.

> ***Van Duyn* ruling:** "**(§ 13)** By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, article 3 (1) of Directive no. 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the community or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety."

3.3. *Directives which are Sufficiently Precise and Unconditional*

Another milestone in the Court of Justice regarding the progressive extension of the direct effect of directives within State legal systems, even when not implemented, is the well-known case of *Ratti,* of April 5th 1969.[14]

The European Economic Community had issued Directive no. 73/173 and Directive no. 77/728 on the contents of labels on solvent and paint products and their sale. When the implementation time-limit of Directive no. 73/173 expired, Italy had not introduced any implementa-

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[13] ECJ Judgment October 6th 1970, *Grad v. Finanzamt Traunstein*, C-9/70 (1970) ECR I-825: see above, chapter IV, § 10.

[14] ECJ Judgment April 5th 1979, *Criminal proceedings against Tullio Ratti,* C-148/78 (1979) ECR I-1629.

tion provisions and left the old domestic rules in force. On the other hand, the deadline for implementing Directive 77/728 had not passed.

Mr. Ratti, member of the board of directors of an Italian solvent and paint manufacturer, aware of the directives' provisions, had adopted these of his own accord, but was prosecuted under criminal law for infringement of the domestic law concerning the labelling of products. The Court found that Dir. 73/173 on solvents products pre-empted the Italian law which was at variance with it. As far as the interpretation of Dir. 77/728 on varnish products was concerned, the Court concluded that it was not possible for a person to avoid criminal liability under national law, invoking the Community Directive, since Italy still had time to implement it.

The Court has developed two premises. The first states that, while it is true that regulations, by express provision in art. 189 (now art. 249) TEC, are directly applicable and therefore capable by their very nature of having direct effect, this, however, does not mean that other categories of the act are not capable of having similar effects as well.[15]

In the second place the Court has affirmed that any Member State which has not brought into force the implementing provisions imposed by the Directive within the time fixed, may not rely, as against individuals, on its own failure to perform the obligations which the Directive entails.

> ***Ratti* ruling**: "**(§ 23)** It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise. **(§ 24)** Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law—even if it is provided with penal sanctions—which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive."

On the basis of these premises, it has consequently affirmed that national judges must accept the request of individual citizens to disregard a domestic provision which is in conflict with a directive that has not been implemented, in circumstances where the citizen has complied with a

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[15] An argument already deployed in the *Grad* case of 1970, see chapter IV, §10.

directive which imposes *obligations which are sufficiently precise and unconditional*.

In other words, whenever a directive does not permit derogation by the State or particular terms for implementation, and the content itself of the obligation concerned is set out with sufficient clarity.

It is clear that a rigid application of the principle which stipulates that a directive only binds Member States and, therefore, does not create legal situations which favour or impose requirements on natural persons, unless it has been implemented, or would have created unfair and paradoxical results, being contrary to the aims of the European Community itself.

A later development of the principle in *Ratti* can be found in the case of *Becker*, of 1982.[16]

The subject-matter of the ruling concerned the failure to implement art. 13 of Directive no. 77/388, by the end of the period prescribed for that purpose. The sixth VAT Directive exempts the imposition of turnover taxes on certain services, such as "the granting and the negotiation of credit." Ms. Becker, a self-employed credit negotiator, objected to paying the taxes, even if she was obliged to under German tax law. The Finance Court of Münster stayed the proceedings and referred to the Court of Justice the question of interpretation.

> ***Becker* ruling:** "**(§ 17)** According to the third paragraph of article 189 of the Treaty, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. **(§ 18)** It is clear from that provision that states to which a directive is addressed are under an obligation to achieve a result, which must be fulfilled before the expiry of the period laid down by the directive itself. **(§ 20)** However, special problems arise where a Member State has failed to implement a directive correctly and, more particularly, where the provisions of the directive have not been implemented by the end of the period prescribed for that purpose. **(§ 21)** It follows from well-established case-law of the court and, most recently, from the judgment of 5 April 1979 in case 148/78 *Pubblico Ministero v Ratti (*1979) ECR 1629, that whilst under article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects. **(§ 22)** It would be

[16] ECJ Judgment January 19th 1982, *Ursula Becker v. Finanzamt Münster-Innenstadt* C-8/81 (1982) ECR I-2301.

> incompatible with the binding effect which article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned. **(§ 25)** Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State."

In this judgment, the Court applied the same principle not to a directive which was insufficiently precise and unconditional, but only to some provisions contained in a non-implemented directive, since they contained substantive rules which were so precise, detailed and unconditional, as to exclude any margin of discretion from the national entities (such as the legislative, judicial, and administrative organs) bound to apply them.

4. National Entities Bound to Apply Non-Implemented Directives

The progressive development of the principle of the *direct effect* of *directives* by the Court of Justice can be demonstrated by the increase in the number of national entities bound to apply directives, which have not been implemented by the legislature.

This evolution demonstrates the tendency in Community institutions to modify the original content of the directives, changing their nature as well. Directives are no longer confined to indicating results to be achieved, principles, and general criteria which are destined for incorporation into the legal systems, but contain detailed rules. In this way the States' discretion is limited just to the type of domestic law (legislative or administrative) to embody the legislation already established at Community level.

The evolution is well-represented in a series of rulings of the Court of Justice.

In the cases of *von Colson and Kamann*[17] and *Dorit Harz*[18] of 1984 the private parties—two female social workers—demanded to be appointed

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[17] ECJ Judgment April 10th 1984, *Sabine von Colson Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83 (1984) ECR 1891.

[18] ECJ Judgment April 10th 1984, *Dorit Harz v. Deutsche Tradax GmbH,* C-79/83 (1984) ECR I-1921.

to the respective positions or, in the alternative, they claimed compensation for damages in the amount of six months' salary, arguing that breach of Directive no. 76/207 on equal treatment in employment had occurred when positions that they applied for where awarded to less well-qualified males.

Ms. von Colson and Kamann were seeking redress against a German government prison authority, while Dorit Harz brought her claim against a private company.

For the first time the Court imposed the duty on national judges to interpret domestic law *in conformity with* a directive, leaving aside the concept of direct effect and irrespective of whether the case involved State authorities or private parties. It also established that Member States must ensure that national sanctions provided for the enforcement of directives should be "such as to guarantee real and effective protection" and have "a real deterrent effect against breach," even in actions against private parties.

In the *Costanzo* case of June 1989,[19] by a preliminary reference under art. 177 (now art. 234 TEC), the Court of Milan asked the Court of Justice whether even the municipal administration (in this case the *Comune* of Milan) was bound to apply Directive no. 71/305 on the subject of tenders, improperly applied by the Italian State notwithstanding the expiry of time-limits, and as a consequence to disregard the conflicting Italian domestic law.

The Court for the first time characterized the position of the national judges as being equivalent to public authorities: "(…) administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive no. 71/305/EEC and to refrain from applying provisions of national law which conflict with them."

> The Court held that it would be a contradiction to affirm that individuals could, before national judges, rely on provisions of a non-implemented directive, which nevertheless had the requisites of direct applicability, with the aim of censuring administrative action, and at the same time, maintain that the public administration was not bound to apply the directive's provisions and disregard the domestic ones which were in conflict with it.

The United Kingdom courts involved the European Court of Justice in

[19] ECJ Judgment June 22nd 1989, *Soc. F.lli Costanzo v. Comune di Milano,* C-103/88 (1989) ECR I-1839. *Cf.* § 33 of the ruling.

the case of *Marshall* in February 1986,[20] concerning the applicability of Council Directive no. 76/207 on equality of treatment in employment for men and women. Ms. Marshall, employed in the British public sector, was dismissed for having reached retirement age (60). Since a U.K. statute fixed a higher retirement age-limit for men (65), Ms. Marshall refused to retire, invoking Dir. 76/207 which prohibits discrimination based on sex, and the industrial tribunal agreed. The Employment Appeal Tribunal reversed this decision on the ground that the Directive had not been adequately implemented by UK legislation. The Court of Appeal referred the question to the Court of Justice.

In this case the Court, having reiterated that directives, as opposed to Treaty articles, do not have *horizontal direct effect* and bind only the Member State and not another individual, turned to the possibility that directives addressed to the State might confer on private parties rights enforceable against other private parties. The Court held that the regional Health Authority (*S. & SW. A.H.A.*) is bound to respect the rules contained in the directive in question. The precise capacity in which the State acted, whether as "employer" or "public authority," made no difference:

> ***Marshall* ruling:** "**(§ 33)** Article 5 (1) of Directive no 76/207 provides that application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex. **(§ 48)** With regard to the argument that a directive may not be relied upon against an individual, it must be emphasised that according to article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to each Member State to which it is addressed. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual. **(§ 49)** In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the state he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law."

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[20] ECJ Judgment February 26th 1986, *Marshall v. Southampton and South-West Hampshire Area Health Authority*, C-152/84 (1986), ECR I-723.

In the *Foster* case of July 1990,[21] the Court of Justice extended the rule just cited to include the public utility responsible for supplying gas in Great Britain and identified the authorities against which the directives may be invoked, holding that a broad range of agencies and utilities providing public services subject to State control were included.

> ***Foster* ruling:** "**(§ 20)** It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

The increase in the number of bodies bound to apply non-implemented directives, as a consequence of the interpretation given by the Court of Justice, has not been welcomed with equal enthusiasm in all the Member States. It has caused an uneven rhythm of national rulings on the point, sometimes in favor of recognizing the body involved in litigation as an "emanation of the State," and at other times the opposite.

The Italian national courts, the *Corte Costituzionale* (the *Constitutional Court* with the power of judicial review of legislation following the Austrian model of constitutional adjudication reserved to a special judge) and the *Consiglio di Stato* (the Court of last resort in administrative matters following the French model) have not put up particular resistance.

In the *Industria Giampaoli* case of 1991,[22] the Constitutional Court had already established the principle that non-implemented directives must be applied not only by national judges, but also by public authorities.

> To illustrate the change of the Constitutional Court with respect to its precedents in the 1970's, it should be remembered that the judgment cited concludes with a ruling of inadmissibility of the judge's reference *a quo*, in that the same judge could have and should have raised the conflict between the Community pro-

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[21] ECJ Judgment July 12th 1990, *A. Foster and others v. British Gas plc*., C-188/89 (1990), ECR I-3313.

[22] Italian Constitutional Court, April 18th 1991, no. 168, *Industria Dolciaria Giampaoli Spa v. Ufficio del Registro di Ancona*, in *Giust. Cost.,* 1991, I, 1409; in *Foro amm.*, 1992, 1837; in *Foro it*., 1992, I, 660. *Cf.* also chapter IV.

> vision and domestic law, and consequently should have disregarded the latter.
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> On the other hand, in the judgment of October 30th 1975, no. 232, the Constitutional Court affirmed the unlawfulness of the action of the judge who disregarded the Italian provision, without waiting for a possible ruling of unconstitutionality of the law declared by the Constitutional Court itself.

The *Consiglio di Stato* has also reiterated that such directives, if sufficiently precise and unconditional, "are subject to immediate application and are self-executing."[23]

The judges and the public entities, in the view of the *Consiglio di Stato*, are in duty bound to observe Community provisions, which now form an integral part of the new order, by disregarding conflicting domestic law, whether that precedes or follows the directive in question.[24]

Some years later the British courts recognized the same principle, overturning previous negative precedents.[25]

In *Griffin & Others v. South-West Water Services Ltd*[26] a UK court decided that "a water and sewerage undertaking was bound by obligations contained in Directive 75/129 on collective redundancies because it could be classified as a public authority within the terms of the ruling in *Foster."* This was the conclusion reached by the British court in spite of the facts that the company had been floated on the stock market, giving the impression of operating as an autonomous commercial undertaking.

The recognition of the principle that not only judges must apply the rules of the Community directives has very relevant consequences on a practical level as well.

Indeed, once the recourse of referring exclusively to national judicial bodies has been abandoned, the way is opened to the recognition of a

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[23] *Consiglio di Stato*, May 20th 1995, sez. VI, no. 498, *Ferr. Stato - Soc. impr. costruz. edili ferr.Ventura,* in *Riv.it.dir.pubbl.com.*, 1996, I, 190; in *Giornale dir.amm.*, 1995, 1134; in *Giust. Civ.*, 1995, I, 2271.

[24] See also *Consiglio di Stato*, June 13th 1995, no. 348/95, in *Giur.amm.sic.*, 1995, 510, which, referring to a regional act, affirms that "the possible conflict of domestic law either with the founding Treaties of the European Union, or self-executing provisions contained in the Community directives, make domestic law subordinate, which legitimizes disregarding them in specific cases either by administrative or judicial authorities."

[25] Compare *Doughty v. Rolls Royce plc* (1992), 1 *CMLR* 1045, a case in which the UK Court of Appeal ruled that Rolls Royce plc. was not an "emanation of the State" and therefore not bound to comply with the directive on equal treatment.

[26] *Griffin & Others v. South-West Water Services Limited*, Chancery Division, June 23rd 1995 (1995) IRLR 15.

vast series of other national bodies empowered to apply Community law and disregard domestic law.

In effect, the Court of Justice has affirmed that certain directives could be used directly with regard to the tax authorities (the *Fallimento Acciaieria e Ferriere Busseni* case),[27] to regional entities (the *Becker* case), to public authorities which are in the public health sector (the *Marshall* case), indeed to any body "whatever its legal form, which has been made responsible for providing a public service under the control of the State" (the *Foster* case).

The ever-increasing number of national entities which are bound to apply directives which have not been implemented by the Member State undoubtedly implies an acceleration of the process of harmonisation and uniformization of law in the Member countries.

However, the consequences from the point of view of legal certainty and the responsibility of the national entities called upon to apply the non-implemented directives cannot be overlooked.

One of the foremost problems concerns the fact that public authorities, local government offices, tax offices, and all public-sector offices in general must be in a position to know about non-implemented directives, and to regard them as being of the same standard as other sources of law, once the time-limit for implementing them officially, by legislative means, has expired.

The second issue concerns the fact that these national bodies should be capable of knowing whether or not a directive possesses the particular characteristics which make it directly applicable. Besides this, they must be able to evaluate whether (or not) the domestic law implementing a directive that has these characteristics has been transposed in the correct way.

The issue concerns not only those who are bound to apply the rules, but also those in whose favor they operate, namely citizens, undertakings, and private individuals, who do not know whether the domestic law currently in force will be applied in their case, or a directive which (more often than not) is unknown as it has not been implemented, and in respect of which it is difficult to evaluate whether or not it has the hallmarks of direct applicability.

Once all this has been evaluated, they must assume the responsibility

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[27] ECJ Judgment February 22nd 1990, *CECA v. Fallimento Acciaieria e Ferriere Busseni,* C-221/88 (1990) ECR I-495.

of applying or disregarding the domestic law, with all the penal and administrative consequences which follow.[28]

The problems of knowing which directives have the characteristics of direct effect, the certainty of the law, abuse of power by bureaucrats, the legitimacy of an administrative provision which is in conformity with the domestic law but not with the directives, are among the main problematical issues which the legal scholars, the courts, and the legislature itself must try to solve in the coming years, with the aim of making the literal words of art. 249 TEC more oriented to the legal solutions of the Court of Justice and the national courts.

5. Vertical and Horizontal Direct Effect of Non-Implemented Directives

As we have seen, leaving aside art. 249 TEC,[29] it is now accepted that directives are considered applicable within the legal systems of Member States, even when they have not been implemented within the prescribed time-limits, in the following circumstances :

- When they concern applications of an *obligation already provided for by the Treaty*.
- When they contain a prohibition on the States from conducting themselves in a particular way (so-called *prohibitory directives*).
- When they contain sufficiently precise and unconditional provisions, which leave no marginal discretion to the Member States (so-called *sufficiently precise and unconditional directives*).

These three principles have been developed by the Court of Justice and are sustained by valid argument which accords with the spirit in which the Community was founded. This is also due in great measure to the facts which form the basis of the judicial decisions.

Indeed, all the cases examined have always concerned a relationship between a private citizen and the State which has failed to implement a directive properly, and it is exclusively in the context of this *vertical* relationship that the Court of Justice has defined the reasons for extending the principle of direct effect of directives (so-called *vertical direct*

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[28] These problems have induced the Italian legislature, for example, to provide some remedies. Art. 3 of the *Community Act of 1998* (see § 2 in this chapter), provides for the publication in the Italian *Official Journal* (*Gazzetta Ufficiale*) of a notice of information of all the Community acts which, once they exceed the time-limits, could have direct effect within the Italian legal system.

[29] See chapter IV.

effect), reasoning that the State cannot be permitted to allow the consequences of its own lack of compliance to fall upon administrative bodies.

Mr. Ratti, who scrupulously complied with Community provisions, should not have been prosecuted by the Italian State which failed to comply with Community law; the *S.A.C.E.* company was able to ask for reimbursement from the State of a tax which it would not have had to pay had the State implemented the directive; Ms. Van Duyn would not have had entry to another Member State refused if there had not been a non-implemented directive in existence which prohibited all obstruction of the free movement of persons. No one doubts in all these cases that the recognition of the direct effect of directives fulfils criteria of justice and equality as well.

But the limits of these solutions cannot be ignored. Indeed, once it is recognized that certain directives may have immediate and direct effect, such recognition should concern not only the relationship between the individual and the State, (*vertical direct effect*), but also that between individuals (*horizontal direct effect*).

In other words, if a particular directive produces direct effects, why should this effectiveness be limited only to the State and its bodies (*vertical direct effect*) and not extend to relations between individuals (*horizontal direct effect*)?

The first position taken by the Court of Justice with regard to this thorny problem can be found in the *Marshall* case in 1986,[30] from which an intense debate started and is still going on.

The case demonstrates various opposing positions.

> The Court of Justice, to whom the UK Court of Appeal had make a reference, recognized the direct applicability of Directive 76/207, in that art. 5 is sufficiently precise and unconditional to be invoked by the national judges, emphasizing however (recalling the precedent set by *Becker*), that the directive cannot impose obligations on individuals, and cannot be invoked as such with regard to an individual.

Since that ruling, the Luxembourg Court has established the principle that the direct effect of non-implemented directives is only capable of vertical and not horizontal effect.

[30] See footnote 20.

This strict and restrictive interpretation which numerous other rulings of that Court have followed,[31] has never been modified.

In the *Faccini Dori* case,[32] the Court of Justice has reiterated in even more explicit terms, replying to various contrary opinions expressed by some national courts, that directives are only directly effective *vertically*, emphasizing the fact that to extend the principle of direct effect to include relations between individuals would denote recognition in the Community of the power to create laws which may give rise to obligations for individuals which have immediate effect, whereas "it has competence to do so only where it is empowered to adopt regulations."

The case concerned a copy-book implementation failure on the part of a Member State. Art. 5 of Council Directive no. 85/577 on the protection of the consumer in respect of a contract negotiated away from business premises provided for a right of withdrawal of the consumer. Ms. Faccini Dori was at Milan central station when she entered into a contract for an English language correspondence course. She withdrew shortly afterwards, advising the vendor that she was relying on art. 5 Dir. 85/ 577. However, Italy had not yet implemented the Directive in question even if the deadline for its transposition into national law had expired. The key issue was whether the Directive was enforceable horizontally by one private party against another one.

There are, however, several cases where the Court, while refraining from specific reference to the principle of horizontal direct effect, has made use of the technique of the interpretation *in conformity with Community law* (a sort of teleological interpretation) as a judicial fiction precisely in order to avoid affirming the principle of horizontal direct effect.

In actual fact there have been some cases where the Court, while not expressly affirming the principle of horizontal direct effect, have ventured a particular interpretation of non-implemented Community directives, which indirectly attributes horizontal effect to them.

The *Marleasing* case of 1990[33] is illustrative.

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[31] ECJ Judgment February 22nd 1990, C-221/88, *Busseni*, followed by the ECJ Judgment July 12nd 1990, C-188/89, *Foster* (cited above respectively in notes 27 and 21), as well as other more recent rulings cited in the following pages.

[32] ECJ Judgment July 14th 1994, *Faccini Dori v. Soc. Recreb*, C-91/92 (1994) ECR I-3325; *cf.* also ECJ Judgment March 7th 1996, *El Corte Inglés SA v. Cristina Blàzquez Rivero*, C-192/94 (1996), ECR I-1281.

[33] ECJ Judgment November 13th 1990, *Marleasing S.A. v. Comercial Internacional de Alimentacion*, C-106/89 (1990) ECR I-4135, following *von Colson*, above footnote 17.

The Marleasing SA company had objected to the incorporation of another company, La Comercial Internacional de Alimentacion SA, contending that the memorandum and articles incorporating the company were null and void according to arts. 1261 and 1275 of the Spanish Civil Code (concerning contracts), in that La Comercial company had been founded with the sole intention of removing the assets of a third company from the reach of its creditors, which included Marleasing.

Thus, according to domestic law, the contract lacked *cause* (*Spanish: causa*) and had been procured through misrepresentation and fraud; but La Comercial company claimed that the availability of the remedy was governed by the First Company Directive, relying on art. 11 of Council Directive 68/151 on co-ordination of safeguards for the protection of interests of members and others, which had not yet been implemented in the Spanish legal system. Art. 11 did not feature 'lack of cause' among the established reasons for declaring the incorporation of a public limited company null and void.

The Spanish judges hearing the case made a preliminary reference to the Court of Justice under art. 177 (now art. 234) TEC. The latter court held that the Spanish judge should have interpreted the domestic law, that is, in this case, the articles of the Civil Code, in light of the non-implemented directive, interpreting them in a way that was compatible with the Directive. In other words, the Spanish judge had to disregard the Civil Code. The criterion of interpreting national laws in conformity with the Directive therefore represented a means of ensuring that, as between private individuals, the non-implemented Community law prevailed over the domestic law which was still officially in force.

This Marleasing ruling confirmed that art. 10 TEC lays down an obligation on national judges to interpret domestic law in conformity with the directives, whether in the case where local measures to implement the directive were not introduced, or where the domestic laws were passed after the entry into force of the directives.

> **Art. 10 TEC:** "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

Legal scholars speak of '*indirect horizontal direct effects*' or '*incidental horizontal direct effect*,' by which an individual cannot rely directly upon a provision in a directive so far as another individual is concerned, but

can expect the judge to interpret the domestic law in conformity with the directive.[34]

This method of approach has not remained confined to cases involving the directive on equal treatment between men and women (where it was developed),[35] but has extended to other sectors as well—the pharmaceutical industry,[36] environmental law,[37] company law,[38] enforcement of trade-marks,[39] and notification under Directive 83/189 on national measures on technical standards.[40]

At this point it seems that the national judge will be obliged to follow the rulings of the Court of Justice in all areas of litigation, whether "private" or "public entities" are involved, and regardless of whether a directive passes the traditional test for direct effect.

In the *Bernaldez* case of March 28th 1996,[41] a contractual term in an insurance contract between two individuals was declared void, on the basis of being contrary to a directive which the Spanish State had not yet implemented. Mr. Bernaldez, a Spanish national, had signed a motor vehicle insurance contract in which a condition, valid under Spanish law, had been inserted stipulating that the insurer was not to be held liable for damages in the event of an accident caused by the driver being under the influence of alcohol. Following an accident which happened in the very circumstances excluded by the inserted condition, the insurance company refused to pay compensation on the basis of the exclusion clause.

The Court of Justice, to whom the case was referred by the court (*Audencia Provincial)* of Seville, held that Council Directive no. 72/166 concerning motor vehicle insurance is to be interpreted as meaning that:

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[34] The first example of 'incidental horizontal direct effect' was seen in ECJ Judgment November 23rd 1989, *Kommanditgesellshaft Eau de Cologne v. Provide*, C-150/88 (1989) ECR I-3891.

[35] ECJ Judgment *Gabriele Habermann-Beltermann v. Arbeiterwohlfart Bezirksverband ndb/opf*, C-421/92 (1994) ECR I-1657.

[36] ECJ Judgment *Upjohn Company and Upjohn NV v Farzoo Inc. and J. Kortmann,* C-112/89 (1991) ECR-I-1703.

[37] ECJ Judgment *Bund Naturschutz in Bayern Richard Stahnsdorf v. Freistaat Bayern,* C-396/92 (1994) ECR I-3717.

[38] ECJ Judgment *Panagis Pafitis and Investment and Shipping Enterprises v. Trapeza Kentrikis Ellados AE,* C-441/93 (1996) ECR I-1347.

[39] ECJ Judgment, *Bristol Myers Squibb ea v. Paranova A/S,* Joined Cases C-427/93, C-429/93, C-436/93 (1996) ECR I-3457.

[40] ECJ Judgment, *CIA Security International,* C-194/94 (1996) ECR I-2201.

[41] ECJ Judgment, *Criminal proceedings against Rafael Ruiz Bernáldez,* C-129/94 (1996) ECR I-1829.

> ***Bernaldez* ruling**: "**(§2)** (…) a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle."

In the case of *Bellone* of April 30th 1998,[42] the Italian company Yokohama S.p.A. had refused to pay certain indemnities to its own commercial agent when the contract expired, since according to Italian law the agency contract is only valid if the agent is registered with the appropriate professional body. The Court held that Council Directive no. 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes a national rule which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register.

In this case too, relations between two private individuals, the Yokohama company and Ms. Bellone, were judged not on the basis of rules deriving from domestic law, but on the basis of a directive improperly or only partially implemented by the Member State.

Still more recently in the *Océano Grupo Editorial* case of 2000,[43] the European Court of Justice again found itself faced with the issue of the effect of a directive between private parties. Two Barcelona publishers, Océano Editorial and Salvat Editores, negotiated various contracts in 1995–1996 with consumers who were Spanish nationals, resident in different regions of the country, for the sale of encyclopedias. Among the conditions in the contract of sale was a clause providing for exclusive jurisdiction of the forum of the seller, in case of dispute. According to Directive no. 93/13 not yet implemented in the Spanish legal system (despite the time-limit having expired), the contract term was plainly unfair and therefore void. Subsequently, the buyers who refused to pay for the encyclopedias were summoned before the Barcelona court by the sellers. In all probability, taking into consideration the costs of a trial in a distant city, the defendants did not answer the summons and so were unable to rely on the unfairness of the contract term mentioned above. Since, according to the referring judge, Spanish law did not permit the Court to nullify the clause *ex officio*, the judge referred the issue to the

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[42] ECJ Judgment April 30th 1998, *Barbara Bellone v. Yokohama S.p.A.*, C-215/97 (1998) ECR I-2191.

[43] ECJ Judgment June 27th 2000, *Océano Grupo Editorial* and *Salvat Editores SA v. Rocio Marciano Quinterno et al.*, C-240/98 and C-244/98 (2000) ECR I-4941.

Court of Justice, as to whether the provision of domestic law was contrary to Community law in the matter of consumer protection.

The Court of Justice was of the opinion that:

> ***Océano Grupo Editorial* ruling**: "**(§ 29)** (…) the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts. **(§ 32)** (…) the national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term."

The Court held that the national court was able, *ex officio*, to nullify the unfair contract term.

Although the Court did not expressly say so, it seems clear at this point that horizontal direct effect excludes any possibility of applying the *principle of interpretation in conformity*, which presupposes a kind of compatibility between the domestic law in question and Community law.

It is true that the Court, in the second part of the judgment, affirms that the duty of the national judge to favor the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term, derives from the principle of interpretation in conformity.

But, as we have seen in the case in point, to interpret in conformity was not possible owing to the unequivocal meaning of the domestic provisions.

It seems clear at this point, that the reiteration of the concept of *interpretation in conformity* by the Court was merely a rhetorical device, to lessen the political/legal impact of the ruling.

The judgment is also remarkable for another reason. It imposes upon the national judge a duty to disregard her/his own procedural provisions, although Directive 93/13 on unfair terms contains no rule which establishes a nullification procedure *ex officio*.

The national judge (so the Court of Justice affirms by implication) must disregard a domestic provision which is in conflict with the *spirit* or *aim* of a provision contained in a directive. In fact the judge has to

undertake a real *creative evaluation of the objectives* of the law.[44] All this, it is worth repeating, not with the aim of imposing the payment of damages on a State for failure to implement directives but, rather, to adjudicate in litigation between private individuals.

In the *Océano* case, in fact, the plaintiffs failed not because they had infringed any positive regulation of national or Community law, but because they had not respected the "aims" of Community law.

It is worth citing the frank comments of the Advocate General, Antonio Saggio, in relation to this implied recognition of the horizontal direct effect of provisions of directives, at the end of the judgment in *Océano Grupo Editorial:*

> ***Opinion of the Advocate General, Saggio***: "**(§ 37)** Ultimately, the national court's function as a Community court of ordinary law entails entrusting it with the delicate task of guaranteeing the primacy of Community law over national law. The need to prevent the harmonising action of the Community directives from being compromised by Member States' unilateral behaviour, whether through omission (failure to implement a directive within the prescribed period) or action (adoption of incompatible national rules), implies that the application of incompatible legal provisions is in any event excluded. In order to be able to achieve its results, this 'exclusionary' effect must occur whenever the national rule comes into consideration for the purpose of resolving a dispute, irrespective of the public or private status of the parties concerned."

More recently the opinion of the Court of Justice on the point has been confirmed in the case of *Leitner* of March 12th 2002,[45] referred by the Austrian *Landesgericht Linz* for a preliminary ruling on Directive 90/314 concerning package travel, package holidays, and package tours.

The facts are as follows. The family of Simone Leitner (who was ten years old) booked a package holiday (an all-inclusive stay) with TUI at the Pamfiliya Robinson club, in Side (Turkey), for two weeks. On July 1997 Simone Leitner and her parents arrived at the club. There they spent the entire holiday and there they took all their meals. About a week after the start of the holiday, Simone Leitner showed symptoms of salmonella poisoning. The poisoning was attributable to the food offered in the club. The illness, which lasted beyond the end of the holiday, manifested itself

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[44] See ECJ Judgment *Travel Vac SL v Manuel José Antelm Sanchis,* C-423/97 (1999) ECR I-2195.

[45] ECJ Judgment of March 12th 2002, *Simone Leitner v TUI Deutschland GmbH & Co. KG,* C-168/00 (2002) ECR I-2631; *cf.* §§ 20–24 of the ruling.

in a body temperature of up to 40° C over several days, circulatory difficulties, diarrhoea, vomiting, and anxiety. Her parents had to look after her until the end of the holiday. Three weeks after the end of the holiday a letter of complaint concerning Simone Leitner's illness was sent to TUI. Since no reply to that letter was received, Simone Leitner, through her parents, brought an action for damages. The Austrian court of first instance awarded the claimant the physical pain and suffering (*Schmerzensgeld*) caused by the food poisoning, and dismissed the remainder of the application, which was for compensation for the non-material damage caused by loss of enjoyment of the holidays (*entgangene Urlaubsfreude*).

That court considered that, if the feelings of dissatisfaction and negative impressions caused by disappointment must be categorized, under Austrian law, as non-material damage, they cannot give rise to compensation because there is no express provision in any Austrian law for compensation for non-material damage of that kind. The claimant appealed to the *Landesgericht Linz*, which concurs with the court of first instance so far as regarding Austrian law, but considers that application of Art. 5 of the Directive could lead to a different outcome.

The ECJ judgment is remarkable for at least three reasons: it confronts the issue of the effect of a directive between private parties; it accords to the national judge a creative power, in order to realize the objectives of the Community law; it affirms that the existence of a right to compensation for non-material damage can be inferred even if an express reference is absent in the Directive.

The ECJ observed that it is clear from the second and third "*whereas*" clauses in the preamble to the Directive that it is the purpose of the Directive to eliminate the disparities between the national laws and practices of the various Member States in the area of package holidays, which are liable to give rise to distortions of competition between operators established in different Member States. It is not in dispute that, in the field of package holidays, the existence in some Member States (but not in others) of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that, as the Commission has pointed out, non-material damage is a frequent occurrence in that field.

Article 5 of the Directive is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday. Although the first subparagraph of art. 5(2) merely refers in a general manner to the concept of damage, the fact that the fourth subparagraph of art. 5(2) provides that Member States

may, in the matter of damage other than personal injury, allow compensation to be limited under the contract, provided that such limitation is not unreasonable, means that the Directive implicitly recognizes the existence of a right to compensation for damage other than personal injury, including non-material damage.

All the judgments cited above (from *Marleasing* to *Leitner)* demonstrate various examples of Community provisions where the ECJ has recognised the doctrine of direct effect, even in the absence of the traditional pre-requisites for it to be recognized.

The ECJ has affirmed, sometimes expressly, that *interpretation in conformity* by domestic judges is not referable to the problem of direct effect, though not explicitly recognizing a dissociation between the concepts of *direct effect* and *interpretation in conformity* as legal parameters.

> Furthermore see:
> – Case C-287/98, *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster* (2000) ECR I-6917, concerning the evaluation of the environmental impact on the basis of Directive 85/337/EEC.
> – Case C-443/98, *Unilever Italia SpA v Central Food SpA* (2000) ECR I-7535, concerning the information procedure in the field of technical standards and regulations provided by Directive 83/189/EEC.
>
> The precedent is to be found in Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* (1996) ECR I-5403 on Directive 85/337/EEC dealing with environmental matters; cf. also Case C-194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL* (1996), ECR I-2201.

Legal scholars working in the field of EC private law believe that the conditions upon which the doctrine of direct effect is based have become the parameters of judicial review conducted by the national courts. In other words, the provisions contained in the directives must be unconditional and sufficiently precise so that the domestic courts can monitor directly if the State authorities have respected the limits imposed by Community law.

In this way the national courts can check the areas of discretion, which, traditionally, are within the competence of the legislature and the executive in each of the Member States.

Some academics qualify this scrutiny by the courts as being a review

of legality by means of which the domestic laws, which are in conflict with Community law, are simply disregarded, nullified, or held inapplicable.

6. The Position of National Courts

The lack of a clear stance on these themes by the Court of Justice is rebounding on the national courts.

The antagonism between the national courts and the Court of Justice, as described in Chapter IV, and the domestic resistance to an autonomous European Community legal order, is far from being shared by the lower national courts.

The lower courts did everything they could to upset their governments. The peculiar phenomenon, which consists in a dynamic competition between higher and lower courts in each Member State, has been explained as a trans-national judicial dialog. The lower courts have begun to look at each other, building a network among themselves, empowered *vis-à-vis* their national higher courts by having the possibility of entering into direct dialog with the Court of Justice (under art. 234 TEC). The corollary is that in some cases, the lower courts have started to use the rulings of foreign courts to overrule their precedents and legitimize changes to their own judicial practices.

Two general positions, somewhat different from one another, may be identified in Italian case law: on the one hand, the lower ordinary courts are more inclined to recognize even the horizontal direct effect of non-implemented directives, and on the other the Supreme Court (*Corte di Cassazione*) is closer to the position of the Court of Justice.

The reasons favoring the thesis of horizontal direct effect were clearly set out by the ordinary court (*Pretore of Rho)* in 1992:[46]

> The case before this ordinary court (*Pretore*) concerned a contract for the sale of goods payable by instalments, negotiated away from business premises. After the contract was signed, the buyer had second thoughts and, wanting to put an end to the contractual relationship, he terminated it as provided by Directive no. 577 of December 20th 1985, concerning contracts negotiated away from business premises, a directive which had not been implemented,

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[46] *Pret. Milano, sez. Rho*, November 14th 1991, *Villa v. Centro promozionale editoriale,* in *Foro it*., 1992, I, 1599. After the amendment introduced in the Code of Civil Procedure by legislative decree no. 51 of February 19th 1998 a 'single judge court' has been established and the judge called *Pretore* no longer exists as such.

notwithstanding the expiry of time-limits for implementation. As a result, the buyer did not perform his obligation to pay the sum due.

The judge assigned to the case, given that the Court of Justice, the Italian Constitutional Court, and the Italian Supreme Court itself have, by now, freely accepted the principle that directives can in certain circumstances also have direct effect within the legal systems of Member States, first of all made the observation that limiting direct effect to just those cases involving relations between private individuals and the State administration would represent a disparity of treatment between citizens, according to whether the other party were public or private.

But, more importantly, the judge observed that "either each case is taken as excluding the direct interference of directives in domestic legal systems, or it has to be conceded that such an impact, whenever the conditions are met, has full effect within the judicial system." Consequently, in the case in question, the lower court permitted the buyer to exercise the right of withdrawal of the contract negotiated away from business premises, a right provided not by a national law, but by a non-implemented directive.

Later, other ordinary courts have followed this precedent: such as, for example, the *Pretore di Livorno* in 1993 (December 10th 1993, *Jarach v. Soc. Publi Marketing Italia*, in *Contratto e impresa*, 1994, 524, commentary by Gorgoni), and the *Trib.Roma* in 1994 (ord. December 17th 1994, *Mazzara v. Edizioni Winner*, in *Contratti,* 1996, no. 1, 13, commentary by Succi).

Against horizontal direct effect, on the other hand, among the other see: *Trib Roma sez I,* June 4th 1996, no. 9700/96, in *Riv.it.-dir.pubbl.com.*, 1997, 475; *Trib. Crema*, September 22nd 1994, *Bruno-Soc. Boschiroli*, in *Resp.civ.prev.*, 1995, 351, where it was clearly stated that "the direct applicability of EC directives, allowed by the Court of Justice within certain limits, may be invoked, where admissible, only against the State (so-called vertical direct effect) and not in litigation as between private individuals (so-called horizontal effect)."

With regards to the Italian Supreme Court, opinions vary, although the stricter interpretation, advanced by the Court of Justice, is certainly prevailing at the moment:

Against horizontal direct effect: *Cass. civ.*, February 28th 1995, no. 2275, *Recreb v. Capillo* in *Foro it.*, 1996, I, 100 (note by Scannicchio); *Cass.civ.*, May 15th 1995, no. 5289, *Recreb v. Rosto*, in *Foro it.*, Rep., 1995 and in *Guida al dir.*, June 17th 1995 (note by Bruno); *Cass. civ., sez. lavoro*, November 20th 1997, no. 11571.

These cases, on the other hand, recognize horizontal direct

effect: *Cass.civ., sez lavoro,* February 3rd 1995, no. 1271, *Allegra v. Thomson microelettronica*, in *Foro it*., 1996, 101 (commentary by Jannarelli); *Cass civ*., March 20th 1996, no. 2369, *Recreb v. Salustri*, in *Contratti,* 1997, no. 1, 7 (commentary by Abbate).

In France, the *Conseil d'Etat* seems to have accepted the review of the legality of national measures implementing a directive, but problems are still arising with regard to horizontal direct effect.

The supremacy principles with regard to directives were accepted in the case of *SA Rothmans International France v. SA Philip Morris France* of 1992,[47] by which the national authorities are obliged to repeal domestic law which is incompatible with provisions of directives, once the time-limits for their implementation has expired.

In this case, two French tobacco companies brought an action to annul ministerial decisions (issued on the grounds of a French statute of 1976) denying them permission to raise their resale prices for imported tobacco products. The *Conseil d'Etat* ruled that the statute was incompatible with an earlier 1972 Directive entitling manufacturers and importers to set their own retail price ceilings.

In 1989, the same French Court ruled that a public authority may not legally enforce a French regulation that is inconsistent with a Community directive whose deadline for implementation has passed: *cf*. case *Alitalia*, February 3rd 1989, in *Recueil Lebon*, 44, 1989; against see *Compagnie Générale des Eaux*, July 23rd 1993, in *Recueil Lebon*, 225, 1993.

Until that moment, only the national authorities had the power to choose how to execute the directives and the proper means of giving them effect in domestic law. Therefore directives could not be invoked by nationals of the State in support of legal actions directed against the individual administrative act.[48]

Despite the French legal system having accepted the principle of the supremacy of Community law over domestic law with regard to directives, the *Conseil d'Etat* has not yet expressly accepted that non-imple-

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[47] See *Conseil d'Etat* February 28th 1992, in *Recueil Lebon* 81, 1992, 1 *CMLR* 253, 1993.

[48] This is what the *Conseil d'Etat* stated in the ruling of 1978, the *Cohn-Bendit case: Conseil d'Etat* December 22nd 1978, *Ministre de l'Interieur v. Cohn Bendit*, *Recueil Lebon* 524, 1978; *Recueil Dalloz* 155, 1979; 1 *CMLR* 543, 1980.

mented directives can create actionable rights for private individuals against other private individuals before the domestic courts.

In the United Kingdom, at the present time, it is believed that to impose interpretative duties on national judges is to go against the doctrine of the separation of powers and, in particular, Parliamentary sovereignty, since it permits the courts to reinterpret legislation according to differing criteria than to those the legislature had in mind. From the point of view of the British courts, if Parliament enacts legislation inconsistent with a prior Treaty obligation, the courts will give effect to the legislation, but only where it affects private individuals.

Section 2 of the European Communities Act 1972 only considers Community Law as directly applicable and makes no reference to other doctrines which may develop from time to time in the European Court.

On the other hand, Section 2 (4) of the Act states that any act "passed or to be passed (…) shall be constructed and have effect subject to the foregoing provisions (…)." This seems to be an instruction to British courts to interpret all the acts of Parliament *in conformity with* Community law.

For these reasons the British courts oscillate between applying the Court of Justice's doctrines and rejecting them, but certainly rejecting the horizontal direct effect of the directives.

The House of Lords had the opportunity to attempt reconciliation of UK legislation with EC directives in the judgment of November 26th 1992.[49]

> The House of Lords acknowledged that British courts have the responsibility "to construe domestic legislation in any field covered by a Community directive as to accord with the interpretation of the directive as laid down by the European Court, if that can be done without distorting the meaning of domestic legislation."

The Lords then asked the Court of Justice whether, on the facts of the case, there was discrimination, in violation of Council Directive 76/207 on equal treatment for men and women. The Court held that there was.[50]

> More telling was the House of Lords' reaction upon receiving the ECJ's ruling in *Factortame no. 1* (Case C-213/89 (1990) ECR I-2433) in the judgment of October 11th 1990, *Regina v. Secretary*

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[49] *Webb v. EMO Air Cargo Ltd.,* 4 *All ER* 929, 1992; 1 *WLR* 49, 1993.

[50] *Cf.* ECJ Judgment July 14th 1994, *Webb v EMO Air Cargo (UK) Ltd.*, C-32/93 (1994), ECR I-3567.

of State for Transport ex parte Factortame Ltd., 1 *All ER* 70, 1991; 3 *CMLR* 375, 1990.

Lord Bridge of Harwich added "that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."

Recently the supremacy and direct effect of directives have been recognized in the so-called "metric martyrs' case," the judgment of February 18th 2002 of the Queen's Bench Divisional Court.

Case references: *Steven Thoburn v Sunderland City Council*—CO/3308/2001; *Colin Hunt v London Borough of Hackney*—CO/3639/2001; *Julian Harman and John Dove v Cornwall County Council*—CO/3993/2001; *Peter Collins v London Borough of Sutton*—CO/4100/2001.

The Queen's Bench Divisional Court dismissed the appeal of some market traders, which claimed to trade in pounds and ounces even if EC directives require goods to be sold in metric units. Appellants had submitted that the Government, according to Section 2 (2) of the EC Act 1972, was not entitled to use a mere statutory instrument to repeal the Weights and Measures Act 1985, which specifically authorized continued use of the imperial system alongside metric. In fact, during the 1990's, the Government decided to comply with the EC directive and issued a series of regulations making it a criminal offence to use imperial measures.

Lord Justice Laws said that "there was no inconsistency between (…) the 1985 Act and Section 2 (2) of the 1972 Act;" as a consequence, the country's traditional system of weights and measures has been abolished and a massive change has been imposed without an act of Parliament.

In July 2002, the House of Lords refused leave to appeal in this case, in the market traders' legal battle to trade in pounds and ounces. An appeal committee of three law lords, sitting in the highest court of the land, refused to give market trader Steven Thoburn permission to challenge a High Court ruling that European law "ranks supreme" in Britain.

On August 2002, metric martyrs lodged papers at the European Court of Human Rights. Human rights group *Liberty* co-ordinated the legal challenge for the metric martyrs in their appeal to the European Court against the UK Government. The case was argued on several points under the European Convention on Human Rights,

including Article 6 (right to a fair trial), Article 9 (freedom of conscience), Article 10 (freedom of expression), Article 1 of Protocol 1 (the right to peaceful possession of property).

The European Court of Human Rights, sitting as a Committee of three judges (M. Pellonpaa, President, S. Pavlovschi and L. Garlicki) in Strasbourg, on February 3rd 2004, pursuant to Art. 27 of the Convention, decided under Art. 28 of the Convention to declare the case inadmissable because it did not comply with the requirements set out in Arts. 34 and 35 of the Convention. In light of all the material in its possession, and in so far as the matters complained of were within its competence, the ECHR found that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

The issue of *horizontal direct effect* cannot be the subject of further perplexity. Its recognition may be necessary because of the need to achieve the aims which the Community proposes, which is the harmonization of the legal rules in view of the establishment of the internal market, skirting around the obstacle caused by the inertia of the Member States.

However, if on the one hand we can appreciate the attempt to accord the individual rights which s/he might legitimately have had, if her/his own legislature had been more diligent in implementing the directives; on the other hand, the results of ignoring the position of those who have conducted themselves in perfect conformity with the domestic laws in force in the country where they have operated are not equally reasonable.

A potential full recognition of horizontal direct effect requires the rethinking of, for example, the *principle of freedom of contract*.

In its *Communication of 2003*, the European Commission confirms its understanding of party autonomy as a principle of Member States' legal systems. Moreover, in the part where it discusses the opportunity to promulgate non-specific sector measures on European contract law it is stated: "It is the opinion of the Commission that contractual freedom should be one of the guiding principles of such a contract law. Restrictions on this freedom should only be envisaged where this could be justified for good reasons. Therefore it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs."
Cf. COM (2003) 68 final, point 93; see also above chapter I, § 11.

On the basis of Community law, in fact, judges can allocate an advantageous position to one party, or redistribute the obligations to the other party in a way that contrasts completely with what was contemplated by domestic law. Which means, in other words, that the sources of law in a supranational context, where we are witnessing the decline in the role of the sovereign State, must be defined with much greater vigour.

The issue of horizontal direct effect of directives is open both at Community and national level, and one cannot exclude a change in the near future, given that even within the Court of Justice itself, there is not an unanimous view and that a fair number of the Advocates-General have been showing their opposition to the thesis advanced up to now by the Court.

The concluding comments of Advocate General Lenz in the case of *Faccini Dori*[51] should be noted, even if the Court of Justice concluded that direct effect could not be pleaded in this case.

> **Opinion of Advocate-General Lenz: § 59** "(…) As regards in the first place the freedom given to the Member States as to the choice of the form and methods for implementing directives, that freedom is completely unaffected until the transitional period expires. Even after that, the Member States retain also where individual provisions have direct effect leeway wherever that is intended by the directive. Only a fraction of provisions of directives will lend themselves to horizontal applicability. For the rest, the Member States are not entitled to invoke, after the expiry of the period for transposition, freedoms which were conferred on them only for the purposes of the due implementation of the directive within the time-limit laid down."

7. The Interpretation of National Law 'In Conformity' with Community Law

Recognition of the directives which is limited only to vertical direct effect could leave the aims of the Community lacking in effectiveness: there is a considerable risk of compromising the unification of the internal market in that, in recent years, the rules of commercial and private law have depended, in the main, on directives.

The Court of Justice has therefore developed another instrument to favor the integration of domestic law with that of the Community, which

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[51] *Cf.* footnote 32.

is known as the *interpretation of national law in conformity with Community law*.

We have already mentioned this in Chapter I, when referring to the so-called *Communitarization of national law*, when examining, in general terms, the phenomenon by which national laws are adapted to the rules of Community law through the *interpretative activity* carried out by the national judges themselves.

The European Court of Justice in the ruling of *Von Colson & Kamann*[52] has affirmed that, in applying national law (and, in particular, the act expressly passed in order to implement directives), the national judge must interpret domestic law in the light of and according to the aims of the directive, by virtue of the provisions of art. 10 TEC (former art. 5).

The principle was even more forcefully restated in the later ruling in the *Marleasing* case of 1990,[53] whereby the duty of the national judge to interpret domestic law in conformity with a non-implemented directive was extended to the hypothesis whereby the national law was adopted *before* the non-implemented directive.

> ***Marleasing* ruling:** "**(§ 1)** The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 (now art. 10) of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts."
>
> It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive, in order to achieve the result required by it and thereby comply with the third paragraph of art. 189 (now art. 249) TEC.

The next step was taken in the judgment in *Wagner–Miret*[54] of 1993, where the principle of the *interpretation in conformity* was applied to a directive whose time-limit for implementation had expired, but lacking the hallmarks of direct applicability. Substantially, this principle permits any domestic act to bring about similar results (in terms of horizontal

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[52] *Cf*. § 26 of the judgment, above cited in footnote 17.

[53] *Cf*. above footnote 33.

[54] *Cf*. below § 8 of this chapter: Case C-334/92, (1993), ECR I-6911.

effect) to those produced by a Community act, with the consequent possible recognition even of horizontal direct effect.

In other words, each domestic law, irrespective of *whether or not* an act has been passed implementing the directive, can always be interpreted *in conformity with a non-implemented or improperly implemented directive*. In this way the national judge recasts the domestic law and the private individual may be bound by a law appositely interpreted according to a rule in a non-implemented directive.

In effect, the ruling in *Faccini Dori*[55] itself, which formally negated horizontal direct effect in relation to a non-implemented directive, allowed a glimpse of the possibility for a national judge to attribute some kind of effect between private parties as well.

> For example, the Court (*Tribunale)* of Rome, by a court order (*ordinanza*) dated December 17th 1994 (*Mazzara v. Edizioni Winner*, in *Contratti*, 1996, no. 1, 13) expressly took up the invitation of the European Court of Justice, which had recommended national judges to interpret domestic law, whether preceding or following a directive, in a way as nearly as possible "in conformity with the aims of Community law."
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> In this way, having faithfully followed the key steps in the *Faccini Dori* judgment, the Italian Court held that the right of withdrawal was available in contracts negotiated away from business premises, within the meaning of art. 4 of Directive 85/577, even though it had not been implemented in the Italian legal system.

However, leaving aside the much-debated issue as to whether *interpretation in conformity* does or does not represent a hypothesis of *horizontal direct effect*, the fact remains that, on the basis of the principles of the direct effect of directives and of the consistency of domestic law with respect to Community law, there is a growing number of cases where the implementation of a directive is the direct result of judicial activity carried out on a case-by-case basis.

Faced with the lack of implementing legislation for the directive and the lack of formal recognition of rights of the individual, the national judge must verify, case by case, whether or not the defendant against whom a particular provision contained in a directive (not implemented, but having direct effect) is being invoked, is a State entity.

If the defendant is a *State entity*, indeed, the judge will be able to apply the principle of *vertical direct effect;* if the defendant is a *private*

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[55] *Cf*. the case above cited in footnotes 32 & 51.

party, the judge will have to verify whether, in the national legal system, there exists a rule which is capable of being interpreted and applied *in the light of* the directive. If such a rule exists, this must be interpreted and applied in the light of the directive; if it does not, the favorable effects of the directive cannot be extended to the private individual.

What is more, it must be noted, as is happening more and more often, the Court of Justice seems to be concealing the recognition of the horizontal direct effect of Community law behind the apologist formula of interpretation in conformity.

8. Member States' Liability in Damages for Breach of Community Law

When it proves impossible either:

– to attribute direct effect to a non-implemented directive or;

– to interpret the domestic law in conformity with the same directive.

The individual who has sustained loss by reason of the failure to implement the directive has no alternative but to seek *damages from the State,* which consist of the payment of a sum of money, representing the loss sustained as a consequence of the lost possibility of exercising the rights which timely implementation of the directive would have given her/him.

The principle was stated for the first time in the case which may be considered as the most well-known in all the forty years in which the Court of Justice has been operating, that is the landmark judgment in *Francovich* of 1991.[56]

> This was not the first time that issue was taken with the European Court as to who was responsible for the failure to implement a Community law.
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> In the case of *Enichem Base v. Comune di Cinisello Balsamo,* C-380/87 (1989) ECR I-2491, an Italian judge had asked the Court of Justice whether, according to Community law, the public administration was to be held liable for damages when one of its administrative acts had brought about the infringement of a right, which existed in the Italian legal system as a *interesse legittimo* ('legitimate interest'); but the question remained unanswered since it was absorbed by answers given to other preliminary questions.

[56] ECJ Judgment, November 19th 1991, *Francovich and Bonifaci v. Repubblica italiana,* C-6/90 & 9/90 (1991), ECR I-5357.

The controversy turned on the failure to implement Council Directive 80/987 which required the harmonization of the legislation of the Member States for the protection of workers' salaries in bankrupt enterprises. In particular, the directive provided for the establishment of a national fund financed by the State itself, to guarantee the payment of creditors arising from the work relationship as a result of the employer's insolvency.

Several employees of two private firms found themselves in precisely the situation envisaged by the Directive, but they were unable to obtain back payments owing to the failure by the Italian State to have implemented the Directive (and to have create the fund), even though the time-limit had expired on October 23rd 1983 and there had been a judgment against the Italian State by the Court of Justice under former art. 169 (now art. 226) TEC for failure to fulfil Community obligations.[57]

The employees, therefore, went before the courts (*Pretori of Vicenza and Bassano del Grappa)* to obtain the concrete guarantees provided for by Directive 80/987 from the State or, alternatively, damages for failure to implement the Directive itself.

In this case, as in *Marleasing,*[58] the ECJ used the wording of art. 5 (now art. 10 TEC), which sets out the principle of the effectiveness of Community law.

> ***Francovich* ruling:** "**(§ 36)** A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 (now art. 10) of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (…)."

On the basis of this interpretation, the ECJ has founded historic judgments which (as we have seen in preceding paragraphs) have enabled the duty to give direct effect to Community law to be transferred firstly from the national legislature to the national judges, and then to the public administration and any other body endowed with executive power.

> The ECJ, having ascertained that, in the case in point, the Directive did not have direct effect, went on to examine the sec-

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[57] ECJ Judgment, February 2nd 1989, C-22/87, (1989) ECR I-143. The Directive in question was finally implemented in Italy by legislative decree dated December 27th 1992, no. 80, *Gazz. Uff., Suppl. Ord.* no. 36, of February 13th 1993.

[58] *Cf.* footnotes 33 and 53.

> ond part of the question, concerning the payment of damages for failure to implement a directive, and formulated some fundamental principles on the basis of which future judicial rulings were made.
>
> The Court considered that: "**(§ 33)** The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. **(§ 34)** The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law**. (§ 35)** It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."
>
> The Court concluded by holding that "**(§ 37)** It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible."

Having established the principle of State liability, the Court then endeavoured to define its limits. There are three conditions under which a State would be liable in damages for failing to carry out its duties under a directive:

- That the end-result provided by the directive entails the grant of *rights to individuals*.
- That such rights are *sufficiently precise,* in the sense that it should be possible to identify their contents on the basis of the provisions of the directive.
- That there exists a *causal link* between the breach of the State's obligation and the loss and damage suffered by the injured parties.

However, the solution at which the Court arrived with the ruling in *Francovich* left open many important points to do with the responsibility of the non-complying State.

Besides the lack of formulated criteria and conditions against which the quantification of damages can be measured in the absence of appropriate Community rules, it was not made clear whether at the trial of an action for damages before the national courts, it is necessary for there to

have been a previous ruling from the Court of Justice, certifying the non-compliance of the Member State.

Another point is also unclear, that is, whether it is possible to seek damages only in the case of non-implemented directives which have no direct effect (as in the case in point), but also in the case of non-implemented directives that are sufficiently precise and unconditional, as if it were an *alternative* to the possibility of relying on their vertical direct effect.

Other doubts remain, as to the possibility of bringing an action for damages in other hypothetical circumstances of the State's failure to comply with Community law in a way that causes economic loss to individuals, such as for example, lack of improper compliance with rules contained in the Treaty or the Regulations.

Even the second judgment of the Court of Justice on the issue of State liability for failure to implement a directive did not put doubts to rest.

In the *Wagner-Miret* case of 1993[59] which, incidentally, presented several similarities with the judgment in *Francovich*, to begin with the same Directive 80/987 turned out to be central to the issue, the Court denied the direct effectiveness of the Directive.

> The ruling concerns Directive no. 80/987 once more, on the protection of workers in the case of the employer's insolvency. This case was not to do with the failure to implement the directive, since the Spanish government had already set up a protection scheme for workers, by a statute dated March 10th 1980, no. 8 (*Estatudo de los trabajadores*), characterized by a *Fondo de Garantia Salarial* (a guarantee fund) analogous to the one envisaged by the Directive.
>
> This case deals with the interpretation of the Directive because the domestic law excluded the category of directors from the protection scheme. Mr. Wagner-Miret, a member of higher management staff of an undertaking which had been dismissed under a 'redundancy' procedure, brought an action against the *Fondo de Garantia Salarial*, to ascertain his own right of access to the fund in the same way as any other employed worker and, in the alternative, to claim damages for the incorrect implementation of the Community law. The presiding judge stayed the main proceedings and made a preliminary reference under former art. 177 (now art. 234) TEC to the Court of Justice.

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[59] ECJ Judgment, December 16th 1993, *Wagner-Miret v. Fondo de Garantìa Salarial*, C-334/92 (1993), ECR I-6911.

However, in contradistinction to what had happened in the preceding judgment, the Court of Justice recognized State liability for failure to implement a directive through the principle of *interpretation in conformity.* Even if it seemed that the Court was returning to a reaffirmation of the principle established in the *Marleasing* case,[60] in fact there has been some judicial development which is quite considerable.

Indeed, if the principle of *interpretation in conformity* had been developed in the *Marleasing* case as a remedy for the discrimination brought about by the recognition of only *vertical* and not *horizontal direct effect* as well, in respect of detailed and precise directives which have not been implemented, in the *Wagner-Miret* case, on the other hand, the same principle was used by the Court to recognize effects in a directive which did not possess the requisites necessary for *direct effect*.

The judgment in *Wagner-Miret* concludes, affirming: "in the event that, even when interpreted in the light of that directive, national law does not enable higher management staff to obtain the benefit of the guarantees for which it provides, such staff are entitled to request the State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect."

It is notable that, with respect to *Francovich*, the *Wagner-Miret* ruling clarifies another important point, namely that State liability for failure to implement a directive can arise even without a previous ruling against (the State) by the Court, under former art. 169 (now art. 226) TEC, for failure to fulfil the EC Treaty obligations.

The relevance of such a ruling became clear in all its importance three years later, in the judgment in *Brasserie du Pêcheur SA. v. Germany* and *The Queen v. Secretary of State for Transport ex parte Factortame Ltd. (so called Factortame III)* of March 5th 1996.[61]

It concerned two joined cases.

The subject-matter of the first was the conduct of the German Government which had authorized, by a 1981 statute on beer quality, the use of that denomination only for those products which contained specified ingredients in strictly pre-determined measures and quantities. The introduction of the new statute made it impossible for the French company *Brasserie du Pêcheur* to export its product to Germany. In 1987, at the conclusion of an action against the German Government under art. 169 (now art. 226) TEC for failure to comply, the Luxembourg judges de-

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[60] See above, footnotes 33, 53 and 58.

[61] ECJ Judgment, March 5th 1996, *Brasserie du Pêcheur v. Germany* and *The Queen v. Secretary of State for Transport ex parte Factortame Ltd and others*, Joined cases C-46/93 & C-48/93, (1996) ECR I-1029.

clared the German statute contrary to art. 30 (now art. 28) TEC, concerning the prohibition on the restriction on importation and measures of equivalent effect.[62] As a result of this ECJ decision, *Brasserie du Pêcheur* brought an action before the German courts to try to obtain an order for damages against the German State for lost sales of the product, for the whole of the period from 1981 to 1987.

The second case concerned the conduct of the United Kingdom, which was accused of having introduced, by the Merchant Shipping Act of 1988, new regulations for registering fishing-boats, which imposed restrictive conditions regarding residence and domicile of the vessel's owner in relation to registration in the relevant maritime register, and the re-registering of all the vessels on the basis of the new legislation. As a result of these limitations and conditions, many foreign operators, in particular Spaniards, were effectively prevented from conducting their fishing operations. The English legal system too was the object of a non-compliance procedure under ex art. 169 (now art. 226) TEC, which was followed by a ruling against it for infringing art. 52 (now art. 43) TEC.[63] It was followed by an action by the fishermen to obtain damages from UK for the lost possibility of carrying on their activity during the whole period that the new contested legislation was in force.

The ECJ, having carried out an exhaustive legal analysis, has taken into account its own precedents and those set by national courts, and set forth certain principles which, albeit still in an evolutionary phase, still constitute fixed points for interpreting Community law.

The ruling clarified, first of all, that the principle of State liability subsists even when the Community provision is not endowed with *direct effect*.

The chance for individuals to invoke Treaty provisions with direct effect before national judges represents only a minimum guarantee, which is not always sufficient to guarantee rights which are attributable to individuals by Community law, and, above all, to prevent damages consequent upon an infringement by a Member State.

An action for damages should therefore be considered as an *alternative and concurrent instrument* with respect to the substantive protection provided for, and therefore cannot be precluded solely because the Community rule, which has been infringed, and cannot be directly applied by national judges.[64]

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[62] ECJ Judgment, March 12th 1987, *Commission v. German Federal Republic*, C-178/84 (1987) ECR I-1227.

[63] ECJ Judgment, October 4th 1991, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-246/89 (1989) ECR I-4585.

[64] See § 20 of both *Brasserie du Pêcheur and Factortame* rulings.

In the second place the ruling defines the prerequisites from which State liability may arise and which applicants have to prove:

– The infringed Community law must be so drafted as to accord *rights to individuals*.
– There must be a *causal link* between the infringement on the part of the State and the loss sustained by the individual.
– The infringement must be *serious and manifest*.

The first two conditions had already been set out in *Francovich*. The third condition represents a new and further element; this derives from the necessity to limit State liability to cases of infringement of a certain gravity, or, to use the words of the Community judges, proving that the conduct of Government authorities was manifestly and gravely illegal, and possibly that the breach was intentional.[65] The Court held that the infringement is to be considered serious and manifest whenever the State has manifestly and gravely overstepped the limits of its own discretion. More precisely, the national judge, before requiring the State to pay damages, has to evaluate whether either the level of clarity and precision of the infringed law, or the breadth of discretionary power which this law accords to the national authorities, or the intentional or involuntary nature of the infringement committed, or whether a possible error of law is culpable or not, and whether, finally, the conduct possibly manifested by a Community institution could have contributed to the omission or adoption of national provisions which are contrary to Community law.

In the third place, the ruling establishes two important principles as regards the quantification of damages:

– In the absence of Community rules on the point, it is up to the legal system of each Member State to establish the criteria which will allow the *quantum* of damage to be determined, given that these criteria may not be less favorable than those applicable in an analogous action based on domestic law or such as to render the damages difficult to obtain.
– In any case, the award of damages must be commensurate with the loss or damage sustained.[66]

In the fourth place, the Court developed another important principle: the duty to pay damages for loss caused to an individual by non-compliance by the Member State cannot be limited just to the loss suffered after the

[65] See §§ 51–56 of both *Brasserie du Pêcheur and Factortame* rulings.
[66] See §§ 86, 87 and 90 of both *Brasserie du Pêcheur and Factortame* rulings.

date of the ruling against the State by the Court of Justice under art. 169 (now art. 226) TEC procedure. Indeed, according to the Court, to subordinate the payment of damages to this kind of prerequisite would be in conflict with the principles of the effectiveness and non-discrimination of Community law, since such a prerequisite would imply the exclusion of any damages whenever the alleged non-compliance had not been proposed by an action of the Commission under arts. 168 *ff.* (now arts. 225 *ff.*) TEC.

Such a principle, though not yet confirmed by later practical application, has considerable impact on national laws and would mark a further important stage in the evolution of the Community legal system.

To affirm that a national judge can make an order for damages against his own State for loss sustained by an individual as a result of alleged non-compliance, without waiting for the Court of Justice to pronounce on the merits, means, in fact, displacing the jurisdiction for evaluating the conduct of States concerning the execution of the Treaty (and the rules which derive from it) *from the Community institutions to the national judges*.

Faced with conduct by the State which leaves no doubt whatever on non-compliance with Community obligations, every national judge hearing the case must compel his own State to pay damages.

This is a solution which aims at making *national courts* assume more responsibility and encouraging a closer working relationship with the *European Court*. This should favor, in the end, a greater awareness by the national courts as to what is happening in the ambit of the Community, and, in particular, be the motivation for a greater dialog between national and European courts (i.e. the *Court of Justice* and, in some cases, the *Court of First Instance*) which has been hoped for, to assist the growth and development of a uniform judicial outlook.

The principle of State liability for partial or complete failure to implement Community law, with all the prerequisites, limits, and conditions developed by the Court, has now become a fixed point. The confirmation was given in a ruling of March 26th 1996 in the *British Telecom* case[67] and thereafter in the judgment in *Dillenkofer* of October 8th 1996.[68] The rulings had different results.

The first case concerned the improper implementation of a directive. In the *British Telecom* case, the plaintiff British Telecom applied to the

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[67] ECJ Judgment March 26th 1996, *The Queen v. H.M. Treasury, ex parte British Telecommunications*, C-392/93, (1996) ECR I-1631

[68] ECJ Judgment October 8th 1996, *Dillenkofer et al. v. German Federal Republic*, Joined cases C-178, C-179, C-184, C-189 & C-190/94 (1996) ECR I-4845.

British court complaining not about the lack of implementation, but the *improper implementation* of Council Directive no. 90/531, concerning procurement procedures for, *inter alia*, the telecommunication sector, and claiming damages for loss sustained as a result of the greater costs incurred in having to comply with the (mistaken) national implementing measure (UK Regulations of 1992). The British court issued a preliminary reference to the Court of Justice; the latter pointed out that:

> ***British Telecom*** **ruling**: "**(§43)** […] Article 8(1) of the directive is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance. That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it. **(§ 44)** Moreover, no guidance was available to the United Kingdom from case-law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted. **(§45)** In those circumstances, the fact that a Member State, when transposing the directive into national law, thought it necessary itself to determine which services were to be excluded from its scope in implementation of Article 8, albeit in breach of that provision, cannot be regarded as a sufficiently serious breach of Community law of the kind intended by the Court in its judgment in Brasserie du Pêcheur and Factortame)."

Substantially, the Court of Justice refused to hold, in this case, that the British State was bound to pay damages for the loss suffered by British Telecom.

The second case of *Dillenkofer* concerned the non-implementation of a directive within the prescribed time-limits.

The (non-implemented) Council Directive no. 90/314 is aimed at bringing closer legislative provisions of the Member States, both regulatory and administrative, concerning package travel, package holidays and package tours. Art. 9 of the Directive fixed December 31st 1992 as the date by which Member States should conform to the Directive, while Germany only implemented it in 1994. Before that date, some German private citizens, having bought a package holiday with M.P. Travel Line International GmbH and the Florida Travel Service GmbH, had to travel back from the holiday destination at their own expense, due to the insolvency of the two agencies, without being able to obtain a refund of monies paid. The German tourists claimed damages from the German

State, maintaining that had the Directive been implemented within the required time-limit, they would have been protected from the effects of the insolvency of the tour-operators. The ECJ, hearing the case, affirmed the precedents on the point, summarizing in a few lines the principles of State liability for failing to implement a directive. In answer to the questions referred to it by the *Landgericht* of Bonn, by orders June 6th 1994, the ECJ ruled as follows:

> ***Dillenkofer* ruling:** "**(§ 44)** The persons having rights under Article 7 are sufficiently identified as consumers, as defined by Article 2 of the Directive. The same holds true of the content of those rights. As explained above, those rights consist in a guarantee that money paid over by purchasers of package travel will be refunded and a guarantee that they will be repatriated in the event of the insolvency of the organizer. In those circumstances, the purpose of Article 7 of the Directive must be to grant to individuals rights whose content is determinable with sufficient precision. **(§ 75) 1.** Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered. **2.** The result prescribed by Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer' s insolvency; the content of those rights is sufficiently identifiable. **3.** In order to comply with Article 9 of Directive 90/314, the Member States should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of the insolvency of the organizer and/or retailer party to the contract. **4.** If a Member State allows the package travel organizer and/or retailer party to a contract to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of Directive 90/314 is not satisfied unless a refund of that deposit is also guaranteed in the event of the insolvency of the package travel organizer and/or retailer party to the contract. **5.** Article 7 of Directive 90/314 is to be interpreted as meaning that the "security" of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of docu-

> ments of value and that the Federal Republic of Germany could not have omitted altogether to transpose Directive 90/314 on the basis of the *Bundesgerichtshof*'s 'advance payment' judgment of 12 March 1987. **6.** Directive 90/314 does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence."

In the light of these judicial developments, and recently in 2002 and 2003,[69] there is no doubt that the principle of State liability for failure to implement a directive, and Community law in general, represents the highest level of expression of the law of the European Community.

To hold the State responsible for failure to implement or to implement properly Community law means affirming that the lack of compliance is (also) attributable to the national legislature. As happens in international law, State liability is considered in its entirety, without indicating whether the infringement is the fault of the legislative, judicial or executive powers, so too in Community law, all the State bodies, including the legislature, are bound to observe the prescriptions laid down by the European Community.[70]

The affirmation is of no small account.

One only needs to think how far removed from this position Italian case law is, on this point. By a ruling of 1995, the Supreme Court,[71] actually ruling on an issue directly connected with fulfilling the judgment in *Francovich*, affirmed a principle diametrically opposed to the one affirmed by the European Court, by which the failure on the part of the State to implement a directive within the time-limit cannot constitute a basis of claim for private individuals who have suffered economic loss as a result of the failure to implement, because legislative activity is characterized by the freedom to legislate and Parliament sovereignty. It was only by a ruling of May 16th 2003 that the Italian Supreme Court affirmed the opposite principle, adhering expressly to the reasoning of the Court of Justice and establishing that an individual citizen can claim

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[69] Respectively, ECJ Judgment July 4th 2002, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein,* C-424/97 (2002), ECR I-5123 and ECJ Judgment September 30th 2003, *Köbler v. Republik Österreich,* C-224/01 (2003), ECR I-10239.

[70] *Cf*., in this connection, § 34 of the ruling in *Brasserie du Pêcheur*, already cited footnote 61.

[71] *Cass.civ*., *sez. lavoro*, October 11th 1995, no. 10617, *Repubblica Italiana v. Mariotti et al*., in *Danno e responsabilità* 78, 1996. Principle reaffirmed in the same terms by *Cass. Civ., sez. III*, 1 aprile 2003, no. 4915, in *Foro It*., I, 2015, 2003.

for damages incurred as a result of the failure to implement a directive which would have conferred a right upon him/her.[72]

In France, the *Conseil d'Etat* in the case of *Rothman* and *Arizona*[73] where it laid the basis for recognizing State liability based on fault (in French*: faute*) for breach of EC law, avoided dealing with the issue as to whether the French legislature may be held liable for breach of EC law.

The issue was faced however, by the *Cour Administrative d'Appel* in Paris, in the case of *Societé Jacques Dangeville,*[74] in which that Court established that where a directive has not been implemented, the State is liable for the failure of Parliament to implement it and, as a consequence, it has to ensure the effective compensation for the damage arising from the infringement.

It should also be added that, in practical terms, in a great number of cases damages have not been ordered because the infringement is not considered "sufficiently serious", as for example in the case *Brasserie du Pêcheur v. Federal Republic of Germany* decided by the German *Bundesgerichtshof* (the Federal Supreme Court) on October 24th 1996.[75]

In the UK, on the other hand, the Spanish trawler owners were successful in obtaining damages against the UK Government in *Regina v. Secretary of State for Transport ex parte Factortame*.[76] The House of Lords affirmed the liability of the State, in that discrimination based on nationality in relation to the registration of British fishing vessels was "sufficiently serious" to give rise to the right to damages.

Once again old antagonisms between the *Court of Justice* and the *national Courts* are emerging, the first time in the effort to make Community law ever more effective and binding, the second while preoccupied with defending principles of autonomy and national sovereignty, which seem to vacillate before the evermore decisive activity of the Court of Justice.

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[72] *Cass. civ., sez. III,* no. 7630, in *Foro It*., I, 2015, 2003.

[73] *Conseil d'État*, February 28th 1992, *Société anonyme Rothmans International France et Société anonyme Philip Morris France, Société Arizona Tobacco Products Gmbh Export KG (RFA) et Société anonyme Philip Morris France (2 décisions),* in *Recueil Lebon* 8; 1992; 1 *CMLR* 253, 1993**.**

[74] *Cf. Cour Administrative d'Appel de Paris*, in *Recueil Lebon* 558, 1992; in *AJDA* 768; in *Droit Fiscal* no. 1665, 1420. The same court later recognized the right to damages in the case of *Societé John Walker and Sons Ltd*: in *Recueil Lebon* 790, 1992, and in *Droit amministratif*, no. 130, 1993.

[75] See *BGHZ* 134,30; 1 *CMLR* 971 (1997).

[76] House of Lords, Judgment October 28th 1999, available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd991028/factor-1.htm.

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CHAPTER VI

A Common Law for Europe?

Key words: Community Law – Comparative Law – European Law – *Jus commune* – *Lex mercatoria* – Code – Restatement – Collection of principles – Pavia Group – McGregor Code – Principles of European Contract Law – European Civil Code Project – Trento Common Core Project – Acquis Group – European Common Law – Uniformity – Diversity

1. Foreword

The multi-level process taking place (of harmonization, uniformization and unification) is leading the legal systems of new and old Member States and further applicant countries such as Bulgaria, Romania, Croatia, or Turkey, towards an ever increasing homogenization of rules and institutions.

Legal scholars throughout Europe are referring to an imminent process of *Europeanization* (or *re-Europeanization*) of the law.[1]

> In the second volume of this Guide, *The Harmonization of Civil and Commercial Law in Europe,* where we examine the areas of influence of Community law (company law, intellectual property, contract law, etc.), we will be highlighting the level of harmonization/uniformization among the national legal systems which has been achieved in the last few years.
>
> In this chapter we will, on the other hand, be examining some initiatives and proposals for a more radical Europeanization of private law, which have been inspired by academics.

No one doubts that there exists in Europe, albeit in the context of a variety of legal traditions (*Civil law* and *Common law traditions)*, a set of common principles which have been for the most part inherited from Roman law. When we speak of the *Europeanization* of law, we are not therefore referring to the process of formation of a common basis of legal principles, because this has already been in existence for centuries.

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[1] See bibliographical references at the end of the chapter.

We are referring here rather to the development of a truly supranational system, *unique*, unified and possessing cogent value, whether it be based on common *case law* or whether it expresses itself as a *text or Code* where common principles are collected, which may function as a foundation upon which a *common European private law* system could be built. Once this case law or these principles have been collected, a later phase, directed towards the construction of a *unique set of rules,* could be contemplated. This second operation should develop according to a single methodology, but one which is flexible, depending on the existing degree of harmonization.

The criteria might vary from an innovative set of rules which is above national differences, to the formulation of rules which are the result of compromise among the various possibilities, to the formulation of the rule which is the most efficient among those applied.

The problem of unification of law arises, as is known, in a wider context than the Community one: at a time when to speak of "globalization" of economic dynamics is a *cliché*, the question can now only be posed against a global background.

However, within the context of the *European Union,* this demonstrates quite unique characteristics, which derive from the particular *objectives* and the particular *inspiration* of the *European Community*.

2. Community Law, Comparative Law and European Law

Regarding the *objectives* of the European Community*,* it should be remembered that the achievement of some seems to be linked to the acceleration of the harmonization process (one thinks especially of the realization of the single internal market in 1993). As for its *inspiration,* the wish to reinforce a common European culture in ever greater measure can be plainly inferred from some expressions used in the Treaty of Rome, in the Single European Act, and in the Treaties of Maastricht and Amsterdam.

The activity of the *European Parliament* has been grafted onto these considerations and later nourished by the debate which has developed in academic circles.

– The *European Parliament's Resolution* of May 26th 1989,[2] which represents a sort of new legitimacy for all those who, for some time, have advocated the *possibility* and the *necessity*—or at least the

[2] Resolution on action to bring into line the private law of the Member States, O.J., C 158, 06/26/1989, p. 400.

advisability—of proceeding with the unification of private Community law and the creation of a series of common rules for all the citizens of the Community.

– The *European Parliament's Resolution* of May 6th 1994,[3] by which the Commission was invited to begin work on verifying the *feasibility of codifying European private law*.

–The position as expressed by the *Committee on Legal Affairs and the Internal Market of the European Parliament* on November 6th 2000,[4] in which for the first time the proposed content of the new *European Civil Code* and methods of achieving it were formulated.

> It is especially the European Parliament which is the driving force here. On November 21st 2000, the Committee on legal affairs and the internal market of the European Parliament held a hearing on the approximation of civil and commercial law in the Member States, based on a working document prepared by Klaus-Heiner Lehne. The document recommends a gradual process of codification which should proceed in two fundamental stages: the first would take the form of a simple operation to organize systematically the rules contained in the now numerous directives on contract law and civil liability; the second stage should concern itself with other areas of civil law as well, to do with the functioning of the internal market, such as, for example, insurance law, credit guarantees, and contracts of service.

– The *European Parliament's Resolution on the approximation of the civil and commercial law of the Member States* of November 15th 2001,[5] by which the European Parliament stated its view in relation to the Communication of the Commission July 11th 2001. In particular, it was critical of the content in that it was limited to just the law of contract, despite the fact that the Tampére European Council (1999) had given a wider mandate. By this Resolution, Parliament has invited the Commission to abandon the strategy of minimum harmonization of Community law, through the use of Regulations

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[3] Resolution on the harmonization of certain sectors of the private law of the Member States, O.J., C 205, 07/25/1994, p. 518.

[4] The agenda and the working document (DT\424755EN.doc) can be found on the web site of the European Parliament: http://www.europarl.eu.int/meetdocs/committees/juri/20001121-hearing/juri20001121-hearing.htm.

[5] O.J., C-140 E/538, 06/13/2002, available on the EP's Website, URL: http://www.europarl.eu.int/plenary/default_en.htm, search under 'A number': A5/2001/384.

as a legislative instrument; furthermore, it has developed a timetable, with effect from 2004 (which the Commission was invited to respect), for the creation of a body of European civil law for Europe to be ready by 2010.

–The European Commission followed Parliament's request and widened the debate, supporting academic research in this field.

–The *Communication from the Commission to the Council and the European Parliament on European Contract Law* of July 11th 2001,[6] to which the above Parliamentary Resolution makes reference, was followed by the *Communication from the Commission to the Council and the European Parliament on A more coherent European contract law—An Action Plan* of February 12th 2003.[7]

> **Communication from the Commission, February 12th 2003**:
> "Suggested Approach: A Mix of Non-Regulatory and Regulatory Measures. **(52)** In some cases, the EC Treaty may already provide the legal base to solve the problems identified, although the present Action Plan does not take a position on the compatibility of the barriers identified with Community law. For other cases, non-regulatory as well as regulatory solutions may be required. As the Commission recalled in its recent Action plan "Simplifying and improving the regulatory environment", there are, in addition to regulatory instruments (regulations, directives, recommendations) other tools available, which, in specific circumstances, can be used to achieve the objectives of the Treaty while simplifying lawmaking activities and legislation itself (co-regulation, self-regulation, voluntary sectoral agreements, open co-ordination method, financial interventions, information campaign)[8] (…) **(53)** The solutions suggested cannot all be implemented within the same time frame. In a number of sectors initiatives have already or will soon be taken to update current directives or propose new ones. The measures to promote standard contract terms can be launched within a year. The creation of a common frame of reference is an intermediate step towards improving the quality of the EC acquis in the area of contract law. It will require research as well as extensive input from all interested parties. The former will be done within the context of the Sixth Framework Programme for research and technological development and will therefore depend on the timing of the respective call for proposals. In any

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[6] COM(2001) 398 final, O.J., C 255, 09/13/2001, p. 1. See chapter I, § 11.

[7] COM (2003) 68 final, O.J., C-63, 03/15/2003, p.1. See chapter I,§ 11.

[8] Communication from the Commission: *Action plan—Simplifying and improving the regulatory environment*, 06/05/2002, COM (2002) 278 final, p. 3.

case, it is envisaged to obtain the results of the research within three years of its launch. **(54)** The improvement of the existing and future acquis is a key action. The Commission will continue its efforts to improve the existing acquis and expects that the common frame of reference, when available and as far as relevant, will be instrumental in this respect. Reflection on an optional instrument will start with the present Action Plan and be carried out in parallel to the whole process. The results of the Commission's examination could only be expected some time after the finalisation of the common frame of reference."

"A common frame of reference: **(59)** A common frame of reference, establishing common principles and terminology in the area of European contract law is seen by the Commission as an important step towards the improvement of the contract law acquis. This common frame of reference will be a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future acquis in the area of European contract law. This frame of reference should meet the needs and expectations of the economic operators in an internal market which envisages becoming the world's most dynamic economy."

–The Commission follow-up to the Action Plan 2003 was the Communication from the *Commission to the European Parliament and the Council, European Contract Law and the revision of the Acquis: the way forward,*[9] of October 11th 2004. The text—besides describing the nature and functions of the Common Frame of Reference (CFR), its structure and other alternative instruments to harmonization, such as the Standard Terms and Conditions (STC) or the Optional Code—reiterates in clear terms that it is not the Commission's intention to propose a European Civil Code which would harmonize contract laws of Member States.

Communication from the Commission, October 11th 2004:

"**ANNEX I. Possible structure of the CFR.** The main goal of the CFR is to serve as a tool box for the Commission when preparing proposals, both for reviewing the existing *acquis* and for new instruments. To that aim, the CFR could be divided into three parts: fundamental principles of contract law; definitions of the main relevant abstract legal terms and model rules of contract law.

[9] COM (2004) 651 final. See chapter I, § 11.

CHAPTER I – Principles

The first part of the CFR could provide some common fundamental principles of European contract law and exceptions for some of these principles, applicable in limited circumstances, in particular where a contract is concluded with a weaker party. Example: Principle of contractual freedom; exception: application of mandatory rules; Principle of the binding force of contract; exception: e.g. right of withdrawal; principle of good faith.

CHAPTER II – Definitions

The second part of the CFR could provide some definitions of abstract legal terms of European contract law in particular where relevant for the EC *acqui*s. Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

CHAPTER III – Model rules

SECTION I – Contract

1. Conclusion of a contract: i.e. notion of offer, acceptance, counteroffer, revocation of an offer, time of conclusion of a contract. 2. Form of a contract: i.e. written contract, oral contract, electronic contract and electronic signature. 3. Authority of agents: direct and indirect representation. 4. Validity: i.e. initial impossibility, incorrect information, fraud, threats. 5. Interpretation: i.e. general rules of interpretation, reference to all relevant circumstances. 6. Contents and effects: i.e. statements giving rise to contractual obligation, implied terms, quality of performance, obligation to deliver the goods / provide the services, conformity of the performance with the contract. 2. Effects of assignment as between Assignor and Assignee: i.e. rights transferred to assignee, when assignment takes effects. 3. Effects of assignment as between Assignee and Debtor: i.e. effect on debtor's obligation, protection of debtor.

SECTION II – Pre-contractual obligations

1. Nature of pre-contractual obligations (mandatory or not) 2. Pre-contractual information obligations: a) General/Form: i.e. written information, by any clear and comprehensible way. b) Information to be given before the conclusion of the contract: i.e. information regarding the main characteristics of goods or services, price and additional costs, regarding the rights of the consumer, specific information for e-contracts. c. Information to be given at the conclusion of the contract: i.e. information regarding the right to ask for arbitration. d. Information to be given after the conclusion of the contract: i.e. obligation to notify any modification of the information.

SECTION III – Performance / Non-Performance

1. General rules: i.e. place and time of performance, performance by a third party, time of delivery, place of delivery, costs of performance. 2. Non-performance and remedies in general: a. Non-performance: notion of breach of contract b. Remedies in general: i.e. remedies available, cumulation of remedies, clause excluding or restricting remedies. 3. Particular remedies for non-performance: i.e. right to performance, to terminate the contract (right of rescission), right of cancellation, right for a price reduction, repair, replacement, right to damages and interest.

SECTION IV – Plurality of parties

1. Plurality of debtors. 2. Plurality of creditors.

SECTION V – Assignment of claims

1. General principles: i.e. contractual claims generally assignable, partial assignment, form of assignment.

SECTION VI – Substitution of new debtor–Transfer of contract

1. Substitution of new debtor: i.e. effects of substitution on defences and securities. 2. Transfer of contract.

SECTION VII – Prescription

1. Periods of prescription and their commencement. 2. Extension of period. 3. Renewal of periods. 4. Effects of prescription.

SECTION VIII – Specific rules for contract of sales

SECTION IX – Specific rules for insurance contracts"

The debate which began in Community academic circles in the 1980s' was founded on the following considerations.

The heterogeneity of European private law represents an obstacle to the achievement of the immediate objectives of the Community, including the ideal of a *common European path*. In particular, the fact that contract law has different legal conceptual taxonomies (although concrete legal solutions are often similar) in each individual State constitutes a barrier to the free movement of goods, one of the fundamental freedoms under the Treaty of Rome.

A market without borders could not afford the expense of judicial heterogeneity, just as a *common European legal culture* could not manifest itself completely in the absence of a set of common rules (both formal and informal) which govern the relationships between people.

According to some writers, judicial unification may actually be inevitable: by following a natural process of convergence, when the societies and economies begin to resemble one another, the legal systems tend to follow the same direction as well.

More specifically, private law, and in particular, contract law, cannot be other than involved in this general tendency.

In the following pages we will not be considering either the positive or negative aspects of a system of *European private law*, nor the advantages or disadvantages of codification of European law, nor the advisability of using some measures rather than others.

We will be observing and analyzing the phenomenon taking place, which is essentially a cultural one, in which we are interested in the effects it could have upon the decision-making process of the Community legislature, which meanwhile continues ceaselessly to issue harmonization directives in various sectors of private law.

We are interested in seeing how far the debates, proposals, and exchanges of opinion, which seem at first sight to belong to the world of ideas, can influence the actual concrete choices made by those who are developing the uniform laws today.

In this book the expressions *unification of private law* or *creation of Community private law* are sometimes used apparently indiscriminately: the fact is that such expressions may have different nuances of meaning.

To unify private law necessarily implies repealing the pre-existing models which are not able to adapt or co-exist with the new order; on the other hand, when one refers to the *creation of Community private law* this means a process by which the pre-existing models are not replaced by a new unified one, but limited to developing another model which is put in place beside (and perhaps in competition with) the ones which already exist and which remain similarly valid and continue to typify the national law, although perhaps limited to particular fields.

> A similar case can be noted, for example, in relation to the new rules regarding unfair terms, which were not substituted for those already in existence in the legal systems of the Member States (and which remain as the general system in force), but which have been placed alongside them within the Civil Code or in specific statutes, to be applied exclusively to relations between a company and a consumer. The Community harmonization of the rules on unfair terms therefore concerns only the category of consumer contracts, while for all other types the previous national models remain in force, unaltered.

It is important to remember that the initiatives for unification are only partly connected to the activity of the Community institutions and even to the scope itself of the Union.

Bearing in mind what we have previously said regarding the fact that

it is one thing to *unify* and another one to *harmonize the law,*[10] the small amount of interplay between initiatives for European unification and the activity of the Community institutions derives on the one hand from the diversity of objectives among Community politicians and, on the other, from the actual diversity of the initiatives in question.

Therefore the debate on unification is proceeding independently from Community legislative and judicial activity and, although there are many points of contact with it, it should be kept distinct.

The jurist finds him/herself confronting two different phenomena, the study of which requires, among other things, a slightly different scientific approach (at least at the moment, though the situation may change in the near future, with the entry into force of the Constitution for Europe).

In the first case, that regarding *Community Law*, the legal phenomenon has the following characteristics: it is concerned with aspects of sectors of private (i.e. civil and commercial) law; it is connected to a supranational legal system and is therefore, among other things, characterized by the presence of a more or less efficient remedial apparatus; its matrix is legislative and judicial.

The so-called *European law*, on the other hand, has the tendency to reach every aspect of legal reality and is in any case characterized by a systematic type of approach; it is not connected to any system endowed with effective power which ensures the application/enforcement of the law; its matrix is academic.

Community Law	**European Law**
Some sectors of private law	Tendency to reach every aspect of private law
Supranational legal system	Systemic approach with the aim of unification
Remedial apparatus	No system of enforcement of the law
Legislative and judicial matrix	Academic matrix

To conclude, the aim *of unification* is the distinctive trait which distinguishes the study of *European law* from the study of *Comparative law*.

Comparative law aims to demonstrate similarities and differences among legal systems and the common ground that exists in the legal solutions achieved under these varying conditions, despite the diversity shown by

[10] See chapter I, § 9 & 11.

the different legal systems, both in style, legal reasoning and whether or not they are codified. Conversely, *European law* involves an academic approach which is purely instrumental in the aim of achieving unification.

3. A Return to *Jus Commune*?

If examples are required from history of phenomena which present some similarities to the contemporary process of unification of European law, one can think of the medieval *jus commune* and the spread of Roman law reworked by interpreters and commentators, and the canon law of the same period. In medieval times, Roman–Justinian law as reworked by *Glossators* (12th and first half of the 13th Centuries)[11] and *Commentators* (14th and 15th Centuries),[12] was imposed by reason of the prestige it enjoyed, which derived from the Justinian text (the *Corpus Juris Civilis*) regarding customary laws, as the only system capable of providing uniform and rational solutions to various problems arising in a period of profound fragmentation.

The *rediscovery of Roman law* (read the *Corpus Juris Civilis*) in North Italy in the eleventh to the twelfth centuries, its study and later reworking and adaptation to the needs of the time on the part of scholars at the first great European universities, did not remain confined to the academic world. It had a very important practical function with the aim of superseding local customary laws which were not able to respond to the needs of a society evolving towards a more extensive and complex system of governance and trade. *Roman law* was the only instrument which could be recognized throughout Europe and which could be used in every part of the Continent.

The comparison with the medieval *jus commune* emphasizes the fact that the application and spread of the "new law" were due to the work of interpreters and judges and not to the activity of legislators, just as today the spread of the new common European private law would not be possible without the interpretative activity by academics, and national and Community jurisprudence, which, more often than anyone would think, precedes the issue of laws by the legislature. The latter sometimes constitutes only the formal and official representation of a change or evolution in legal writing and judicial thinking.

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[11] They explained or 'glossed' each line and even each word of the sacred text, the *Corpus Juris Civilis* of Justinian, using the technique of quoting parallel texts from elsewhere in the *Corpus* to illustrate the meaning of a given passage.

[12] They took into account what the world of their own day was like and what it needed. They went beyond the strict limits of the meaning of the ancient *Corpus Juris Civilis*.

In the debates about common European private law (above all in the Germanic area), there is current reference to the historical period of the *jus commune*, when the unity of European law was not beset by the presence of domestic legal systems which tend to regulate every aspect of relationships encountered in life. For these scholars,[13] the experience of the *jus commune* could constitute something more than a simple means of understanding the dynamics in action at a European level. The supporters of modern European unification look back with regret to a moment in history when a jurist from Bologna could converse with a colleague from Heidelberg not only making reference to the same cultural and conceptual heritage, but even using the same language (Latin, the language of Gaius' *Institutiones*). According to the supporters of this new *historical approach* it is precisely the study of this period in the past which is able to supply elements useful for overcoming the judicial tendency to particularize, which we have seen is very strong even in present-day Europe. A legal initiative imposed from on high which lays down a Code (or even a series of directives) would end up being a failure, or would at least meet greater difficulty, compared with a reform which is born out of a sense of history and widespread critical reflection, given direction by academics and aimed at satisfying the needs of society.

> Very often the ECJ make use of legal maxim or adages coming out from the *jus commune* in its decisions (or in the conclusions of the Advocates General), even in their original latin form, as a way of solution for cases where no clear rule in the EC legal order is found. Cf. *Grifoni I & II* cases (1990 &1994) ECR I-1203, ECR I-341; *Rudolf Misset v. Council* (1987), ECR I-223; *Hansen* case (1990) ECR I-2911 and many others.
>
> About the epistemological value of these maxims in the construction of the common European private law some commentators suggested three possibilities: it can be just as a simple rhetorical device; an expression of EC principles of law, which are able to embrace in a comprehensible formulation the common spirit of many rules contained in many different national laws; a consequence of the 'subconscious' remaining of ancient *jus commune* in the core of the new European private law.

Naturally there is an awareness that to simply re-propose the model of the *jus commune* in a time such as our own, much more complex from the social and economic point of view, as well as being characterized by a

[13] *Cf.* the bibliography at the end of this chapter.

legal system of regulations of far-reaching effect, is backward-looking and unsustainable. The slant which the study of the history of law can give in helping to look beyond a horizon bound by the notion of nation-states and in forming a European judicial outlook, does seem worth considering, in any case.

The point upon which most European academics agree concerns the role of the medieval jurist, which shows similarities to today's jurists, who are working towards a modern-day unification of European private law. The fundamental reason lies in the fact that even today the response to the changing needs of society does not come from the organs of state, but from the work of scholars and interpreters of the law. It really is the jurists, before the legislators, who are stimulating and planning the creation of a system of *European private law.*[14]

Finally, it should be emphasized that the common legal culture which modern jurists will aspire to (the interpretative aspect) is not an alternative to Community intervention in the institutions (the codification aspect) and so, for this reason, the Code *vs.* culture (as well as the Brussels bureaucrats *vs* law professors) contraposition is a false one. Both aspects must become integrated in the effort to reduce the social costs of diversity and legal pluralism in Europe. The challenge is to maintain contextual diversity as far as possible, while making the fundamental rules of the game binding, waiver of which represents abdication by private law of its dual function of governing the economic process and a mechanism for social control.

4. The *Lex Mercatoria* and other Unifying Commercial Practices

The facts which are giving encouragement to the supporters of a common European private law do not only come from history. Even relatively recent phenomena (or those which have re-emerged only in relatively recent times), have stimulated legal scholars to consider the possibility of "formalizing" European private law in a legal text: Consolidation, Restatement, Code, or some sort of legislation.

We have in mind, aside of course from the Community laws expressed in directives and regulations and the judicial precedents from the Court of Justice*, international Conventions,* in particular those supported by the European Community—such as the Rome Convention of 1980 on

[14] As we have seen above, in this chapter and chapters I & II, the academic matrix of what we have been calling *European private law* is one of its fundamental characteristics. *Cf.* the bibliography at the end of this chapter.

the law applicable to contractual obligations,[15] and the *Vienna Convention* of 1980 on the international sale of goods.[16]

Some scholars have emphasised the fact that the Conventions promote the 'conciliation of laws': they always deliberately leave crucial sectors uncovered, accepting (not merely tolerating) opposing points of view, thus allowing numerous variants to work in the medium to long term. This characteristic *openness* of the Conventions may however prejudice the simplicity and predictability of judicial results, indispensable features for achieving a single market and which seem (at this stage anyway) to be prevailing over the needs of flexibility and capacity to change. In that context, the question of modernizing the Conventions applies in particular for the protection of consumers and workers (known as the *weaker parties*).

The Rome Convention is a private international law instrument in the form of an international treaty. Through the *Green Paper 2003,* formulated as a questionnaire,[17] the European Commission is looking to the possibility of converting the Convention into a Community instrument (Rome I) and taking the opportunity to modernize it. One of the solutions proposed by the Commission is to introduce a general clause guaranteeing the application of a minimum standard of Community protection when all, or just some particularly significant, elements of the contract are located within the Community. This solution would remedy the current lack of protection for the 'mobile consumer' (i.e. someone who has gone to a country other than his/her country of habitual residence to make a purchase or obtain a service).

Converting the Rome Convention into a Community instrument would establish uniform private international law within the Member State. It would accord the Court of Justice jurisdiction over interpretation of these rules and would facilitate the application of standardized conflict rules in the Member States. The instrument chosen by the Commission is the Regulation, which is binding and directly applicable, and does not toler-

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[15] O.J., 10/09/1980, L 266. It entered into force on April 1st 1991. In due course, all the new members of the European Community signed the Convention. When the Convention was signed by Austria, Finland, and Sweden, a consolidated version was drawn up and published in the Official Journal in 1998 (O.J., 26.01.1998, C 27). For the text of the Convention see http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/doc.html. See also chapter I § 11.

[16] For the text of the Convention see http://www.uncitral.org/ British/texts/sales/salescon.htm. See also chapter I § 11.

[17] *Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation*, COM (2003) 654 final.

ate the uncertainties and delays inherent in the transposition of Directives.

There are other relevant factors as well which contribute in some way to overcoming the divisions between the various European legal systems.

We are referring here, in particular, to the effective unifying influence of the so-called *lex mercatoria,* that is the collection of principles of the law of contract which predominate within the so-called *societas mercatorum*. Thanks to the *lex mercatoria,* international commercial operators can overcome—at least in part—the difficulties which originate from the legal diversity of Europe in matters of contract.[18] The phenomenon known as the *lex mercatoria*, which first manifested itself at the time of the *jus commune*[19] and which is reappearing today, is a clear sign of the need not only for consumer contracts but also, (although for different reasons), commercial contracts to be regulated in a trans-national and, more specifically, European way.

The *lex mercatoria* is of course not just a European phenomenon. Indeed, its *international* character, in the fullest sense of the term, is a result of its purpose and use by the merchant class who generated it. If we concern ourselves with it in this book it is only because the commercial practices of businessmen are an important means of overcoming the obstacle to the concrete achievement of the single market caused by the diversity of European law. The *lex mercatoria* serves to prevent, in some measure, the unpredictable effects which can give rise to the so-called *conflict of laws*, although it certainly cannot obviate every possible unknown judicial factor which an economic transaction may come across in a Europe which is without an effective system of private common law. The difficulties arising from the present situation are serious enough that to prejudice the achievement of the single market and the transaction costs implied by the diversity of the legal systems constitutes a disincentive for businessmen.

From this viewpoint it also would seem to be an important workshop devoted to finding new solutions for a *common European private law,* at least so far as contracts are concerned, workshops where the experiments, unsystematic and without full awareness of the businesspeople involved, are nonetheless carefully studied by academics, who try to identify general tendencies in relation to national laws.

It is precisely in the context of the *international commercial law and*

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[18] See chapter I, §§ 10 &11.

[19] On which we have made observations in the preceding §§.

practice[20] we should remember the work done by the *International Institute for the Unification of Private Law (Unidroit*) which, after a long gestation, has reached the point of setting out a series of *Principles for international commercial contracts*,[21] which have aroused considerable interest, both because of the prestige of the Institute and the ambitiousness of the project.

> The purpose for which the *Principles* were developed is indicated in the *foreword:* to enunciate general rules on the subject of international commercial contracts; to supply to the contracting parties some rules for reference in the event of future controversy; to make general principles available to arbitrators in order to clarify the concrete meaning of such expressions as "*lex mercatoria*" or "*good faith*" and those similar; to provide a solution to controversial questions in cases where it proves impossible to identify the relevant rule of the otherwise applicable law; to be used for the interpretation or integration of the instruments of uniform international law; to serve as model for national and international legislators. In reality they are not put forward as a model for the unification of the law of international commercial contracts, nor do they have pretensions to constituting a reference point for a new common European private law, with integrative functions with respect to national law. Their objective is simply to act as default rules.

In the context of our theme, the *Unidroit Principles* appear as a possible inspiration for initiatives in favor of the creation of a system of common European private law, both in an ideological and a methodological sense. We are referring here to the possibility of not favoring the most widespread legal solution at all costs, but as far as possible endeavouring to find a rule that is efficient. Secondly we are referring to the decision to eliminate those notions and concepts, traditional and typical of many legal systems but difficult to be assimilated by all, from the text of the *Principles*. Thus the *Principles* have completely ignored the concepts of "*causa*" and of "*consideration*" in the contract, which are hard for a jurist whose system does not contain them to understand. In the third place, the role played by the experts in the working group which edited the *Principles* should be emphasized. Perhaps the choice was

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[20] On Private International Commercial Law legal materials and bibliographical references are available at http://www.jus.uio.no/lm/private.international.commercial.law/-contract.principles.html.

[21] For the Principles, see the website at http://www.unidroit.org/.

inevitable, given the purpose of the project, but this serves to confirm the true nature of the present-day need for unification: this arises from changes in the underlying economic reality and cannot in any way be abstracted from that, and turned into a sterile academic exercise. Putting it to a practical test is the only way to determine what the real significance of an initiative like this is.

5. The Initiatives for Unification: Code, Restatement, and Collection of Principles

Only a few years ago it seemed unthinkable that a citizen could choose with whom to draw up a contract for telephone services; unthinkable that nearly all the most important contracts for exclusive supply would disappear at a stroke; it seemed impossible to be able to oppose the consolidated practices of the violation of privacy, a violation which was believed, wrongly, to be a natural consequence of modern socio-economic relations.

In the near future, the law will be ever more *Europeanized* or *Communitarized*. This climate fosters initiatives on the part of those who believe that the moment has come to consider either the possibility of codification or of collection, a document to bear witness to the existence of a common European private law, one capable of defining the limits which have been reached to date and, at the same time, favoring a harmonious and systematic future development.

The proposals put forward by the supporters of the unification of private law vary in breadth and ambitiousness according to the subject-matter of the unifying initiative, and how specific and organic the text, Code, or private law document is.

Regarding the first aspect, it should be noted that whereas the Parliamentary Resolutions of 1989 and 1994[22] proposed the codification of the *whole of private European law*, the more recent Parliamentary Resolution of 2001[23] and the great majority of academics—those who maintain that a closer uniformity of legal rules in the field of Community law is possible and necessary—seem inclined to limit the various initiatives to just the *law of contracts*.

The reasons for this choice are essentially these:

On the one hand, contract law seems in fact more susceptible to unification because it involves historic traditions and values of a particular society in a lesser way. It is undoubtedly more 'technical or neutral'

[22] See above in this chapter, § 2.

[23] See above in this chapter, § 2.

than, for example, family law[24] is, or the law of inheritance, or property law.

On the other hand, unification is thought to be particularly necessary in the case of contract law, given the relevance that this part of private law has in relation to commerce between the Community countries. Its unification would seem to be the natural corollary of the harmonization carried out so far by the European Community in order to achieve firstly a Common Market and secondly a Single Market, and in this way would complete the work begun in the ambit of the Community itself, with the promotion of the law applicable to contractual obligations in the *Rome Convention* of 1980[25] and of the international sale of goods in the *Vienna Convention* of 1980.[26]

5.1. *The Pavia Group*

We have stated that jurists have different ideas about the direction that the future path of *European common law* should take.

One of the best known initiatives is the one undertaken by the so-called *Pavia group*, formed as a result of a study-group which took place on October 20–21 1990 at the University of Pavia, in Italy. The efforts of the Pavia working group, led by Professor Giuseppe Gandolfi, one of the main promoters of the initiative, are directed at the creation of a *European Code of contracts*. Beginning with the contention that not even the Community directives are an adequate instrument to overcome the problems which are a consequence of the variety of contractual regimes within Europe, the jurists who meet at Pavia hold that the only possible path to follow, with unification of European law in view, is that of *legislation*. In other words, the unifying commercial practices[27] and jurisprudence[28] that reflect developments in a common *legal science* can only have a complementary role with respect to legislative solutions.

The original feature of the Pavia group is that they work with a legal text as a basis, which functions as a framework upon which a system of private Community law is then built. This base-text was found in the fourth part of the Italian Civil Code (*Libro quarto*).

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[24] Some authors have emphasized that family law has already achieved quite solid uniformity, probably because the institutions, both in the Civil and Common law traditions, rest upon the foundations of canon law: *cf.* bibliography at the end of this chapter.

[25] Cf. footnote 15 and chapter I, §11.

[26] *Cf.* footnote 16 and chapter I, §11.

[27] As to which, see the preceding §§.

[28] As to which, see chapter I, § 15.

Attention was concentrated upon this Code even at the first meetings, not so much because the initiative had been promoted by Italian academics and the study-group was held in an Italian university, but rather, primarily, because the legal experts present had identified certain elements and characteristics in the 1942 Italian codification, which made it suitable for the role they wished to assign to it. In the end, it even prevailed over what has been considered the ultimate in codification in the 20th Century, the Dutch Code *NBW* (*Nieuw Burgerlijk Wetboek*), of which Parts III, V, VI and a portion of VII ("*patrimonial law,*" "*property rights,*" "*general part of the law of obligations*" and "*special contracts*"), entered into forceon on January 1st 1992.

Indeed, it is recognized that the *Italian Codice Civile* is found at the half-way point between the *French* and *German* legal systems. There are not many innovative legal rules in the 1942 Italian Civil Code: the greater part of the rules derive from the *Code Napoleon,* the more recent German Civil Code *BGB (Bürgerliches Gesetzbuch)* and the German 'Pandectist School.'[29]

Which text could therefore have been better suited to represent the entire field of civil law in the Pavia project?

Another reason for having chosen the Italian text is that it is better suited for dealing with the differences (as we said above, it is half-way point between the two main legal models on the Continent, the *French* and the *German* one) and establishing a dialog with the contractual principles of the Common Law. In the Italian legal system, for instance, there is no distinction between civil contracts and commercial contracts, and the Code covers both civil and commercial law; the much-discussed abstract concept of *Rechtsgeschäft* is known but not applied practically; this is a concept translatable in British as *legal act* or *legal transaction*, which is the pivot of the German Civil Code. It is an object for discussion in several continental doctrines, but it is not used in the Common law or French law. However, even if such a concept is not provided for in the project, the phenomenon is not absent. The term *obligation* is very often mentioned but, as in Common law, in reference to the *effect of the contract*.

It should also not be forgotten that the Italian Civil Code is more recent than its two 'older brothers', and so for this reason also seems more suitable for representing cases from the world of trade and manu-

[29] The German School of Pandects of the 19th Century was so called because of the Pandects contained in the Digest, the most important part of the Justinian *Corpus Juris Civilis*. To those scholars, the study of Roman law was not a historical but a dogmatic pursuit, since it was part of the living law of their time.

facturing which are no longer rooted primarily in the nineteenth and early twentieth centuries.

The awareness of the fundamental division in the European legal order between the *Common law* and *Civil law* traditions was not lost on the lawyers of Pavia. It is exactly for this reason that an interesting methodological choice was made to adopt a duplicate base-text for consideration: in addition to *Part Four of the Italian Civil Code*, which had already been selected, it was decided that reference would be made to the *Contract Code* project of the Oxford jurist, Harvey McGregor, whose reference work was entitled just that, *A Contract Code* (1993).

The Pavia Group has recently published the text *European Contract Code, Book I—Preliminary Draft,* based on the work of the *Academy of European Private Lawyers,* formally established in 1992, with its seat at the University of Pavia.

> The Preliminary Draft of the *European Contract Code* (University of Pavia, 2001) is in French, English being assumed to have rather an intercontinental connotation. The next volume will contain the text of Book II, dealing with particular types of contract.

Art. 1 of the Statute of the Academy sets out its aims: to contribute, through scholarly research, to the unification and the future interpretation and enforcement of private law, in the spirit of the Community conventions. Furthermore, it promotes the development of a common European legal culture.

The draft Code contains a set of rules based on the legal systems of Switzerland and all the EU Member States, and deals with aspects of contract formation, the form and content thereof, interpretation and effects, performance and non-performance, termination and extinction, and judicial remedies.

5.2. *The McGregor Contract Code*

The McGregor *Contract Code* is a systematic reworking of the English and Scottish laws of contracts in their highly advanced stage.

The characteristics of this text make it particularly suitable to the task which the Pavia group seeks like to accomplish. Developed for the *English Law Commission*, set up in its turn by the Parliament in the 1960's, it had to mediate between the English and Scottish legal models, the latter being, in its turn, within the *Civil law* tradition.

The full name of the work is in fact *Contract Code drawn up on behalf of the English Law Commission*. More references are available in Internet at http:// www.lawcom.gov.uk/homepage.htm.

Basically, McGregor found himself confronting a similar problem to that facing those who are trying to lay down a common text for a system of European private law, where a solution must necessarily be found which bridges the *Civil law* and the *Common law* traditions.

In this way, many of the features typical of the Common law have disappeared from the final version of the *Contract Code*.

The McGregor draft, composed of 190 articles, is arranged in the style which is typical of civil law Codes, but with the addition of a gloss or explanatory comments. The work consists of legal propositions, with comments made by the author himself. Although completed in 1971, it has not (yet) been followed up, given the diffidence with which it was received in English and Scottish legal circles.

5.3. *The Principles of European Contract Law*

Another very well-known initiative, which enjoys a wide consensus, is the group of legal scholars led by Professor Ole Lando of the University of Copenhagen.

The group has set up a special non-governmental Commission, made up of lawyers from all the countries of the Community.

The *Commission on European Contract Law* receives subsidies in the first place from the *Commission* of the *European Community*, but it is also supported by Universities and other research bodies.

For further details, see the website at http:// www.jus.uio.no/lm/eu.principles.lando.commission/doc.html.

For the text of the principles see in internet at http:// www.jus.uio.no/lm/eu.contract.principles.1998/index.html.

Lando has highlighted the following paradox in his writings: a businessman in European State *X* whose headquarters are near the border with another State *Y*, a Member of the Union, finds himself obliged to maintain 'preferential relationships' with firms which are located in his own State *X,* even though these are situated at a much greater distance than those just across the border in State *Y.* According to Lando, the reason for this inefficient choice lies in the diversity of systems of *contract law*, which causes uncertainty and increased costs for businesses that would

prefer to have recourse to suppliers (or to sell to clients) who share the same legal system, rather than introduce foreign elements into the contract.

In the opinion of Lando and the lawyers working on this project, it is precisely the consideration that there are legal systems in Europe which are different (and linguistically so diverse) that is creating pressure for the harmonization of the laws of contract: *"It is precisely where there is no common legal tradition that harmonization of the laws is called for"* (Lando).

The primary objective at which the Commission for European Contract Law is aimed is clear: to collect and develop overarching *Principles* in common, with a *future European Code of private law*. The collection of European Principles on which the Commission is working is simply the first stage of a much more ambitious project. In 2001 common principles were published in a volume entitled *Principles of European Contract Law, Parts I & II*, on the subject of formation, validity, interpretation, contents of contracts, the authority vested in an agent to validly bind her/his own principal, performance, non-performance, and judicial remedies on the basis of comparative analysis.

The difference between Lando's objectives and those of Gandolfi is evident, given that the latter is aiming at a true codification in the ordinary sense of the term, namely a systematic collection of mandatory, private law rules.

With respect to the *Unidroit* Principles, which are used primarily in international arbitration, not as a binding instrument but rather to assist in resolving controversies between parties to a contract which invokes the *lex mercatoria,* the *Principles* developed by the Lando Commission could be used by the national legislature where the adoption of new rules is contemplated, or by the European legislature as a function of a new common codification. One could also imagine the possibility that, once the Commission's work is finished, it could be of use to national authorities when they have the task of interpreting the rules of international conventions.

5.4. *The European Civil Code Project*

Another important academic initiative is the *Study Group for a European Civil Code*, made up of academic experts from the (new and old) Member States and from some of the candidate countries in the future enlargements of the European Union.

Currently, there are two websites about the project: the Dutch Team at http://ecc.kub.nl/ (Dutch Team actually consists of three

teams, located in Amsterdam, Tilburg and Utrecht) and the official pages of the study group at www.sgecc.net/. These web pages provide information about who they are, what they are seeking to achieve, how they work, and how they are presenting results.

The Study Group on a *European Civil Code* is a network of legal scholars from across the EU, engaged in research in the field of private law in the various legal jurisdictions of the Member States. The aim of the Project is to produce a codified set of Principles and Rules of European Patrimonial Law, complete with commentary and annotations.

The work of the Study Group is conducted by two principal sets of bodies. There are a number of *Working Teams* acting on a permanent basis, with responsibility for research and proposals within the fields of private law assigned to them. A *Coordinating Group*, a body of some thirty professors from all the EU Member States, meets at regular intervals and is charged with the task of reviewing the content of submissions made by the Working Teams. Organizational questions are addressed by a *Steering Committee* consisting of seven members and chaired by Professor Christian von Bar (Osnabrück). The Steering Committee makes recommendations as to the work priorities for the Study Group, in particular the sequence of meetings and the order of treatment of topics under review.

The day-to-day work of the Study Group is carried on in the *Working Teams*.

The Working Teams are: **1.** The Working Team on Sales, Services and Long-term Contracts, *Sub-team on Long-term contracts (*Prof. Martijn Hesselink), Long-term contracts: commercial agency, distribution and franchising contracts, *Sub-team on Services* (Prof. Maurits Barendrecht), Supply of services, *Sub-team on Sales* (Prof. Ewoud Hondius), Sale of goods; **2.** The Working Team on Financial Services (Prof. Laurent Aynès, Prof. André Prüm), Financial services; **3.** The Working Team on Credit (their work consists of scholarly comparative law research within their terms of reference) and Securities (Prof. Drobnig) (on law of personal securities (*sureties*), and security interests in moveables); **4.** The Working Team on Extra-Contractual Obligations (Prof. Christian von Bar), Tort law, *Negotiorum gestio*, Law of unjustified enrichments; **5.** The Working Team on Transfer of Moveable Property (Prof. Johannes Rainer), Transfer of property in moveables; **6.** The Working Team on Trust Law (Prof. Hector MacQueen), Trust law; The Study Group works in cooperation with the following associate teams: Project Group on a Restatement of European Insurance Contract Law (Prof. Fritz Reichert-Facilides), Insurance contract law.

Their work consists of research in comparative law within their terms of reference, analytical discussion of the nature, extent and rationale of the legal principles existing within the various European jurisdictions researched, and finally synthesis of common principles and demarcation of areas of profound diversity in the legal systems. Each Working Team determines for itself its own method for undertaking these tasks. The Teams are supported by a panel of *Advisors* who have been chosen because of their national expertise in the relevant field of law under review. Advisors meet with the Teams at intervals to provide subject-specific input to the tenor and detail of the evolving work; they also remain available for consultation by the Teams at other times. Given the familiarity with the intrinsic problems of a given legal topic which the Advisors possess, the Advisory Councils enable the direction and outcome of the research in each Team to be guided and informed by an independent standing pool of knowledge. The outcome of the studies undertaken in the Working Teams is reproduced in *Position Papers*, which are developed and refined on an evolving and iterative basis. In addition to setting out the comparative law research and analysis of the relevant rules, these papers endeavour to restate the law in the form of draft articles. These articles detail the principles of consensual (or predominant) acceptance in the current law across the Member States while, at the same time, making provisions for those parts of the law where the comparative research has uncovered (substantial) disharmony.

In putting forward proposals, the draft principles often attempt to surmount existing legal diversity with a solution which either bridges different approaches or develops a fresh perspective. These materials are accompanied by an introduction, detailed commentaries and notes, the purpose of which is to justify the particular rationalization of current law which the articles embody, to demonstrate the support which the restated principles enjoy in the existing law of the various legal systems by means of appropriate references, and to explain how interpretation and application of the restated principles produces the propositions set for in the text of the paper.

At the various stages of their development, Position Papers are submitted to the *Coordinating Group* for scrutiny by its membership of distinguished jurists from across Europe. In light of the reasoned deliberations of the Coordinating Group, Position Papers are revised by Working Teams to reflect the further considerations which have emerged in the wider discussion of the texts. Revised or rewritten Position Papers are resubmitted to the Coordinating Group for fresh scrutiny.

The strength of this open-ended process of improving the draft articles is that it ensures that they are supported by a breadth of academic

opinion and that their suitability and intellectual justification is rigorously reviewed. The Study Group on a European Civil Code benefits from a substantial overlap in membership with the Commission on European Contract Law (the Lando Group).

The main difference between the European Civil Code Project and Gandolfi Project consists in the global view of all interests involved taken by the first group, which try to unify the general part of contract law (*rectius*, of *patrimonial law*) and certain specific types of contracts.

5.5. *The Trento Common Core Project*

The *Common Core of European Private Law Project* merits a special mention. It originated in 1993 at the University of Trento, under the auspices of Professor Schlesinger, upon the initiative of Professors Ugo Mattei and Mauro Bussani and soon won the attention of civil and comparative lawyers all over the world.

The distance between the Common Core and the initiative described above is notable both in respect of the aim and object of the research as well as the methodology applied.

First of all the Trento project is not concerned just with the laws of contracts and obligations, but goes beyond contracts and torts and into the law of property as well.

Regarding its aim, the participators in the project have been given the task of setting out a reliable geographical "map" of European private law, and to "draw" on the map the results of the comparison. There is already an awareness that the work, by reason of its breadth, may become indispensable for the future collection or codification of European law.

The difference with respect to the other initiatives illustrated above is that the purpose is not to find uniform rules at all costs, nor to create a rational system for the solutions which will be built up on the "map": what matters is only the exactitude of the picture.

Regardless of whether or not the future development is a *European Code*, or whether the choice is between pluralism or unity, the first step to take, in any case, is to establish an accurate knowledge of what is in play. According to the promoters of the Trento project, the present debate on a European Code recalls clearly the nineteenth century debate between Savigny and Thibaut on the advisability of codification in Germany, regarded as an opposition between law seen as a product of history, and law seen as a product of reason.

To the end of mapping European private law, questionnaires have been developed regarding case law with the aim of discovering the working solutions in use in the various systems, applying an up-dated version

of the methodology of the *factual approach* used by Schlesinger in the 1960's for the seminars at Cornell.

The general meetings are organized in plenary and topical sessions. They are also a crucial part of the project's organization. The plenary discussions which open and close the general meetings are the venue of much of the necessary methodological debate that accompanies the actual comparison. The instructions on how to answer the questionnaires were actually produced in the course of such general discussions. It has been a tradition to open the Trento meetings by inviting senior scholars involved in similar projects or recognized as leaders in the field of private law, comparative law, or European law, to address the participants commenting on the common core approach. Each questionnaire, edited by one or more co-editors, forms the basis of a volume on the topic and is discussed within one of the three general areas in which the project is organized (i.e., *property, contracts, and torts*).

> At present, three books have been published under the Project, by the Cambridge University Press: R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (2000), J. Gordley, *The Enforceability of Promises in European Contract Law* (2001), M. Bussani & V. Palmer, *Pure Economic Loss in Europe* (2003).
>
> See the project's website at http:// www.jus.unitn.it/ dsg/common-core/

What distinguishes the aims and methods of the *Common Core* is the conviction of the majority of its members that the important thing is not so much to create new and more or less artificial common principles, but to more fully understand the differences and highlight the similarities in rules and results which *already exist in the domestic laws*[30] with the aim of creating a *European legal culture*.

The Trento Project, then, is principally directed at legal scholars: an important premise is that if an adequate legal culture is not established, the creation of a supranational legal system would be useless, since it will lack the lawyer-interpreters who understand and appreciate the reasons for such a law and its history.

Therefore, the best way to create such a free area, in legal terms, in Europe would be to create schools of European common law, where the

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[30] From this point of view the aims and purpose of the *Common Core* coincide perfectly with what constitute, as far as Rodolfo Sacco is concerned, the primary aim of the comparative method (see chapter I, § 15).

law courses taught transcend the specifics of the various national laws. Code and practice should not be seen to be in antithesis and exclusive of one another: the law should never exclude an underlying legal culture.

5.6. *The Acquis Group*

The establishment of the *Acquis Group* heralds a new initiative as regards the scholarly investigation and systematic arrangement of *existing Community private law*.

Existing Community law, the so-called *Acquis communautaire*,[31] is made up of an incoherent mass of individual pieces of legislation and case law, emanating from different policies and pursuing different aims. Nevertheless, common elements and structures are becoming increasingly discernible. The task of the Acquis Group lies in identifying the common features of European private law, which are emerging in Community law, and to use them to understand and develop the law. In particular, the Acquis Group intends to contribute to the task of providing material for the European Commission to build the *Common Frame of Reference* (CFR) mentioned in the Communication of February 12th 2003.[32]

Its task is to derive common Principles of Existing EC Private Law following a new approach, by focusing upon EC Law itself, instead of comparing different national legal systems.

The *Principles of Existing EC Private Law* will consist of three core elements:

Firstly, general outlines will be presented, which identify the Community's underlying political and economic intentions. These outlines can be compared to the recitals within Community legislation.

Secondly, definitions of major legal terms used in Community legislation will be formulated. These definitions will also include evidence of exceptions and inconsistencies within Community legislation.

Thirdly, in some areas, existing Community legislation on contract law has become so prolific as to allow contract law rules to be distilled and reformulated on a more general level (the so called *Principles of Existing EC Contract Law)*.

Such rules can be juxtaposed with the existing Community legislation from which they are derived, thus also demonstrating whether these rules can claim general validity, or whether inconsistencies still exist in particular areas of contract law. The Principles will be further elaborated

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[31] *Cf.* chapter I § 11.

[32] *Cf.* above § 2, this chapter and § 11, in chapter I.

by an accompanying commentary. Therefore, these Principles of Existing EC Contract Law should provide elements for the common frame of reference both with regard to the set of definitions and to an intended set of principles.

The group is represented by its speaker, Professor Gianmaria Ajani, and coordinated by Professor Hans Schulte-Nölke.

> Member institutions are, *inter alia*: University of Turin (Prof. Ajani, Prof. Ferreri), University of Piemonte Orientale (Prof. Graziadei); Institute for European and Comparative Law, University of Oxford (Prof. Freedland, Dr. Dannemann); UMR de droit comparé, Université Paris I-Sorbonne (Prof. Rochfeld, Houtcief); Department of International Law and Economy, Universitat de Barcelona (Prof. Borrás Rodriguez, Prof. Gonzalez-Beilfuss); Research Group on EC Private Law, Universities of Bielefeld, Hamburg, Heidelberg, Münster, Würzburg et al. (Prof. Magnus, Prof. Schulte-Nölke; Prof. Schulze et al.); Department of Private Law, University of Helsinki (Prof. Wilhelmsson); Business & Law Research Centre, University of Nijmegen (Prof. Kortmann); Institute for Private Law and for Foreign and International Private Law, University of Graz (Prof. Bydlinski); Consumer Law Center, University of Coimbra (Prof. Pinto Monteiro, Prof. Mota Pinto); Hellenic Institute of International and Foreign Law, University of Athens (Prof. Kerameus); Institute for International Private Law and European Economic Law, Eötvös Lorand University (ELTE), Budapest (Prof. Lajos Vékás); Copenhagen Business School, Law Department, Copenhagen (Prof. Møgelvang-Hansen); University of Lund (Prof. Bogdan, Prof. Gorton).
>
> See the project's website at http://www.acquis-group.org/index.html.

The Principles of Existing EC Private Law (in particular those on contract law, i.e. the Principles of Existing EC Contract Law) to be formulated by the Acquis Group differ from initiatives relating to European private law to date, mainly in that they will be taken from existing Community law and not from domestic legal systems.

Therefore, these Principles cannot replace the existing Principles of European Contract Law of Lando, and those projects (mentioned above) with similar objectives. Rather, they are to explore an important perspective which, up to now, has not been systematically analyzed. By focusing on Community law the economic reality of the European legal area will be articulated more clearly than has hitherto been the case.

The Principles which derive from the existing *acquis* will serve to

promote the compatibility of Community law with the legal systems of Member States, providing important assistance for Member States in the process of transposing Community law or aligning national laws to neighbouring European law.

Moreover, they will serve as a common basis for the Community legislature when preparing a revision of the existing *acquis communautaire* in the field of contract law by helping to increase coherency with regard to legal language and contents; they will help avoid inconsistencies and foster the creation of a more homogenous system of sector-specific legislation. Finally, they will provide practitioners with valuable support in interpreting Community law and the respective transposed provisions within national legal systems.

5.7. *Other Initiatives*

The initiatives described above are not the only ones. While there are several, diverse undertakings to be found in virtually all the countries of the Union, they share the same objective: consolidation of a common body of European private law. In some cases they are networks financed by the European Commission, which connect universities of a certain number of Member States, or universities of Central and Eastern Europe with those of Member States.

One of these joint research projects, known as *Common Principles of European Private Law*, has concluded its first three-year cycle, and another four-year period on *Uniform Terminology for European Private Law* has recently been started.

> Concerning the first research project, see the official website, directed by the coordinator, Prof. Schulze: www.uni-muenster.de/Jura.history/Europa. Partner Universities were Barcelona, Berlin (Humboldt University), Lyon (Jean Moulin), Münster, Nijmegen, Oxford, and Turin.

> Concerning the second research project, see the official website, directed by the coordinator, Prof. Ajani: http://www.dsg.unito.it/ut/. Partner Universities are Barcelona, Lyon (Jean Moulin), Münster, Nijmegen, Oxford, Turin, and Warsaw.

The aim of the network is to work out common principles and structures for the core areas of private law using comparative studies of the law in the Member States. A key assumption in this project is that the further process of unification in the EU will require a much deeper reconciliation between the different national laws.

The research plan is based on a vision of the participating teams that, in regard to private law of the Member States, the differing codification and casuistry as well as common structures can be demonstrated by means of comparative studies.

During the last three years, the seven teams from six countries have held biannual joint conferences in cooperation with the network co-ordinator, Professor Schulze. In the meantime, mutual visits among participating researchers in order to co-ordinate the network activities ensured close cooperation. Furthermore, there have been workshops and several joint publications. The individual researchers have worked together with the participating teams: in this way, each one has been able to learn about the system of law of several countries, not just by reading comparative literature, but by directly experiencing research work in a foreign legal environment.

Other initiatives have arisen as a result of the academic interests of groups of scholars, which are centered around research institutes or centres of documentation (as well as universities): one of these initiatives which has original characteristics goes by the name of *Lectures in Comparative law, International law and European law.*

This concerns an interdisciplinary discussion forum inaugurated in 1999 at the Institute for European Studies of Turin, by Professors Gianmaria Ajani, Michele Graziadei, and Bianca Gardella Tedeschi. According to the forum's organizers, the lectures are an opportunity for specialists from three different disciplines, i.e. comparative law, international law and European law, to meet; these disciplines traditionally have occupied distinct areas in the legal scene with little intercommunication. However, changes in the meaning of sovereignty, the creation of law by international and supranational organizations and trans-national commercial practices are some of the factors which have encouraged a change in viewpoint, favoring the abandonment of strict segregation of areas among the disciplines. The Turin forum therefore, seeks to encourage debate on the changes taking place, and those taking part find themselves participating in a well-tried work scheme, which takes the form of a "three-way dialog," centering on the figure of the participant (who presents her/his own paper), discussant (who makes a critical commentary), and contributing panelists (who conclude the discussion).

> So far the following have participated as contributors: Peter Fitzpatrick, Gràinne De Bùrca, Daniela Caruso, Joseph H.H. Weiler, David Kennedy, Antonio Gambaro, Christian Jorges, Filippo Ranieri, Franz Werro, Gunther Teubner, Sacha Prechal, R. MacDonald, Yves Dezalay, Yoichi Ito, Daniel Jutras, David and Luise Trubek, Mads Andenas, Esther Arroyo i Amayuelas, Richard E. Gold.

Another similar initiative is formed by the *Jus Commune Lectures on European Private Law,*[33] organized by The Netherlands Comparative Law Association, which was established on January 20th 1968 to promote and stimulate the comparative legal analysis in regard to all areas of the law (private and public law) in The Netherlands.

Several other projects are already under way to promote understanding of the European common legal heritage. Another initiative aims to furnish legal writings and materials for use by teachers and students, judges and other practitioners, legislators and officials. This was commenced during the 1990's (in cooperation with Maastricht University and the European Commission) and is issued as the series *Casebooks for the Common law of Europe*.[34] The 'Casebooks Project' was initiated by Professor Walter Van Gerven, with the aim of highlighting similarities and differences between the various legal systems through the analysis of selected case law precedents. Leading cases in the various legal systems are placed alongside other material to be studied (academic commentary, sources of law) with the additional aim of highlighting the interaction of case law with other legal 'formants' within the same legal system. The research results, which are not confined to the law of contract, are published in volumes, each of which is devoted to one specific field of law (contract, tort, property, and so on). The *Casebooks* are complemented by a range of notes and commentary, which aid the understanding of the common principles which emerge, or the differences encountered between the legal systems which form the subject of the study.

> In 1998 a first volume concerning tort law was published by the project (and in 2000 a further volume appeared: W. VAN GERWEN, J. LEVER, P. LAROUCHE, *Cases, Materials and Text on National, Supranational and International Tort law,* Oxford, 2000); later came a volume on contract (H. BEALE, A. HARTKAMP, H. KOETZ, *Contract law, Casebooks on the Common Law of Europe,* Oxford, 2002) and a further volume on unjust enrichment (J. BEATSON, E. SCHRAGE, *Unjustified Enrichment,* Oxford, 2003).The volume entitled *Non-Discrimination Law* is at an advanced stage of preparation.

The descriptive-analytical approach taken by the *Casebooks* project is shared by the *Common Core* project at Trento; they represent comple-

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[33] See the website at http://www.ejcl.org./ .

[34] See the website at http://www.law.kuleuven.ac.be/casebook/index.htm

mentary forms of research into the common private law of Europe through a "bottom-up" approach, primarily aimed at encouraging the creation of a solid European legal culture.

6. A View of European Common Law: Uniformization and Diversity

Aside from the various routes which they are taking, what is common to all these projects is the desire to focus on the common legal heritage, and so to increase the applicability of a common European private law.

"To unify" means to go beyond the Community objective of harmonization of the laws, for the sake of a more radical ideal which is in contradistinction to the restricted view of tasks and objectives of the European Union. In this sense, the debate regarding unification of private law in Europe is in the political arena, which presently characterizes discussions of the future of Community institutions and their relationships with the Member States.

It is not by chance that the United States' Restatements are frequently cited in support of the unification ideal which brings together States whose legal traditions are not always homogenous and where the problem is as much political as it is legal.

However, the parallel between the U.S. and the European experiences should not be pushed too far. While it is true that the problems on the political front are quite similar, the legal ones are characterized by particular features, the first of which is of course the linguistic diversity of the old Continent. Besides which, while the historical differences among the legal traditions of the European States are ancient and deep-rooted, as far as the United States is concerned, almost all of the States have internal legal systems which are typical of the Common Law tradition. There is still a common legal language and culture in all the various States which make up the U.S., while in Europe one may be able to discuss the common core of the different traditions, but cannot overlook the presence of absolutely individual institutions amongst the individual traditions. A further difference between the U.S. and Europe rests in the different democratic legitimization of the supranational institutions, in one part "federal," in another, of "the Union."

The debate regarding the lack of democracy surrounding the decisions taken in Brussels is already well-known.

The body which has greatest democratic claim to legislative power and to political legitimacy, because it's directly elected (the European Parliament), was given the smallest part to play in the legislative process in the original Treaty of Rome. All the subsequent Treaty modifications

have been designed to increase the role of the European Parliament, but the other institutional actors are unenthusiastic about increasing its role in the legislative process. The European legislature, at the moment, can only lay down rules for the establishment and functioning of the common internal market (arts. 94 & 95 TEC). Beyond the objectives enumerated in art. 3 TEC, the Community and its institutions do not have legislative, executive, or judicial competences (art. 7 (1) TEC).

In other words, no legislature at the EU level is empowered to enact comprehensive legislation covering all areas of private, patrimonial law. For this reason it will not be possible to turn the initiatives aimed at drafting general principles or rules of contract law into binding law.

> The situation could change in the near future: according to the provisions of the Constitution for Europe (2004), Union legislative acts can be adopted on the basis of a Commission proposal only, except where the Constitution provides otherwise [art. I-26 (2)] and can be enacted by Parliament, jointly with the Council of Ministers (arts. I-20 and I-23, Constitution for Europe). See above chapters I and IV.

Some scholars have proposed amending the Treaty in order to bring codification of private law with the scope of Community law, in the same way as was decided by the Amsterdam Treaty with regard to judicial cooperation in civil matters.

Despite all these processes taking place, the unification of private European law seems difficult to achieve, especially in the form of a *European Civil Code*.

> The problematic issue of the different ways of creating a text for a common, European private law, from the international–constitutional point of view is, in some senses, a problem *beyond* the one dealt with in this book.
>
> Suffice it to say that the aforementioned parallel possibility (the issuing of regulations and directives or the promotion of Conventions) reflects the distinction drawn by Renè David regarding the ways of achieving unification of the law: i) *supranational* unification, transferring particular legislative competence to a political body; ii) *international* unification, in a strict sense, by means of organizing the coexistence of the States while respecting completely their sovereignty, in order to promote lasting international relations.

A majority of commentators believe it is unrealistic to think of forcing diverse legal systems to accept *ex abrupto* a rigid and detailed succession

of articles contained in a European Civil Code. An alternative would be rather the promotion, by the Community, of a Convention between Member States on the model of the Rome Convention of 1980,[35] or various Conventions for special contractual features, for property-related issues, or civil liability matters.

Furthermore, if such a hoped-for unification is to be attempted by means of legislative acts issued by Community institutions, it lacks a 'constitutional' basis in the founding Treaty and in its successive modifications. Indeed, possibly in art. 6 TEU (*ex* art. F of the Maastricht Treaty) there is a 'saving clause' in favor of the national legislature, in which respect for the national identities of the States forming part of the Union is declared.

To this objection, the supporters of unification reply that other objectives, such as for example consumer protection, were not really originally imposed by the Community either.

The critics respond by observing that it is precisely the difficulty encountered by the Community legislature in harmonizing just one area of the European private law (that of *consumer contracts*), which serves to demonstrate the impossibility of constructing a European Civil Code, at least as things stand at the moment.

The fundamental objection concerns the possible role which should be assigned to the European Community in laying down the codification of common private law: in light of the discussion of the *democratic deficit* characterizing the European Community's legislative process as noted above, the new Code might emerge as a tepid product of European bureaucracy before even considering the loss of the rich variety of legal models that currently characterizes the Community.

As we shall see in second volume of the Guide, *The Harmonization of Civil and Commercial Law in Europe*, the directives on unfair terms in consumer contracts, on the protection of the consumer in respect of contracts negotiated away from business premises, on time-shares and so on, are the result of long and drawn-out bargaining-sessions between the organs of the Community and the States, which—at all costs—attempt to preserve the main characteristics of their own systems.

It is a mistake to ignore the problem of the cost of having diverse private law systems, and probably the ability to cope with these differences is underestimated. Economic research and the cost/benefit approach

[35] See above § 4, in this chapter. The only difference would be the 'interested area': substantive law, instead of international private law.

could help one to more accurately calculate the cost of diversity compared with the cost of coping with differences.

However, it could equally be a mistake to overlook the difficulties implied by the construction of a European Civil Code, whether it is presented as an *alternative* to national laws, or is created as a complete *replacement* of the national systems of codification.

The most realistic point of arrival at which the strategy adopted by the Commission is aimed—broadly in evidence in the *Action Plan 2003* and the *Communication 2004*[36]—is an Optional Code: a type of legal instrument which leaves the parties free to change and create their own rules and alter existing ones. On the one hand, the development of a *soft law* instrument gives the sense that something is happening, but, on the other, it fails to create a set of rules capable of governing the economic dynamics which are unfolding in Europe. For the 'soft law' argument to prevail, as some authors have pointed out, involves the supranational legal system renouncing control over economic processes. Private law thus abdicates its principle function of governing the market, to become a product of market forces.

Whatever the final results may be, the value of the various projects and initiatives illustrated above does not depend upon the effective achievement, in a more or less brief period of time, of a single Code (hard Code or soft/optional instrument) or of a Restatement of the law.

In any case, they will certainly have a fundamental role in the development of Community legislative activity, as the Commission itself pointed out in the *Communication 2004*. In fact, as we said above in the first pages of our book, the preliminary work for the CFR will be founded within the Sixth Framework Programme for research. The activity of the scholars will be of great assistance both to the European Commission and the Court of Justice to be able to count on the support of restatements of existing EC common principles. Thus the European institutions will be able to consider the results and reflections of the European legal scholars.

It will not only be the authorities in Brussels who will benefit from the academic studies on the subject: there is an army of lawyers and professionals, not to mention private individuals in each Member State, who encounter European Community law on an ever more frequent basis in their daily lives.

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[36] See also above chapter I, §11.

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(see also bibliography ch. I)

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List of Abbreviations

AG	Advocate General
AP (s)	Accession Partnership (s)
C-	Case
CEECs	Central and Eastern European Countries
CFI	Court of First Instance
CMEA	Council for Mutual Economic Assistance
COREPER	Committee of Permanent Representatives of the Member States
EA	Europe Agreement
EBRD	European Bank for Reconstruction and Development
EC	European Company
ECJ	European Court of Justice
ECR	European Court Reports
ECS	European Cooperative Society
ECSC	European Coal and Steel Community
EC	European Community
EEA	European Economic Area
EEC	European Economic Community
EEIG	European Economic Interest Grouping
EFTA	European Free Trade Association
EIB	European Investment Bank
EMS	European Mutual Society
EP	European Parliament
EURATOM	European Atomic Energy Community
EU	European Union
FDI	Foreign Direct Investments
FTA	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GIE	Groupement d'Intéréte économique
IBRD	International Bank for Reconstruction and Development (World Bank, WB)
IGC	Intergovernmental Conference
ILO	International Labor Organization
IMF	International Monetary Fund
ISPA	Instrument for Structural Policies for Pre-Accession
MDBs	Multilateral Development Banks
NPAA(s)	National Program(s) for the Adoption of the Acquis

OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
OJ	Official Journal of the European Union
SAA	Stabilization and Association Agreements
SAPARD	Special Accession Program for Agriculture and Rural Development
SE	Societas Europaea
SEA	Single European Act
SIGMA	Support for Improvement in Governance and Management
TAIEX	Technical Assistance Information Exchange Office
TEC	European Community Treaty
TEU	European Union Treaty
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Miscellaneous

ABA	American Bar Association
ABGB	Allgemeines Burgerliches Gesetzbuch fur Osterreich (Austrian General Civil Code)
AC	Appeal Cases (English Law Reports)
AG	Aktiengesellschaft
AGB Gesetz	German Act on General Terms and Conditions in Business
art.	article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (Supreme Court, Ordinary Jurisdiction)
BGHZ	Reports of civil cases of the German Federal Supreme Court
CEELI	Central and East European Law Initiative
Cass.	Corte di Cassazione (Italy)
Cass. S.U.	Cassazione, Sezioni Unite (Italy)
Cf.	compare, see
Civ.	Camera civile della Corte di Cassazione (Italy)
Com.	Camera commerciale della Corte di Cassazione (Italy)
Cod. civ.	Codice civile (Italy)
CONSOB	Commissione nazionale per le società e la borsa (Italy)
C. consom.	Code de la consommation (France)
Corte cost.	Corte costituzionale (Italy)
d.lgs.	decreto legislativo (Italy)
d.l.	decreto legge (Italy)
Dir.	Directive
DM	Decreto Ministeriale (Italy)
DPR	Decreto del Presidente della Repubblica (Italy)

ff.	followings
Gazz. Uff., Suppl. Ord., Serie gen.	Gazzetta Ufficiale, Supplemento Ordinario, Serie generale (Italian Official Journal)
GTZ	German organization for technical cooperation
HGB	German Commercial Code
Ibid.	Ibidem
ID.	Idem
L.	Legge/Loi/Ley
MICECO	French inter-ministerial mission for Central and Eastern Europe
NBW	Nieuw Burgerlijk Wetboek (Dutch Civil Code)
Para(s).	Paragraph(s)
S.A.	Société Anonyme (France)
S.A.R.L	Société a responsabilité limitée (France)
R.D.	Regio Decreto (Italy)
Reg.	Regulation
TAR	Tribunale amministrativo regionale (Italy)
Trib.	Tribunale (Italy)
Sez.	Sezione (Italy)
ZPO	German Code of Civil Procedure

Law Reviews

All ER	*All England Reports*
Am J.Comp.L.	*American Journal of Comparative Law*
AJIL	*American Journal of International Law*
Bull.	*Bulletin des arrêts de la Cour de Cassation*
Cal. L. R.	*California Law Review*
CMLR	*Common Market Law Review*
Colum.L. R.	*Columbia Law Review*
Cornell L. R.	*Cornell Law Review*
EC Bull.	*European Community Bulletin*
EJIL	*European Journal of International 1aw*
EL Rev.	*European Law Review*
ERPL	*European Review of Private Law*
European Competition L. Rev.	*European Competition Law Review*
Harv. L. R.	*Harvard Law Review*
Hastings LJ	*Hastings Law Journal*
ICLQ	*International and Comparative Law Quarterly*
JBL	*Journal of Business Law*
J Leg. Stud.	*Journal of Legal Studies*
J Pub Law	*Journal of Public Law*
LQR	*Law Quarterly Review*

LS	*Legal Studies*
Mich.L.R.	*Michigan Law Review*
MLR	*Modern Law Review*
NYULR	*New York University Law Review*
OJLS	*Oxford Journal of Legal Studies*
Stan.L.R.	*Stanford Law Review*
Texas L Rev	*Texas Law Review*
Tulane L Rev	*Tulane Law Review*
YaleLJ	*Yale Law Journal*
WLR	*Weekly Law Reports*

AG	*Die Aktiengesellschaft*
AöR	*Archiv des öffentliches Rechts*
BB	*Betriebs-Berater*
BKR	*Zeitschrift für Bank- und Kapitalmarktrecht*
CR	*Computer und Recht*
DB	*Der Betrieb*
DVBl.	*Deutsches Verwaltungsblatt*
EuR	*Europarecht*
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*
EWS	*Europäisches Wirtschafts- & Steuerrecht*
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht*
IPRax	*Praxis des internationalen Privat- und Verfahrensrechts*
JA	*Juristische Arbeitsblätter*
Jura	*Juristische Ausbildung*
JZ	*Juristenzeitung*
NJW	*Neue juristische Wochenschrift*
RdE	*Recht der Energiewirtschaft*
RIW	*Recht der internationalen Wirtschaft*
RRa	*Reise Recht aktuell*
VersR	*Versicherungsrecht*
VuR	*Verbraucher und Recht*
WM	*Wertpapiermitteilungen*
WRP	*Wettbewerb in Recht und Praxis*
WuW	*Wirtschaft und Wettbewerb*
ZEuP	*Zeitschrift für Europäisches Privatrecht*
ZEuS	*Zeitschrift für Europarechtliche Studien*
ZHR	*Zeitschrift für das gesamte Handelsrecht*
ZLR	*Zeitschrift für das gesamte Lebensmittelrecht*
ZÖR	*Zeitschrift für öffentliches Recht*
ZRP	*Zeitschrift für Rechtspolitik*
ZUM	*Zeitschrift für Urheber- und Medienrecht*

AJDA	*Actualités juridiques du droit adiministratif*
Cah. dr. eur.	*Cahier de droit européen*
Contrats, conc., consomm.	*Contrats, concurrence, consommation*
D.	*Dalloz*
D. Aff.	*Dalloz Affaires*
Defrénois	*Répertoire du notariat Defrénois*
Dr. et patrim.	*Droit et patrimoine*
Gaz. Pal.	*La Gazette du Palais*
I. R.	*Informations rapides*
J. C. P.	*Juris-classeur périodique*
JCP	*Semaine Juridique*
JCP(E)	*JCP édition Entreprise*
P. A.	*Les Petites Affiches*
Rec.	*Recueil Lebon*
Rev. crit. dr. internat. privé	*Revue critique de droit international privé*
Rev. eur. dr. consomm.	*(REDC) Revue européenne de droit de la consommation*
Rev. du dr. de l'U. E.	*Revue du droit de l'Union européenne*
Rev. int. dr. comp.	*Revue internationale de droit comparé*
Rev. trim. dr. civ.	*Revue trimestrielle de droit civil*
Rev. trim. dr. com.	*Revue trimestrielle de droit commercial*
Rev. trim. dr. eur.	*Revue trimestrielle de droit européen*
Rev jur. dr. aff.	*Revue de jurisprudence de droit des affaires*
Rev. rech. jur.	*Droit prospectif, revue de la recherche juridique*
RIDC	*Revue internationale de droit comparé*

Arch. Civ.	*Archivio civile*
Contratti I	*Contratti*
Contr. e Impr.	*Contratto e Impresa*
Contr. e Impr./Europa	*Contratto e Impresa/Europa*
Corriere Giur.	*Corriere Giuridico*
Danno e resp.	*Danno e responsabilità*
Dir. comun. e scambi internaz.	*Diritto comunitario e degli scambi internazionali*
Foro amm.	*Foro amministrativo*
Foro It.	*Foro Italiano*
Giornale dir.amm.	*Giornale di diritto amministrativo*
Giur.amm.sic.	*Giurisprudenza amministrativa siciliana (ora Giustizia amministrativa siciliana)*
Giur. di merito	*Giurisprudenza di merito*

Giur. It.	*Giurisprudenza italiana*
Giust. civ.	*Giustizia civile*
Giust. Cost.	*Giustizia Costituzionale*
Guida al dir.	*Guida al diritto*
Resp. civ. prev.	*Responsabilità civile e previdenza*
Riv. crit. dir. priv.	*Rivista critica di diritto privato*
Riv. dir. civ.	*Rivista di diritto civile*
Riv. dir. comm.	*Rivista di diritto commerciale*
Riv.it.dir.pubbl.com.	*Rivista italiana di diritto pubblico comunitario*
RTDP civ.	*Rivista trimestriale di diritto e procedura civile*

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