THE PRACTICE OF THE EUROPEAN COURT OF JUSTICE —A FACTOR IN THE PROMOTION OF INTEGRATION

BY

OLE DUE

The Preamble to the Treaty establishing the European Economic Community states that the Governments of the Member States have decided to lay the foundations for an ever closer union among the peoples of Europe.* In other words, even the original Treaty foresees a continuous process of integration.

This process of integration is, naturally, thought to be promoted by acts adopted by the political bodies, the Commission and the Council of Ministers with the participation of the European Parliament. In fact, however, the Court, through its legal practice, has also decisively contributed to this process.

In order to see how the Court has been able to make such a contribution, it is necessary to understand those treaty provisions that lay down the competence of the Court, to understand the interplay between the Court and such litigants as may have an interest in promoting integration, and to know something about the methods used by the Court when interpreting the Treaties.

The Court's principal task is indicated by article 164 of the Rome Treaty: [t]he Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed.

This task shall be exercised within the limits of the special jurisdictions conferred upon the Court in subsequent articles. The most important of these include four kinds of direct action, *i.e.* actions for infringement of the Treaty, actions for annulment, actions for failure to act and actions for damages, and one kind of indirect action whereby national courts make references for a preliminary ruling to the Court.

Actions for infringement of the Treaty[1] are brought against a Member

* Speech delivered by the President of the European Court of Justice, Dr. Ole Due, in connection with his receiving a doctor's degree in law *honoris causa* awarded by the Stockholm Faculty of Law in 1991 at a ceremony arranged by the Faculty's Law Journal (*Juridisk Tidskrift*). Published as *EF-domstolens retspraksis som integrationsfremmende faktor*, 1991/92 *Juridisk Tidskrift* 407–416.

[1] See Arts. 169–171 of the Treaty.

State, either by the Commission or by another Member State, though in practice this latter possibility has proved to be an exception. The relief which may be granted in such an action is partly declaratory, but the State found to be in breach of the Treaty has, under the Treaty, a duty to take the necessary steps to comply with the judgment, *i.e.* to end the infringement of the Treaty stated in the judgement.

In case of an action for annulment[2] the Court examines the legality of a binding legal act of the Council of Ministers or the Commission. The grounds for annulment are those of administrative law: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, and misuse of power. Such an action may be brought by a Member State, by the Council of Ministers or by the Commission, without any limitation as to substance and without any requirement to show a legal interest (*locus standi*) in the case. The Treaty also awards natural or legal persons a limited right to bring actions, which will be discussed below. The Court has also, on its own initiative, given the Parliament a limited right to bring an action for annulment in order to protect its own prerogatives under the Treaty.

The obverse of the action for annulment is the action for failure to act.[3] Upon such an action, which may be brought by a Member State or by the Institutions of the Community, the Court may find that the Council or the Commission has failed to make a decision which should have been made according to the Treaty. Whereas an annulment entails the automatic quashing of the act concerned, as a rule retroactively, the mere establishment of unlawful failure to act does not cause the omission to come to an end; this is one of the reasons why in practice the action for failure to act has been used rarely.

Under an action for damages[4] the Court may impose non-contractual liability on the Community, in practice particularly relating to the norm-making and administrative activities of the Community.

Preliminary rulings[5] concern the interpretation of the Treaty or of an act of the Institutions of the Community, or the validity of such an act. Questions may be put before the Court by a national court which has found that it requires a decision on the issue in order to enable it to give judgement in a case brought before it.

But how can the Court, in the exercise of these competences, contribute to the promotion of the process of integration, and in doing so, play a real

[2] See Arts. 173, 174 and 176.
[3] See Arts. 175 and 176.
[4] See Arts. 178 and 215, sec. 2.
[5] See Art. 177.

political role? The Court is, in effect, barred from taking initiatives of its own, and must be content with settling matters brought before it. Therefore the initiative must emanate from an applicant. Amongst what are termed privileged applicants, *i.e.* those which may bring an action before the court without showing a legal interest (*locus standi*) in the matter, neither the Member States nor the Council of Ministers may be expected to bring actions with a view to promote the interest of integration. If the Member States, or in some cases, only a qualified majority of them, are in agreement concerning an initiative to promote integration, the road is normally open for political action. Even if this is not the case, however, all Member States have exercised a certain understandable restraint in relation to the possibility of using the Court for solving mutual disagreements.

On the other hand, the Commission has frequently used the action for infringement of the Treaty as well as the action for annulment, in some cases also the action for failure to act, to promote integration in cases where its proposals have reached deadlock in the Council of Ministers, or have been adopted with substantial limitations.

The European Parliament has, for the same purpose, on some occasions used the action for failure to act. Further, the Parliament has sought strenuously to have its right to bring an action for annulment recognized, although such a right is not provided for under the rules of the Treaty. In a recent judgment[6] the Court has accepted the right of action where the Parliament finds that the act was made in breach of Treaty rules on the participation of the Parliament in the law-making, and where the purpose of the action, therefore, is to protect the prerogatives of the Parliament. This decision rests upon the Court's notion that it must *inter alia* enforce respect for the balance of power between the Institutions of the Community laid down in the Treaty. In the future the decision will give the Parliament a limited right, also through action for annulment, to promote its political goals of integration.

As well as the Commission and the Parliament, private applicants may often have an interest in promoting integration. The right of such applicants to bring a direct action is, however, severely limited. They have no right to bring an action for infringement of the Treaty, but must be content with complaints to the Commission in cases of possible infringement of EEC rules by a Member State. They may bring an action for annulment and for failure to act, but only against decisions which are addressed—or would have been addressed—to themselves, and against decisions which, although they have been given the form of regulation or a decision ad-

[6] Case 70/88 *Parliament* v. *Council* ("Post Chernobyl") [1990] ECR I-2041.

dressd to another person, affect them, directly and individually.[7] Should a decision addressed to private applicants constitute the application of a regulation in a concrete case, they may also, in connection with the action instituted against the decision, invoke the applicability of the regulation.[8] (A plea of illegality).

This severe limitation of private applicants' direct access to the EC Court must be seen against the background of the way in which the administration of Community rules is arranged. Only in some areas, particularly in the field of competition law,[9] are these rules administered by the Commission. Normally, the administration of Community rules is the responsibility of national authorities. The implementation of such rules is widely delegated to the Member States, when the Communities have used the form of a directive, since the directive is only binding upon the Member States as to the result to be achieved, but leaves the States free to choose the forms and methods of implementation.[10] Wherever the application of Community rules in relationship to the citizen is the responsibility of national authorities, disputes regarding such application may be brought before national courts. Admittedly, the national courts may refer a question concerning the interpretation and validity of the Community rule concerned for a preliminary ruling to the EC Court, but this presupposes that the rule may be applied directly by the national court.

For these reasons the concept, commonly referred to as the "direct effect" of Community rules in Member States, has had considerable importance for the indirect access of private litigants to the EC Court of Justice.

Some of the provisions of the Rome Treaty, according to their tenor, directly concern individual enterprises.[11] There has never been any doubt that these provisions have a direct effect in the Member States. The same can be said about rules which have been given the form of regulations, such as is the case *inter alia* in the field of customs and agriculture. A regulation is, according to the Treaty,[12] of general applicability: it is binding in its entirety and is directly applicable in all Member States.

The question whether those provisions of the Treaty which according to their tenor are directed towards the Member States, but which are sufficiently precise to be directly applied by any national authority, including

[7] See Arts. 173, sec. 2, and 175, sec. 3.
[8] See Art. 184.
[9] See Arts. 85–87.
[10] See Art. 189. sec. 3.
[11] See for example Arts. 85 and 86 as well as Art. 79, sec. 1.
[12] See Art. 189. sec.2.

the courts, have a direct effect, was first squarely put in the case *van Gend en Loos*, 1962.[13] Since most of the Member States apply the dualistic view of the relationship between international treaties and national law, it was only natural that the Member States, which intervened in the matter, suggested that the issue be answered in the negative. The Court, however, gave an affirmative reply.

From later Court practice on the direct applicability of Treaty provisions it can be inferred that all Treaty provisions which, according to their contents, are sufficiently precise and unconditional to be used in the national legal system have such a direct effect. This applies not only in the relationship between citizens and national administrative authorities, but also in the relationship between citizens, provided that the contents of the provision warrant such an effect ("horizontal direct effect"). In Court practice this has had particular significance for Art. 119 of the Treaty on equal pay for men and women.[14]

As already mentioned, a directive is binding only on Member States. Nevertheless, the Court has established that provisions of directives which are sufficiently precise and unconditional to be applied directly may be invoked by citizens should the directive not be implemented, on time and correctly, by the national authorities.[15] Here, however, the effect is still unilateral in the relationship citizen-authority. A state which has not implemented a directive may not treat its citizens as if they were directly bound by the directive.[16] Nor is the directive given a "horizontal effect" in the relationships between citizens. To afford the non-implemented directive binding effect in relation to the individual citizen or the individual enterprise would be contrary to the rule of law. Therefore, it is inacccurate in such a case to use the term "direct effect" of a directive. On the other hand, the Court has imposed a general duty on national administrative authorities and courts—regardless of the lack of direct effect of a directive—to interpret existing national law rules in such a way that the objectives of the non-implemented directive are reached as far as ever possible.[17]

[13] Case 26/62, *NV Algemene Transport—en Expeditie Onderneming Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*, [1963] ECR 105.

[14] See for example Case 43/75, *Defrenne* v. *SABENA*, [1975] ECR 455, Case 109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark* v. *Dansk Arbejdsgiverforening acting on behalf of Danfoss*, [1989] ECR I-3199, and Case 262/88, *Douglas Harvey Barber* v. *Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889.

[15] See for example Case 8/81, *Becker* v. *Finanzamt Münster-Innenstadt*, [1983] ECR I-53.

[16] See Case 152/84, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] ECR I-723.

[17] See Case 14/83, *Von Colson & Kamann* v. *Land Nordrhein-Westfalen*, [1984] ECR 1891, and, recently, Case 106/89, *Marleasing SA* v. *La Comercial Internacional de Alimentción SA*, [1990] ECR I-4135.

Direct effect would be of limited interest to the private litigant, unless it had the effect that contrary national rules must be set aside, in other words that Community rules shall prevail over national law. This issue was first put in the preliminary ruling of *Costa-ENEL*, 1964.[18] Costa was an Italian attorney, and the matter before the Italian *Giudice conciliatore* concerned the payment of a small electricity bill from the national electricity company ENEL. In rejecting the claim for payment, Mr. Costa wanted to protest against the nationalisation of the Italian electricity supply. He claimed *inter alia* that the nationalisation was contrary to certain provisions of the Treaty, and the Italian judge therefore, laid before the Court the question of the interpretation of these provisions. Community law, however, does not concern itself with the issue of ownership rights in the relationship between citizens and the public,[19] and the decision of the Court would not have attracted any great interest, had not the Italian Government intervened, suggesting that the Court dismiss the issue. According to the view of Italy the issue was one of national law only. The Treaty was implemented in Italian law by means of ordinary legislation, and as the statute on nationalisation was adopted later, this statute should, it argued, for this reason take precedence. This intervention caused the Court to establish that the transfer of sovereignty implicit in the Treaty entailed a corresponding limitation of the sovereignty of Member States, and that any subsequent national legisation, in contravention of a Treaty provision with direct effect, must, straight off be considered void.

This principle of supremacy of Community law was further developed in the *Simmenthal* case, 1978.[20] The issue before the Court was whether any Italian court had the right to set aside a national legislative provision as being contrary to Community law or whether such a matter first would have to be referred to the Constitutional Court. This is the body which, according to Italian law, has exclusive jurisdiction on issues of inconstitutionality of legislation. The European Court declared that *this* right—and duty—was conferred upon any national court of law. The Court used this opportunity to make the principle of supremacy more precise: it entails, first, that any Community rule of direct applicabiltity automatically makes any national rule with contrary legal effects void, and, secondly, that no subsequently enacted national rule may have effect contrary to directly applicable Community law.

We may already see how the Court, through these decisions, has deci-

[18] Case 6/64, *Costa* v. *ENEL*, [1964] ECR I-585.
[19] See Art. 222.
[20] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*, [1978] ECR 629.

sively strengthened the position of the Community in the Member States and thereby made a substantial contribution to integration. But at the same time, the Court has succeeded in making private litigants and national courts co-actors in the integration process.

The Court's method of interpretation is of fundamental importance here. It corresponds much more to that of a constitutional court than to that of an international court. Thus, for example, the Court has clearly avoided applying the international-law principle of mutuality in Community law.[21] The fact that the Court, in its interpretation of an individual provision of the Treaty, puts great weight on its context, is a matter of course. Nor is it remarkable that the Court puts decisive importance on the objective of the provision, as seen in its context. However, the Court perceives the issue of context far more broadly than a national court would normally consider doing. This implies that, even in its interpretation of legal issues in very narrow fields, it often seeks guidance in the very objective and principles of the Community, laid down in the first part of the Rome Treaty. Since there are no publicly accessible *travaux préparatoires* to the Treaty, the Court must itself make clear its understanding of these provisions on objectives and principles. In juxtaposition with the fact that both the Treaties and acts of the Institutions are authentic in all Community languages, the Court is given far wider scope for interpretation than any national court would normally have, even in constitutional matters.

Even if the Court does not refer to the Preamble of the Rome Treaty as a decisive element in interpretation, it does not ignore the idea of an ever-closer community, *i.e.* of continuous integration. Therefore, the Court has rejected the notion that a treaty provision might fall into desuetude,[22] or that competence, once conferred upon the Community, may return to the Member States, should it at a certain point become obvious that Council of Minister's majority, necessary to exercise that competence, cannot be reached.[23] Conversely, the Court has not hesitated to overcome the effects of the passivity of other Community institutions through its interpretation of the Treaty. It has, similarly, attempted to fill obvious *lacunae* in Community rules, and has reinterpreted Treaty provisions, when general developments in society have made such reinterpretation necessary. In what follows, examples will be given of the Court's method of interpretation in relation to all three groups indicated.

The Court's method of interpretation may be summarised as relatively

[21] See for example Case 232/78, *Commission* v. *France*, [1979] ECR 2729.
[22] Case 7/71, *Commission* v. *France*, [1971] ECR 1003.
[23] See *e.g.* Case 804/79, *Commission* v. *United Kingdom*, [1981] ECR 1045.

free, decisively linked to objectives, and dynamic.

As already indicated, the Court, through its practice, has attempted to mitigate the effects of the passivity of other Community institutions, notably that of the Council of Ministers.

According to Arts. 52 and 59 of the Treaty, restrictions on the freedom of establishment and the freedom to provide services were progressively to be abolished in the course of the transitional period, which expired on January 1, 1970. According to Treaty rules, this was to take place through the adoption of directives. Yet, at the expiry of this period, directives for a number of sectors were lacking. In spite of this, however, the Court declared in the *Reyners*[24] and the *van Binsbergen*[25] cases that the Treaty provisions on freedom of establishment and freedom to provide services were directly applicable as of that date. All nationality requirements for the exercise of gainful employment—in the case of services also any domicile requirement—became inapplicable in relation to Community citizens and enterprises, and a number of the Commission's proposals were hence made superfluous.

Something similar took place when the Court in the *Dassonville*[26] and the *Cassis de Dijon*[27] cases—apart from considering, as from the date mentioned, the prohibition in Art. 30 of the Treaty on quantitative restrictions on imports and measures having equivalent effects directly applicable—interpreted widely the prohibition against "measures having equivalent effect". Under the *Dassonville* ruling this expression covers all national rules which, directly or indirectly, actually or potentially, impede Community trade. Under the *Cassis de Dijon* ruling, goods which are lawfully produced and traded in one member State may be imported and sold in other member States. However, this judgment and many subsequent rulings on the same issue, apart from the exceptions expressly mentioned in Art. 36 (namely those which are based on *ordre public*, public security or the protection of health and life) accept other obstacles resulting from disparities in the legislation of Member States, provided that such legislation is applied in a non-discriminatory and proportionate manner and is necessary in order to satisfy mandatory requirements, *e.g.* of consumers or environmental protection. This Court practice has allowed the Commission and the Council to concentrate their harmonisation efforts on areas where, due to lack of harmonisation, unilateral restraints on trade are still lawful.

[24] Case 2/74, *Reyners* v. *Belgian State*, [1974] ECR 631.

[25] Case 33/74, *Van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299.

[26] Case 8/74, *Procureur Du Roi* v. *Dassonville et.al.*, [1974] ECR 837.

[27] Case 120/78, *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

In the examples mentioned, Court practice has made legislative initiatives superfluous. On other occasions the Court, on the contrary, has promoted such initiatives.

When Commission draft proposals to promote harmonisation have been stuck in the Council, the Commission has often, by bringing suits for infringement of the Treaty, attempted to establish that existing national regulations contravene the Treaty, thus increasing the interest of Member States in adopting harmonised rules. This method has been successfully applied in the insurance area,[28] and, less successfully, regarding taxation of wines and spirits.[29] In the last-mentioned area the Commission has forced Member States to remove discriminatory elements in taxation, but has not succeeded in overcoming the fiscal and health considerations that constitute the main reason for existing differences in levels of taxation in the Member States.

From time to time, preliminary rulings have also contributed to the promotion of common rules. Transport sector services are, in the Treaty, separated from the general rules on liberalisation and made part of transport policy, which is only slowly taking shape. The Court, however, has stated that the other rules in the Treaty apply to the transport sector, including the rules on competition.[30] In a recent case the Court has further established that the prohibition against abuse of a dominant market position contained in Art. 86 of the Treaty is directly applicable.[31] Probably there is no other area so marked by cartels and national privileges as air transport. Therefore, Member States have preferred to implement the long-overdue common rules on air transport rather than letting their courts apply Treaty rules directly to existing national air transportation legislative arrangements, with the ensuing unavoidable chaos.

Turning to the Court's filling of *lacunae*, we soon find clear examples in the cases on direct applicability and on supremacy. The Treaty itself has little to say on the effects of Community rules within the various national legal orders, and nothing at all on the legal effects under national law of infringements of the Treaty.

In the *Simmenthal* case[32] the Court ruled that it is incumbent upon national courts to protect the rights bestowed upon Citizens by Communi-

[28] See particularly Case 205/84, *Commission* v. *Germany*, [1986] ECR 3755.

[29] See for example Case 171/78, *Commission* v. *Denmark*, [1980] ECR 447.

[30] See for example Case 209–213/84, *Ministère Public* v. *Asjes et al.*, [1986] ECR 1425.

[31] See Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH* v. *Zentrale für Bekämpfung unlauterer Wettbewerbs e.V.*, [1986] ECR 80.

[32] Case 106/77, *Amminstrazione delle Finanze dello Stato* v. *Simmenthal SpA*, [1978] ECR 629.

ty rules of direct applicability. In most cases this is done by setting aside conflicting national rules. In some instances, however, the harm has already been done, *e.g.* when an enterprise had had to pay taxes and levies in contravention of Community rules. Here the Court has established a duty to make compensation. In the absence of Community rules, the details of the procedure and of the substance of the duty of repayment of charges are left to the national legislatures, but such rules must not be discriminatory and must not be so framed as to render it virtually impossible to exercise the right, *e.g.* through unreasonable rules on burden of proof or on limitation periods.[33] There may also be a need for interim protection of rights that citizens claim to enjoy under Community rules, until a national court is able to assess with certainty whether such rights exist; in the typical case after having referred the matter to the Community Court in the form of a preliminary ruling. In the *Factortame* case, 1990,[34] the Court told the House of Lords that a British court had a duty to suspend, by way of interim relief, the application of an act of Parliament, imposing nationality and domicile requirements for the registration of fishing vessels, provided that the sole obstacle which precluded it from granting the interim relief was a national Common Law rule, according to which interim relief may not be granted against the Crown. The judgment caused a lively discussion in the House of Commons and in the British press, although it is a natural consequence of the principle already established in the *Simmenthal* case.

In a recent case the Court has established that the failure to implement in due time a directive without direct effect may make the State liable for damages in relation to its citizens.[35]

Another *lacuna* in the Treaty was filled by the *ERTA* ruling, 1971,[36] under which the competence to make treaties with third-party countries rests with the Community, not only where this is expressly provided for in the Treaty, but also in areas where the Community has adopted internal rules which might be affected by such treaties.

The classic example of the filling of *lacunae* is, however, the Court's case law relating to the protection of fundamental rights. The Treaty does not offer a catalogue of such rights, with the exception of the prohibition against discrimination, and the Community as such has not ratified the Conventions on Human Rights. In consequence of the precedence of Community law, the fundamental rights contained in the various national

[33] See for example Case 199/82, *Amministrazione delle Finanze dello Stato* v. *SpA San Giorgio*, [1983] ECR 3595, and Case 208/90, *Emmott*, [1991] ECR I-4269.

[34] Case C-213/89, *The Queen* v. *Secretary of State for Transports, ex parte: Factortame Ltd and others*, [1990] ECR I-2433.

[35] Joined cases C-6/90 and C-9/90, *Francovich and Bonfaci*, [1991] ECR I-5357.

[36] Case 22/70, *Commission* v. *Council*, [1971] ECR I-263.

constitutions are not directly applicable in cases before the Community's institutions. The Court has, however, declared that such rights as may be inferred from the common constitutional traditions of the Member States and from Treaties to which all member States are signatories, form part of the legal principles, the application of which the Court will ensure.[37]

Finally, some instances will be demonstrated where the Court, by means of a dynamic interpretation, has adapted the Treaty to general developments in society.

By the so-called *Cassis de Dijon* case law the Court in effect has added national non-discriminatory rules for the protection of consumers and the environment, where the Community has still not introduced harmonisation rules, to the exceptions from the principle of free movement of goods stated in Art. 36. In doing so, the Court has accepted the consequences of the growing concern for such protection which has developed everywhere in Europe since the Rome Treaty in 1957 and long before such interests found expression in the Single European Act, 1986.

Correspondingly, the Court has accepted the consequences of the increased competence of the European Parliament, first, in granting, without support in Treaty provisions, access to annulment proceedings against Parliamentary decisions, which might affect the position of third parties,[38] and, secondly, in accepting a right of the Parliament to attack the validity of Council and Commission decisions where they have been made without Parliament participation, required according to the Treaty.[39] On these issues the text of the Treaty is amended by the Maastricht Treaty so as to conform to the practice of the Court.

Any attempt to illustrate in a single paper the importance of the Court for the process of integration will, of necessity, form a blurred picture, as when a videotape is run at high speed; for in each scene there are images which one might wish to stop and watch closer. Most of the scenes from which individual pictures have been presented here would easily form the subject of a separate paper.

The author has, however, attempted to convey a general impression of the European Court's far greater role in the political evolution of the Community than that played by any court in the Scandinavian context. It is important to be aware of this fact, particularly in a country which, most likely, in the near future will take part in negotiations for full membership of the Communities.

[37] See for example Case 44/79, *Hauer* v. *Land Rheinland-Pfalz*, [1979] ECR 3727.

[38] Case 294/83, *Partie Ecologiste "Les Verts"* v. *European Parliament*, [1986] ECR 1339.

[39] Case 70/88, *Parliament* v. *Council* ("Post-Tchernobyl"), [1990] ECR I-2041 (above, footnote 6).