

**LEGAL ENFORCEMENT OF OBLIGATIONS
INCUMBENT UPON MEMBER STATES
UNDER TREATIES OF THE EUROPEAN
COMMUNITIES**

BY

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In the area of international cooperation we are used to lofty words. The signing of a new treaty is generally accompanied by eloquent predictions of the benefits it will bring. Not often do we hear anybody worry about the chances of new international obligations being respected by “the High Contracting Parties”.

Certainly, there is said to be a principle of international law that the breach of an international engagement involves an obligation to make reparation of the moral and material wrong done. But what about the means of having it authoritatively established that a failure has actually taken place? There can be different opinions on such a matter. And, even supposing the state concerned does not deny a breach, what about the means of getting it to put an end to the infringement?

The first-mentioned problem is sometimes solved by a special clause to the effect that the contracting states undertake to accept the judgments of a court or arbitrators. For example, under art. 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the High Contracting Parties may declare that they recognize the jurisdiction of the European Court of Human Rights.

As to the second problem, some treaties provide, for example, that a breach involves an obligation to take the consequences thereof by introducing legislation.

However, it is rare for a state to undertake to recognize as compulsory the jurisdiction of an international forum. In general, the effectiveness of treaties depends upon the good will of the states concerned in combination with the pressure exerted by public opinion and, in the last resort, on the general rules on sanctions under international law. Obviously, such a system is far from being perfect. Good will is no cure for errors of interpretation. Public opinion has a restricted scope and moreover is not always a reliable jurisdiction. As to the general rules of sanctions under international law, a state offended by the violation of a treaty on the part of another state is held to have a right to react by means of reprisals, if it cannot get reparation through negotiation or other amicable means. But the efficacy of this principle varies from one case to another, depending on the economic or physical strength of the parties involved. Besides, it is a rather drastic and dangerous way of securing the performance of legal obligations.

Under municipal law, important duties incumbent upon the citizens are enforced by a mechanism which includes police, public prosecutors, courts and different kinds of sanctions applicable to breaches of the law. This applies to penal law. As to civil law—where the obligations defined by the law affect the state only in an indirect and rather faint way—the roles of the police and public prosecutors are given over to the private parties offended against.

Generally speaking, the efficacy of legal obligations seems to imply at least three basic requirements. First, there must be an institution for establishing in an authoritative way whether or not a certain kind of behaviour is a breach of the law. Secondly, there must be some kind of machinery to ensure that breaches of the law are detected and prosecuted. This machinery may be an institution, but this is not always necessary; where general interests are only faintly involved, human self-interest may be considered sufficient to ensure the rule of the law. In the third place, an infringement must involve some uncomfortable consequences on the part of the delinquent.

In international law as well as in municipal law, there are some obligations which vitally concern a general interest and others which do not or do so only faintly. This paper is intended to deal with the order instituted by the European Communities for the enforcement of obligations incumbent upon the member states. The obligations which these Communities impose upon their members are far-reaching, and it is important, not only for the individual member states, but for the Communities as a whole, that each state should carefully observe Community law. My paper will deal with the ECSC and the EEC Treaties. There are some differences between these two Treaties with respect to the sanctioning system. By contrast, the rules of the Euratom Treaty being, in this matter, essentially the same as those of the EEC Treaty, it seems unnecessary to burden the paper with special remarks on Euratom.

The paper is divided into three parts. The first is devoted to the framework: the Community institutions entrusted to deal with violations committed, a survey of the case law of the Court, and some other basic data. The second part is intended to be an investigation of the Court's case law on the notion of infringement. The third part deals with the legal consequences of a verdict. Finally, there will be a few concluding remarks.

I. THE FRAMEWORK

Under both Treaties the rules applicable to breaches committed by member states are characterized by two basic features. First, there is an administrative institution to ensure that infringements are in fact detected and dealt with. Secondly, there is a Court for the adjudication of violations. Until the Merger Treaty of April 8, 1965, the administrative tasks were conferred upon the High Authority under the ECSC Treaty, whereas under the EEC Treaty they were handled by the EEC Commission. Since July 1, 1967, the tasks of the High Authority and the EEC Commission have been taken over by a single institution, the Commission of the European Communities. By a convention of 1957, there was established a Court of Justice for of the European Communities. Both the Court and the Commission are under a duty to exercise their functions in complete independence of national interests.

Proceedings against member states for failure to fulfil any of their obligations are essentially governed by the provisions of EEC arts. 169–171 and ECSC art. 88. (I do not intend to enter into the EEC exceptive proceedings under arts. 93 and 225.) I will begin by quoting art. 88 (1) and (2) of the ECSC Treaty and art. 169 of the EEC Treaty:

ECSC Treaty, art. 88 (1). If the High Authority considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time limit for the fulfilment of its obligation.

The State may institute proceedings before the Court within two months of notification of the decision; the Court shall have unlimited jurisdiction in such cases.

EEC Treaty, art. 169. If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

It will be seen that under both Treaties there is provision for an initiative administrative procedure handled by the Commission. If the latter considers that there has been a breach, the state concerned is called upon to present its views. This procedure is very useful in order to establish facts and eliminate errors on both sides, but it may also serve as a kind of conciliation machinery. In fact, the administrative procedure has very

often proved sufficient to put an end to infringements. However, it sometimes happens that the Commission and the state in question take different views inasmuch as the Commission considers a certain behaviour to be illegal, whereas the state involved maintains that there is no infringement. In this case, or if for any other reason there is no reconciliation, the matter will be taken to another stage, where there are certain differences between the Treaties.

Under the ECSC the Commission has the competence to establish that a member state has violated the Treaty. Such a decision must be reasoned and a time limit must be set within which the state has to provide for the execution of its obligation. In principle, the decision is binding upon the state, but as the state can lodge an appeal against it, the Court normally gets involved, so that finally there is a judicial establishment. Formally, the Court does not establish whether there was an infringement; it either annuls the Commission's decision or rejects the appeal lodged by the member state.

Under the EEC Treaty, the Commission acts rather like a public prosecutor. It does not make a "decision" but only issues an "opinion". However, like the "decision" under art. 88 of the ECSC Treaty the "opinion" must be reasoned and a time limit must be set. If the state concerned does not comply with the opinion, the Commission may bring the matter before the Court.

Hitherto, only four cases have been brought before the Court under art. 88 of the ECSC Treaty. In two of these cases the Commission's decision was annulled;¹ in the other two cases the Court rejected the appeal lodged by the member state in question.²

Under art. 169 of the EEC Treaty the Court has had to decide 25 cases; in 21 of these the defendant state was found guilty. The table below gives a survey of the EEC cases.

Cases where the defendant state was held guilty:

1. Italy (pork meat)	Rec. 1961 p. 633
2. Italy (wireless equipment)	Rec. 1962 p. 1
3, 4. Luxemburg and Belgium (gingerbread)	Rec. 1962 p. 813
5, 6. Luxemburg and Belgium (milk products)	Rec. 1964 p. 1217
7. Italy (mechanical products)	Rec. 1965 p. 1057
8. Italy (art treasures)	Rec. 1968 p. 617
9. Italy (statistical duty)	Rec. 1969 p. 193
10. Italy (liquor)	Rec. 1969 p. 377
11. France (rediscount rates for export credits)	Rec. 1969 p. 523

¹ Rec. 1960 (VI), pp. 668, 723.

² Rec. 1960 (VI), p. 117, and Rec. 1969, p. 523.

12.	Italy (lead and zinc)	Rec. 1970 p. 47
13.	Italy (viticulture cadastre)	Rec. 1970 p. 93
14.	Italy (cocoa)	Rec. 1970 p. 187
15.	Belgium (timber)	Rec. 1970 p. 237
16.	Italy (administrative service charge)	Rec. 1970 p. 961
17.	Italy (non-compliance with previous judgment)	Rec. 1972 p. 529
18.	Italy (premium for slaughtering cows)	Rec. 1973 p. 101
19.	Italy (premium for grubbing up fruit trees)	Rec. 1973 p. 161
20.	Italy (forestry material)	Rec. 1973 p. 667
21.	France (maritime workers)	Rec. 1974 p. 359

Cases where the Commission's action was rejected:

22.	Italy (refunds on agricultural exports)	Rec. 1970 p. 25
23.	Italy (skin wool)	Rec. 1970 p. 111
24.	France (Tunisian olive oil)	Rec. 1970 p. 565
25.	West Germany (assistance for reconversion of mining districts)	Rec. 1973 p. 813

It should be noted that the number of cases dealt with by the Court represents only about one tenth of all actions initiated by the Commission in consequence of infringements on the part of member states. Roughly half of these actions have been withdrawn without even a reasoned opinion.³

An interesting question in this context is whether the Commission is obliged to act when it considers a member state to have violated Community law.

As to the ECSC Treaty, some authors hold that the Commission has a duty to intervene, whereas others take the view that the Commission has discretion to act or not to act.⁴ In favour of the latter interpretation, it may be argued that it is sometimes inopportune from a political point of view to censure the behaviour of a state.⁵ However, the tenor of art. 88 obviously supports the opposite interpretation, since it is stated that the Commission "shall" take note of the failure. (Cf. the French text's use of the present tense: "elle constate".) Actually, the Court has found it to be a duty of the High Authority to take a decision when it considers that a state has violated the Treaty: "l'article 88 oblige la Haute Autorité, lorsqu'elle 'estime qu'un Etat membre a manqué à une des obligations qui lui incombent en vertu du présent Traité' à constater ledit manquement par une décision motivée".⁶

³ On the Commission's policy, see Aubenas, pp. 462 ff.

⁴ In favour of an obligation, Cahier in *Cah.dr.eur.* 1967, p. 136, and Schulze-Eggert, p. 49. Against, Rasquin, pp. 11 ff.

⁵ Cf. Aubenas, p. 462. © Stockholm Institute for Scandianvian Law 1957-2009

⁶ Rec. 1955-56 (II), p. 84. Cf. Rec. 1958-59 (V), p. 25, and Rec. 1960 (VI), p. 132.

Under the EEC Treaty the question is more complicated. On the one hand, the Commission "shall" issue a reasoned opinion when it considers a state to have failed; as, so far, the wording corresponds to art. 88 of the ECSC Treaty, it may be concluded that the Commission is bound to issue an opinion. On the other hand, however, if the state does not comply with the opinion, the Commission "may" bring the matter before the Court ("peut" in French, "kann" in German). Supposing the Commission, though obliged to issue an opinion—which, unlike the decision under art. 88 of the ECSC Treaty is not binding upon the state concerned—is not obliged to bring the matter before the Court if the state does not comply with the opinion, the obligation to issue such an opinion will be of little interest.⁷ The important question is therefore whether or not the Commission is obliged to go to the Court where a member state does not observe an opinion issued by the Commission under art. 169. The tenor of art. 169 (2) is in favour of an interpretation to the effect that the Commission is free to decide on its own discretion. Legal writers generally take this view,⁸ and the Court's case law supports it: on one occasion the Court stated that it is up to the Commission to choose the time for initiating an action before the Court,⁹ and on another occasion the Court took the view that the procedure under art. 169 "in consideration of its nature and object" implies a competence of the Commission to choose the most opportune means and time in order to put an end to infringements committed by member states.¹

It appears from these opinions of the Court that under art. 169 of the EEC Treaty the Commission is free to decide in each case whether an action before the Court or some other, more "flexible" method of proceeding is the best way to put an end to the detected violation. The discretion certainly implies that the Commission may take purely political reasoning into account, but it seems important to stress that this is permissible only in order to put an end to the violation. Should the state in question definitely take the standpoint that it will not change its behaviour, the Commission is bound to bring the matter before the Court. This is often overlooked by legal writers, but Karl Roemer, the Court's advocate, seems to have had it in mind when, on one occasion, he observed that the

⁷ Cf., however, von der Groeben-von Boeckh, at art. 169 (1), Däubler, p. 329, and Schulze-Eggert, p. 67.

⁸ Amphoux, no. 1059, Ipsen, p. 235, Cahier in *Cah.dr.eur.* 1974, pp. 11 ff., Däubler, p. 329, Eynard, p. 118, Rasquin, p. 28, Schulze-Eggert, p. 70.

⁹ Rec. 1968, p. 625.

¹ Rec. 1971, p. 1017 (strictly speaking, the remark was made with reference to art. 141 of the Euratom Treaty, which has the same tenor as art. 169 of the EEC Treaty). Cf. also Rec. 1966, p. 39.

main aim of art. 169 is to establish a lawful situation, adding that one could "imagine" the Commission to have the right to abstain from appealing to the Court's jurisdiction "for example in a case where the member State in question is likely to observe its duties shortly after the expiration of the period fixed and where there is not the least interest in taking note of the past failure".²

It appears from the foregoing that under both Treaties the Commission plays a role reminding of that of a public prosecutor. Naturally, anybody can report to the Commission breaches of the Treaties in order to have them adjudicated. However, it may occur that the Commission holds the incident reported to be legal. Under municipal law, a person offended by a breach of the law is sometimes qualified to bring an act against the offender. Is there anything of that sort under the EC Treaties? The question must be answered differently according to which of the Treaties is concerned.

Art. 35 of the ECSC Treaty rules that, in a case where the High Authority is obliged to issue a decision but fails to do so, this omission may be brought to the attention of the High Authority by a member state, the Council or enterprises and associations, as the case may be; where at the end of a period of two months the High Authority has not taken any decision, an appeal may be lodged before the Court.³ As the Commission does indeed have an obligation to take note of a member state's failure to comply with the Treaty, it appears that other member states as well as enterprises affected may bring the matter before the Court, where the Commission refrains from taking note of the violation in question.

As to the EEC Treaty, it follows from art. 170 that a member state in breach may be sued by another member state. However, a state cannot take an action to the Court immediately. Before instituting proceedings against another member state, it must first bring the matter before the Commission. The states concerned must have been given the opportunity both to submit their own cases and to reply to each other's case orally as well as in writing. Thereupon the Commission has to deliver a reasoned opinion. By contrast, private parties are not entitled to take an action to the Court against a member state. If neither the Commission nor any other member state intervenes, there will not be any official statement to the effect that a

² Rec. 1962, pp. 842 ff. The Court itself has now confirmed this standpoint; see Rec. 1974, p. 369. It is therefore not correct to say that the Commission has a "total freedom" in this respect (Cahier in *Cah.dr.eur.* 1974, p. 9). According to Aubenat, pp. 462 ff., the Commission considers itself to have a "moral obligation" to go to the Court. Cf. Eynard, pp. 104 ff.

³ The applicant must, however, establish an "interest". See the case (*De Gezamenlijke Steenkolenmijnen in Limburg*) referred in Rec. 1961 (VII), p. 1. A Dutch association submitted—successfully—that the High Authority ought to have proceeded against Germany for financing a tax-free salary increment paid to miners.

member state has failed to fulfil its obligations under the Treaty. However, this does not mean that private parties are deprived of any possibility of bringing a member state's failure before the Court. By virtue of art. 177 the Court is empowered to give preliminary rulings when questions concerning the interpretation of the Treaty are raised before a court or tribunal of one of the member states. If there is no possibility of appeal from the decision of the national court and a ruling on the preliminary question is necessary to enable the national court to give its judgment, the national court must bring the matter before the Court of the European Communities; if the judgment of the national court is not final, the judge may, but is not bound to, bring the matter before the Court of the Communities. Without going further into this provision it should, however, be observed that, by means of an action before a national court, a private party may sometimes secure a statement by the Court of the Communities that a member state has failed to comply with its obligations under the Treaty.⁴

II. THE FAILURE

In the first part we have seen that the EC Treaties have an institutional framework which is well fitted to the purpose of securing that failures committed by member states will be detected and that adjudication will take place. However, this system would hardly be effective if the notion of failure was to be interpreted in a very restrictive way.

Both the ECSC and the EEC Treaties require, for the establishment of a violation, that a member state shall have "failed in one of the obligations incumbent upon it by virtue of this Treaty". Considering this wording it could be questioned whether proceedings against a member state may take place in consequence of a breach of obligations which do not directly appear from the Treaties but only from so-called secondary Community law.

Art. 14 of the ECSC Treaty provides that the High Authority shall, in the execution of the tasks entrusted to it by the Treaty, take decisions, formulate recommendations and issue opinions; decisions "shall be binding in their entirety", and recommendations "shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed". (Opinions are not binding.) Likewise, by virtue of art. 189 of

the EEC Treaty, the Council and the Commission shall issue regulations and directives, take decisions, formulate recommendations and issue opinions; regulations shall “apply generally”, directives are binding upon each member state to which they are addressed as to the result to be achieved, while leaving to the national authorities the choice of form and methods for their implementation, and decisions are binding in their entirety upon those to whom they are addressed. (Like opinions under the ECSC Treaty, EEC recommendations and opinions are not binding.)

Legal writers seem to claim with unanimity that decisions and recommendations under the ECSC Treaty, as well as regulations, directives and decisions enacted by virtue of the EEC Treaty, inasmuch as they are binding upon the member states, qualify as “obligations . . . by virtue of this Treaty” within the meaning of the provisions governing proceedings against member states. This interpretation has been confirmed by the Court’s practice.⁵

A failure may also be established where there is no direct conflict with a Community provision. On one occasion (the case Premium for slaughtering cows) the Court considered a member state to have violated the EEC Treaty by transforming directly applicable Community law into municipal law; in its decision it pronounced that “all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community”.⁶ In this context it may be noted that, by virtue of art. 5 of the EEC Treaty, the member states must take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community and must abstain from any measures which could jeopardize the attainment of the objectives of the Treaty. (To the same effect art. 86 of the ECSC Treaty.) On another occasion (the case Premium for grubbing up fruit trees) a member state was held to have violated an obligation, under the EEC Treaty, to adapt its budget procedure in order to make it possible to comply with its special obligations under the Treaty.⁷ Däubler argues that a member state’s

⁵ Rec. 1960 (VI), p. 133, Rec. 1969, p. 544 (ECSC cases). As to EEC, in the Statistical duty case, the Viticulture cadastre case, the Administrative service charge case, the Premium for slaughtering cows case, the Premium for grubbing up fruit trees case and the Maritime workers case violations of regulations were established. The Rates for export credits rediscount case concerned a decision taken by the Commission and the Lead and zinc case a decision issued by the Council. In the Administrative service charge case the violation established concerned a directive as well. In the Forestry material case also a breach of a directive was established.

⁶ Rec. 1973, pp. 114 ff. © Stockholm Institute for Scandinavian Law 1957-2009

⁷ Rec. 1973, p. 172.

violation of "allgemeine Rechtsgrundsätze" could be considered a breach of Community law, even where the principle expressed in art. 5 of the EEC Treaty does not apply.⁸ This, however, is a daring opinion without any support either in the Treaties or in the Court's case law.⁹

Art. 88 of the ECSC Treaty rules that the Court has "unlimited jurisdiction" (*recours de pleine juridiction*). A corresponding expression does not appear in art. 169 of the EEC Treaty. This difference, however, is not necessarily of any importance, because *recours de pleine juridiction* would, in any event, not be a fit expression where there is no decision to be reviewed. As was established above, an opinion issued by virtue of art. 169 of the EEC Treaty has no binding effect; whereas under the ECSC Treaty the Court examines whether or not the Commission's decision is legal, in proceedings under art. 169 of the EEC Treaty the Court directly establishes whether the defendant state has failed to comply with its obligations—albeit within the compass set out in the Commission's opinion.

Be that as it may, the expression "unlimited jurisdiction" leads to the question which kind of objections a defendant state may successfully raise against a charge of violation, provided that it has in fact been established that there is a failure on the part of the state concerned.

First, it is clear that each member state is responsible for its public organs. In some cases (e.g. the Timber case and the Administrative service charge case) the defendant government objected that it had done everything within its power to establish a lawful situation; it could not, for constitutional reasons, be held responsible for the fact that its bill had not been taken up by the legislature within the period fixed by the Commission. The Court declared that a member state will incur responsibility in the sense of art. 169 regardless of the question which of the state's organs by its action or omission to take action caused the failure to take place even where a constitutionally independent institution is concerned.¹

All public organs are included. It makes no difference that their actions or omissions, as the case may be, can be attacked within the state's own jurisdictional system. In the case Refunds on agricultural exports the Commission proceeded against Italy, accusing the Executive of not having made timely payment to exporters of refunds relating to the export of products covered by common organizations of agricultural markets that had been established after July 1, 1967. Italy objected *inter alia* that, if an

⁸ Däubler, p. 326.

⁹ This matter should not be confused with the fact that the institutions of the Communities are obliged to comply with general principles of law. See Lauwaars, pp. 228 ff.

¹ Rec. 1970, pp. 244, 907. The Court stated in *Bankia* that it is not surprising that "un principio così fondamentale" could have been unknown to the governments concerned (p. 359).

action under art. 169 bears on a regulation which takes direct effect in each member state and which does not require further measures of implementation by the national authorities, the Court could find that the member state concerned had failed to fulfil its Treaty obligations only when that state had taken positive action designed to frustrate the direct effect of the regulation. A simple non-observance of the provisions embodied in the regulation would amount to a breach of municipal legal provisions; in such a case injured parties should seek redress by resort to national legal remedies. The Court rejected this objection, stating that "the availability of legal remedies in the national legal order can in no way prejudice the application of the procedure of Article 169. Both actions pursue different aims and have different effects".²

Some authors hold that the municipal courts of the member states do not qualify as organs of the state in this context. They argue that these courts are, by virtue of art. 177 of the EEC Treaty, Community institutions when applying Community law.³ This view seems to be formalistic in the extreme: carried to its logical conclusion, it would imply that the member states are themselves "Community institutions". It appears from Part Five, Title One, Chapter One, of the Treaty that municipal courts do not rank as Community institutions under the system established by the Treaty. Besides, while admitting that they were, in fact, serving as a kind of Community organs when applying Community law, it is hard to see why this quality must exclude them from being state organs as well. Certainly, the Commission is not likely to take up action against member states in consequence of isolated cases of failure committed by municipal courts,⁴ but this applies not only to municipal courts but to all administrative organs of the states and has nothing to do with the fundamental question whether or not municipal courts should be considered as state institutions under the procedure of art. 169.

Another problem connected with the notion of failure concerns defective decisions enacted by the Council or the Commission. As was observed above, the obligations incumbent upon the member states by virtue of the Treaties include secondary Community law. This question has been considered by the Court on several occasions. Three cases concern the

² Rec. 1970, p. 33.

³ See, e.g., Mertens de Wilmars and Verougstraete, pp. 289 ff.

⁴ Cf. Cahier in *Cah.dr.eur.* 1974, p. 8. Däubler, p. 327, even holds that the Commission is competent to proceed only against infringements of a normative nature. Louis, p. 236 footnote 32, seems to share this opinion: "Nous croyons aussi que la prudence est de rigueur et qu'une action de la Commission suppose des manquements flagrants et répétés." For my part, I do not believe that the Commission would be rejected and brought by the Commission against a member state just because the violation has not been repeated.

ECSC Treaty. In the first two cases the Court took the view that the member states must observe the forms and periods which the Treaty provides for appeal against Community decisions and that they cannot later attack them in a procedure under art. 88.⁵ In the third case the Court confirmed its view that a decision against which no appeal has been lodged within the period prescribed by the Treaty must be considered as “definitive”. Nevertheless the Court did examine the objection of the defendant state that the decision at issue had been taken in a field which, according to the defendant state, falls within the exclusive competence of the member states.⁶ In this the Court probably followed the pleading of Karl Roemer, the Court’s advocate: he mentioned that, since no appeal for annulment had been instituted against the decision within the time limit laid down in art. 33 of the Treaty, it could only be reviewed with respect to defects of such gravity as would deprive the decision of any legal effect.⁷ The Court did not use the same words as Mr Roemer but referred to a lack of “all legal basis in the Community order” and expressed the opinion that “it is a basic requirement of the legal order that the Court should examine whether this is the case”.⁸ Knöpfle has criticized these words as being logically and practically unsatisfactory.⁹ Like Mr Roemer, he sees the essential point in the question whether or not the defects submitted are *schwerwiegende und offensichtliche*, the main item being the Treaty’s rules of competence.¹ However this may be, the Court and Knöpfle are likely to reach the same result in concrete cases.

Undoubtedly the same principle applies to directives and decisions under the EEC Treaty.² As to regulations, however, art. 184 rules that an exception of illegality may be raised “in a dispute pending before the Court on the basis of another Article”; the consequence of such exception may be the “inapplicability” of the regulation in the case before the Court. Probably this provision is motivated by the fact that, as a rule, a private party is not entitled to lodge an appeal against a regulation;³ it would have

⁵ Rec. 1960 (VI), pp. 134, 692 and 761 ff.

⁶ Rec. 1969, pp. 543 ff. Cf. pp. 539 ff.

⁷ “des actes nuls de plein droit”; Rec. 1969, p. 552.

⁸ Rec. 1969, p. 540.

⁹ Knöpfle, p. 265 footnote 9.

¹ Cf. Mertens de Wilmars and Verougstraete, p. 400: “acts affected by very serious irregularities”. Louis, p. 231, develops the same idea to the effect that “il ne serait pas concevable que la Cour puisse être amenée à prononcer un arrêt constatant un manquement à une décision contraire à un principe constitutionnel du droit communautaire”.

² Rec. 1966, p. 540. The Court’s advocate especially pointed out the interest in peace and legal security. Cf. Eynard, pp. 119 ff., Knöpfle, p. 265, and Mertens de Wilmars and Verougstraete, p. 400. Dissenting, Däubler, p. 329, who holds that art. 184 (see below) applies to directives and decisions as well as to regulations.

³ See art. 173 (2).

been unfair not to give private parties any means of protesting against the application of an illegal regulation.⁴ This reasoning does not apply to member states, who are indeed entitled to lodge an appeal for annulment against any regulation within the time limit laid down in art. 173 (3) of the Treaty. Therefore, the object of art. 184 suggests an interpretation excluding the member states from having recourse to the exception of illegality. However, the tenor of art. 184 can hardly be reconciled with such an interpretation.⁵

The principle that, as a rule, secondary Community law cannot be attacked by member states in procedures under art. 88 of the ECSC Treaty and art. 169 of the EEC Treaty applies even if the defendant state has lodged an appeal in conformity with the provisions prescribed. In one case concerning the ECSC Treaty, the High Authority had taken a decision under art. 14 where one of the member states was obliged to take certain measures. The state concerned lodged an appeal. Before examining the legality of the decision, the Court dealt with the question whether the state had breached the Treaty by not conforming to the decision in dispute.⁶ This may seem very rigid, but it is logical; according to art. 39 of the ECSC Treaty and art. 185 of the EEC Treaty, appeals to the Court are not to suspend the execution of the act submitted, but the Court may, if it considers it necessary, order execution to be suspended.

The efficacy of a legal obligation depends, to a certain extent, on what excuses are permitted to exclude a judgment that an offender is found in breach. Under municipal law, excuses are, as a rule, more often taken into consideration in penal cases than in civil procedure. This may seem odd, since from the state's point of view obligations under penalty are more important than are civil obligations. However, the rule of law is considered to require that people shall not be exposed to punishment for acts executed without wrongful intent. Since the object of the procedures against member states under the EC Treaties is less to punish or stigmatize the defendant state than to resolve disputes which must necessarily arise among member states or between Community institutions and member states in regard to Treaty application,⁷ the rule of law does not have the above-mentioned bearing upon the procedure.

⁴ See Rec. 1958 (IV), pp. 26 ff., 66 ff. and 184 ff. Cf. the reasoning of the Court's advocates Roemer and Lagrange, pp. 101 ff. and p. 202 ff.

⁵ Cf. Mertens de Wilmars and Verougstraete, p. 400, Ehle, at art. 184 (1), Lauwaars, p. 277, and Cahier in *Cah.dr.eur.* 1974, p. 23. Dissenting, Bebr in *C.M.L.Rev.* 1966-67, p. 12. It is doubtful whether the principle laid down in art. 184 of the EEC Treaty is applicable to so-called general decisions under the ECSC Treaty. See Rec. 1958 (IV), pp. 27, 66 ff. and 184 ff. Cahier holds that, in this context, there is a fundamental difference between the two Treaties (*Cah.dr.eur.* 1967, p. 146).

⁶ Rec. 1960 (VI), pp. 117 ff. See, in particular, also pp. 117-118.

⁷ See, e.g., the Court's advocate Roemer in Rec. 1960 (IV), p. 697.

In the Pork meat case, Italy had temporarily stopped the importation of pork products as a measure to deal with an economic crisis. In the procedure initiated by the Commission before the Court, the Italian Government submitted that Italy had manifested its intention to withdraw the measures in dispute as soon as possible; furthermore it claimed that there were no other means of handling the crisis than the ban. The case concerned the standstill clause of art. 31. The Court rejected these pleas, establishing that the obligation imposed on the member states under art. 31 is absolute and without any exception, whether as to extent or as to time. Now, Italy had also invoked the escape clause of art. 36 (providing for exceptions justified by reasons of public order). The Court took the view that art. 36 does not apply to economic crises. It further observed that Italy had not been granted an authorization under art. 226.⁸

The case Rediscount rates for export credits concerned the fact that for several years the Banque de France had granted a rediscount rate for export credits which was more favourable than the rate for internal credits. The Commission took a decision which, to a certain extent, authorized this practice: the French Government was authorized to maintain a difference of three points between rediscount rates for credits on internal and on external transactions from July until October 31, 1968, and a difference of 1.5 points from November 1, 1968, to January 31, 1969. The French Government, confronted in November 1968 with a new balance-of-payments crisis, refused at that time to reduce the difference between the internal and external rates in conformity with the prescriptions issued by the Commission. In the procedure before the Court, France submitted that the maintenance beyond November 1, 1968, of the difference between the preferential rediscount rate and the ordinary rate was justified by the new monetary crisis which occurred in the autumn of 1968. The Court rejected this objection, remarking that France could have had recourse to the emergency procedure under art. 109: "These

⁸ Art. 226 reads as follows.

1. If, during the transitional period, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market.

2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.

3. The measures authorised under paragraph 2 may involve derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.

provisions, which follow from the very nature of unilateral safeguard measures, have not been observed in the present case.”⁹

In the Lead and zinc case, Italy pleaded serious social troubles as an excuse for not having complied with a decision issued by the Council.¹ The Court found that only an authorization under art. 226 could have justified the measures taken by Italy; in default of such authorization the plea was rejected.

Nor has the Court admitted crises relating to domestic politics as a ground for excluding liability on the part of defendant states. In the Timber case, Belgium alleged “force majeure”, referring to the fact that a bill passed by the Government had become invalid owing to the dissolution of the Chambers of the Belgian Parliament. In the case Premium for grubbing up fruit trees, Italy pleaded political disturbance which had forced Parliament and the Government to concentrate their efforts upon finding a new head of state; in addition, dissolution of Parliament and elections had taken place. This case concerned failure to provide for effective application of a regulation under which the member states were obliged to pay premiums to farmers for grubbing up their fruit trees. The failure in dispute may appear rather trivial in comparison with the scourge suffered by Italy at the time. Nevertheless the Court considered the objections to be irrelevant.

In the case Premium for slaughtering cows, the Court examined an allegation that certain measures prescribed in a regulation were actually impossible to execute. The obligation in question was similar to that just mentioned: the member states were obliged to remunerate farmers for undertaking not to sell milk and milk products. Italy submitted that, in view of the structure of stockbreeding in Italy, it would in any case have been impossible to check the conditions required for remuneration. The Court rejected this objection: “practical difficulties which appear at the stage when a Community measure has to be put into effect cannot permit a member State unilaterally to opt out of observing its obligations.... The Community institutional system provides the member State concerned with the necessary means to secure that its difficulties should be reasonably considered within the framework and principles of the Common Market and the legitimate interests of other member States.”² In this context it may be added that in the case Premium for grubbing up fruit trees the Court also rejected an objection raised by Italy that it had proved impossible to finance the premiums in question.

⁹ Rec. 1969, p. 542.

¹ Rec. 1970, p. 54, The defendant state submitted, too, that it was excused by an economic crisis.

² Rec. 1973, p. 115.

From the foregoing it appears that the Court has taken the view that liability is not excluded by the circumstance that the failure in dispute might be due to economic, social and political crises or even that it was impossible for the defendant state to observe its obligations. However, it would not be justifiable to conclude from these cases that it is irrelevant whether a defendant state has acted negligently or not. In all the cases so far referred to, the member states submitted that they were excused because of circumstances which are either the object of particular provisions of the Treaty or touch upon the internal organization of the state. Since the EEC Treaty contains special provisions on member states undergoing economic or monetary crises and these provisions lay down particular procedures and obligations on the part of the state affected,³ it is logical that such circumstances cannot be considered as an excuse under art. 169, when the state affected has not exhausted that particular procedure. With reference to the internal organization of the state, it seems to be in line with the Treaty system that it is not all kinds of disturbance that qualify as a justification of failures to comply with Community law. This however, does not necessarily mean that an act or an omission to act which is contrary to Community law could never be justified by exceptional circumstances not anticipated in the Treaty. In this context, it is interesting to observe that Mr Karl Roemer, the Court's advocate, has interpreted the judgment in the case *Premium for grubbing up fruit trees* as establishing an obligation on the part of the member states to take every precaution to secure, even in a crisis situation, the fulfilment of their urgent duties in relation to the Community.⁴

In some cases under art. 169 of the EEC Treaty, member states have alleged that the infringement in question was a kind of self-help. In the *Milk products* case the Commission had taken up proceedings against Belgium and Luxemburg for imposing a charge upon imported milk products, in violation of the standstill clause of art. 12. The two states submitted that the Community itself had neglected its obligations by not establishing within a certain time limit a common organization of milk products; such an organization, had it been established, would have legalized the measures taken by the defendant states. The Court rejected this objection, observing that the Treaty system, in establishing a new legal order which governs rights, obligations and procedures applicable to infringements, implies that the member states are prohibited from enforcing their rights themselves.⁵ A similar case concerned the *Euratom*

³ See, e.g., arts. 73, 82, 109 and 226. Cf. Däubler, p. 326.

⁴ Rec. 1973, p. 677. The Court's advocate Mayras, by contrast, seems to have considered the "impossibility" submitted to be legally irrelevant (Rec. 1973, p. 123).

⁵ Rec. 1964, pp. 1231 ff.

Treaty.⁶ France pleaded that its neglect to comply with certain rules laid down in that Treaty should not involve liability, because the Community had failed to comply with its obligation to review the rules. The Court took up the same position as in the Milk products case and reminded France that it could have taken up proceedings against the Council. In the Tunisian olive oil case, however, the Commission's complaint was, indeed, rejected in consequence of neglect on the part of the Community. The Commission had taken up proceedings against France for allowing olive oil to be imported from Tunisia without customs duty. The Court took the view that the institutions of the Community had neglected their obligation to issue special provisions for the commerce between certain member states and some countries with which these member states had traditional links (the commerce between France and Tunisia coming into this category). This neglect, the Court judged, had caused a situation which could easily be misunderstood, and in consideration of this France was acquitted. It should be stressed that this was a special case, because the French omission could be considered as a *duty* by virtue of the rules laid down in the Community document known as Protocol I.⁷

The notion of failure does not presuppose any particular prejudice. Generally speaking, any infringement upon the obligations incumbent upon the member states by virtue of Community law is likely to do some harm to the legal order of the Community.⁸ In the Euratom case referred to above, the defendant state argued that the obligation in dispute had lost all interest, practically as well as legally. The Court rejected this submission, observing that the disputed provision had not lost its character of being compulsory even though the conditions of the market might, in fact, have reduced the importance of the provisions for a certain period.⁹

It sometimes happens that, by the time the Court is called upon to decide upon a failure, an infringement has ceased to exist because the state concerned has complied with the opinion issued by the Commission. This is no problem under the ECSC Treaty, where the state and not the Commission brings the matter before the Court. As to the EEC Treaty, the Commission is entitled to go to the Court only if the state has not taken steps to fulfil its obligation within the period fixed by the Commission. If, however, the state does not comply with the opinion within the time limit fixed but does so before the Court's decision, this is, according to the Court's practice, not necessarily an obstacle to a verdict. In the Pork meat

⁶ Rec. 1971, p. 1003.

⁷ Cf. *Louis*, p. 233.

⁸ Cf. the Court's statement to this effect in Rec. 1974, p. 369 (no. 15).

⁹ Rec. 1971, p. 1021.

case the defendant state had conformed to the opinion issued by the Commission about a month before the Court's judgment, and the Court had to examine whether this fact made the complaint "sans objet, de telle sorte qu'il n'y aurait lieu à statuer".¹ It held that this was not so, because "in the present case" there was still "an interest in obtaining a legal decision stating whether the infringement has been committed or not".² It should be noted that in this case there were important questions of principle related to the matter; the interpretation of two safety clauses had been at issue (arts. 36 and 226). In the case Premium for slaughtering cows, where the Court took a similar view (though it did not consider there was perfect rectification), it specially pointed out that a ruling under art. 169 may be important in order to establish the basis of a responsibility that the state may incur, as a result of its default, with regard to other member states, the Community or private parties.³ In the Skin wool case, however, the Court rejected the Commission's complaint in consequence of steps taken by the defendant member state after the expiration of the period fixed by the Commission. The state had argued that these measures signified an end to the infringement alleged, whereas the Commission, in its turn, maintained that the violation was still going on. The arguments put before the Court had, to a great extent, concerned this question; however, the Commission had explicitly pleaded that even should the Court hold that the infringement had been brought to an end, there was an interest in obtaining a ruling as to whether the failure described had actually taken place. In spite of this, the Court did not examine the case upon its merits. For procedural reasons it held that it was incompetent to enter upon an examination of the new situation. As to the former situation, the Court argued that the Commission had not alleged any other purpose for its action than that of bringing about conformity with the Treaty.⁴ Mr Karl Roemer, the Court's advocate, had taken a different view. He held that the action ought to be examined upon its merits, inasmuch as it concerned the time before the new steps taken by the defendant state. Mr Roemer referred to the Pork meat case as giving clear guidance.⁵ However, Mr Roemer seems to have overlooked the fact that the Pork meat case concerned questions of far more general interest than those arising in the Skin wool case.⁶

¹ Rec. 1961, p. 653.

² Rec. 1961, pp. 653 ff.

³ Rec. 1973, p. 112.

⁴ Rec. 1970, p. 117.

⁵ Rec. 1970, p. 121. Cf. Winter in *C.M.L.Rev.* 1970, at pp. 491 ff.

⁶ Louis (p. 228) argues that the judgment was due to the fact that the Court had only been invited to pronounce upon the new situation. However, as noted above, the Commission did indeed invite the Court to establish that the defendant state had been in failure before the issuance of the new *décret-loi*.

The case Non-compliance with previous judgment has been differently interpreted in this respect. In its decisions establishing that a member state has violated the Treaty the Court normally declares that the member state concerned has, by a specified action or omission, failed to fulfil its obligations under a certain provision. However, in its decision in the case Non-compliance with previous judgment the Court chose only to place on record that an end had been put to the failure (“La Cour prend acte de ce qu’il a été mis fin, avec effet au 1^{er} janvier 1962, au manquement aux obligations qui incombent à la République italienne en vertu de l’article 171 du traité CEE”).⁷ The case was extraordinary. In a previous case (the Art treasures case) the Court had found that Italy failed to fulfil its obligations under art. 16 of the EEC Treaty by continuing after January 1, 1962, to impose a progressive tax on the value of art treasures exported to other member states. When, more than two years later, the Italian Act no. 1089 of June 1939 for the protection of Italian art treasures had not been repealed but continued to be enforced by the Italian customs authorities, the Commission brought a new appeal under art. 169. This time it claimed that Italy had violated art. 171, which requires a member state to take the necessary measures for implementing a judgment of the Court. From the tenor of the Court’s decision in the case Non-compliance with previous judgment Ruzie⁸ and Gayet-Simon⁹ conclude that the Court had not found the Commission to have sufficient interest in a declaration by the Court on the matter whether the infringement described in the Commission’s opinion had actually taken place. However, if this was in fact the view of the Court, it is hard to see why, in its statement of reasons, the Court discussed the obligations incumbent upon Italy by virtue of art. 171. Besides, in its decision the Court mentioned as an established fact that a violation of art. 171 had taken place. Millarg, for his part, thinks that the peculiar wording of the decision was chosen for political reasons.¹

With regard to the problem discussed, the following conclusions can be drawn. If the state concerned puts an end to the failure before the expiration of the period fixed by the Commission, the infringement will be “excused”, inasmuch as there can be no verdict under arts. 169 and 171. A later rectification does not in itself constitute an excuse, but the Court will not examine actions on the infringement, unless there is an interest in

⁷ Rec. 1972, p. 536.

⁸ Ruzie in *Rev.trim.dr.europ.* 1972, pp. 676 ff.

⁹ Gayet-Simon, p. 307 © Stockholm Institute for Scandianvian Law 1957-2009

¹ Millarg in *EuR* 1973, pp. 231 ff.

having a judgment upon the merits.² The interests to be considered may vary in nature. For the prevention of new failures on the part of the defendant state and other member states there might be a need for a precedent. The interest may also relate to sound economy in judicial administration. There will be one action instead of two.

Complaints initiated by the Commission under art. 169 of the EEC Treaty have been rejected in only three cases. As was mentioned above, the Commission's complaint in the Skin wool case was rejected partly for reasons of form, partly for the reason that there was not sufficient interest in obtaining a judgment upon a situation which had been brought to an end. In the case Refunds on agricultural exports, the Court did not consider the evidence established to be sufficient for a verdict. Finally, in the case Assistance for reconversion of mining districts, the Court held that a decision of the Commission, although valid, was so vaguely worded that it did not give "full effect" to the obligation which it imposed on the Federal Republic of Germany. In the decision of February 17, 1971, the Commission invited the Federal Republic to stop, without delay, the indiscriminate granting ("die unterschiedslose Gewährung") of tax advantages for certain investments. Not until December 1971 did the Commission pronounce what specific discriminatory criteria should be applied. The Court held therefore that the German authorities could not be reproached for having paid regard to "the justified interests of private parties".³

These cases do not admit of very far-reaching conclusions. It goes without saying that the Commission has the burden of establishing sufficient evidence for its complaints under art. 169. Nor is it surprising that the Court rejects a complaint when the requisite formalities have been neglected. The case Assistance for reconversion of mining districts is the most interesting one in this context. It establishes that the Court does not automatically condemn a member state which has failed to observe a Community decision. The fact that the non-observance in dispute was held to be a protection of "justified" private interests was manifestly important, along with the ambiguity of the decision. It may be observed that on one occasion the Court remarked in general terms that the defendant was allowed to "invoke any justification whatsoever of the failure to fulfil that obligation".⁴

² The Court's statement in the Maritime workers case to the effect that the Commission does not have to prove an interest is not in opposition with my conclusion, because it appears from the tenor that the Court referred only to situations where the state concerned continued to be in breach.

³ Rec. 1973, p. 832.

⁴ Rec. 1960, pp. 691 ff. Though this declaration was made with respect to art. 88 of the ECSC Treaty, it should apply to actions against member states under the EEC Treaty as well.

III. CONSEQUENCES OF A VERDICT

As mentioned before, under the ECSC Treaty the establishment of an infringement occurs through the decision issued by the Commission, whereas under the EEC Treaty the violation is established by the Court. However, in both cases the member state concerned is obliged to take the necessary measures of compliance. The obligation to do so follows only indirectly from the ECSC Treaty but is explicitly laid down in the EEC Treaty: "If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice" (art. 171).

What are the measures referred to in art. 171 of the EEC Treaty? They are not explicitly defined in the Treaty. However, as the obligation to take measures is undeniably a duty under Community law, the answer has to be found by interpreting that law. Certainly, it follows from art. 171 that, as a matter of principle, the member state may choose at will, within its national framework, among available remedies, but in fact this freedom is often rather illusory.

The Court's judgment in the Humblet case⁵ is quite instructive. Humblet was a Belgian ECSC official. According to art. 11 of the Protocol on the Privileges and Immunities of the ECSC Community, he should have been exempted from any tax on salaries or emoluments paid by the Community. However, Humblet's Community salary had been taken into account by the Belgian authorities when assessing his other income for tax, in application of the principle of progressive taxation. Humblet initiated an action against Belgium before the ECSC Court, requesting the Court to set aside the assessment and to order Belgium to refund the amount that had been collected in violation of the Protocol, together with interest at the rate of 4.5 per cent per annum. Belgium objected—*inter alia*—that the Court neither had competence to set aside the assessment nor to order Belgium to make a refund. On these points the Court took the same view as Belgium. It argued as follows. The Court is not competent to cancel legislative or administrative acts issued by a member state. The ECSC Treaty is based on the idea of a precise distribution of competence between the Community institutions, on the one hand, and the organs of the member states, on the other. Art. 171 of the EEC Treaty is an expression of this principle. According to this provision, the Court's decision on a member state's violation of the Treaty has only a declaratory effect, but the

state concerned has an obligation to take the necessary measures of compliance. When the Court rules that a legislative or an administrative act issued by the authorities of a member state violates Community law, the state concerned is obliged to repeal the act in question and to compensate for the illegal effect caused by that act. This obligation has priority over municipal law. In the Humblet case it would imply that in case the illegality of the taxation had been established by the Court, the Belgian Government would have been bound to take the measures of repealing the decision on taxation and of repaying to the plaintiff the amount that had been illegally collected.

The Humblet decision makes it clear that the Court cannot *directly* intervene in the member states' legal order. The Court's decision is of a declaratory and not a constitutive character. However, it also follows from the Humblet case that the Court's decision *indirectly* affects the legal situation within the member state concerned. In fact, the legal situation is as follows. The Court does not claim to have power to repeal or to change contradictory municipal law. The Court's verdict that a legislative or administrative act issued by a member state is illegal has to be implemented in cooperation with the state concerned, factually as well as legally. One may doubt whether these restrictions established by the Court are of any importance. Community law is, to a great extent, "directly applicable" in all member states,⁶ which means that such law does indeed claim to affect automatically the content of municipal law, so that in the case of directly applicable law the fundamental borderline established by the Court in the Humblet case does not imply anything in favour of the member states' sovereignty. Furthermore, be that as it may, the legal meaning of the direct effect is that a member state which does not acknowledge the superiority of Community law and which does not apply it above municipal law is failing in one of the obligations incumbent upon it by virtue of the Treaty. However, this is exactly what happens even where a member state does not comply with such Community law as is *not* directly applicable. Likewise, if the Court had claimed that its decisions automatically affect the content of municipal law, this could not have had any other legal meaning than that a member state which does not apply that rule is violating the Treaty—but the same effect will also occur when a member state does not comply with a duty established by the Court in a purely declaratory decision!

It should be noted, however, that the difference may have some practical impact, inasmuch as the member states are likely to find it easier not to issue legislative acts which they are under a duty to issue than to forbid

their courts and administrative organs to apply Community law. Thus, oddly enough, the borderline established by the Court for its competence under art. 171, which at first sight seems to be more formal than material, appears to be more important from a practical than from a theoretical point of view.

However this may be, with regard to the legal enforcement it remains to be investigated what duties the Court's decision implies in an actual case.

It follows from the *Humblet* case that, when the Court has found that a legislative or an administrative act issued by a state organ is in conflict with Community law, the state concerned is obliged to repeal the act in question and to compensate for the illegal effect caused by the act. In practice, breaches of Community law by member states have often consisted in the levying of discriminatory customs duties or other dues or taxes with a similar effect. In such cases, i.e. in cases where a member state has, in conflict with Community law, collected money from a private party, the Court's decision implies an obligation, not only to repeal the act concerned, but also to repay the amount that was illegally collected.⁷ The Court therefore makes it a point in its decision that the initial date of the infringement should be established.

A related problem is whether the obligation to repay charges includes compensation for loss of interest. The Court, though it has touched upon the matter, has not made its position quite clear. In the *Humblet* case it refused to examine *Humblet's* claim for interest on its merits, remarking that it was a matter of municipal law to decide upon the right to compensatory interest.⁸ This may imply, although not necessarily, that the question of interest was held to be totally extraneous to Community law. In the case *Premium for slaughtering cows* one of the reasons mentioned by the Court for an examination of the case on its merits was the fact that "the question of the paying to those entitled of interest on the overdue payments is not settled".⁹ This remark, in its turn, may possibly imply that the Court holds that member states are bound to pay interest by virtue of Community law. The problem may therefore be considered unresolved. Under international law the problem of interest is the subject of some controversy. As to Community law, the fact that the Treaties do not explicitly establish an obligation to pay interest when compensating illegal payments is no valid argument against such an obligation, since the Treaties do not explicitly establish the indisputable obligation that municipi-

⁷ See, e.g., a decision of Corte d'Appello di Milano following upon the decision of the EC Court in the case *Administrative service charge*, referred to by *Pescatore*, p. 361.

⁸ Rec. 1960, p. 1147. © Stockholm Institute for Scandianvian Law 1957-2009

⁹ Rec. 1973, pp. 111 ff.

pal law in conflict with Community law should be repealed and that illegally collected charges should be repaid. One may well imagine that an obligation to pay interest on such charges follows from unwritten Community law. The rate to be applied would depend on the circumstances of the case.¹

A breach of Community law by a member state may consist in illegal payment of subsidies or assistance. Does a verdict, in such a case, imply an obligation to reclaim overdue payments? The answer is, in principle, yes: in the case Assistance for reconversion of mining districts the Court made it clear that the obligation to cease to grant or to modify such assistance as is in conflict with the Common Market implied the obligation to reclaim the assistance that had been paid illegally. However, in such cases the principle of legality is likely to come into conflict with the principle of legal security. It follows from the Court's practice that, in answering the question as to which of these principles is to be preferred in a given case, it is necessary to weigh public interest against the special interests that are involved.²

The executive procedure is supposed to be governed by the municipal law of the member state concerned. Community law does not directly intervene in this matter. Indirectly, however, it does apply, inasmuch as the member states are, by virtue of the principle laid down in art. 5 of the EEC Treaty and art. 86 of the ECSC Treaty, under an obligation to have a jurisdictional system which gives effect to judgments given by the Court.

In legal writing different opinions are to be found on the question whether, in a decision establishing a failure, directions may be given to the state concerned as to how the decision should be implemented. On the one hand, it is quite clear that a decision under art. 88 (1) of the ECSC Treaty by the Commission and a decision under art. 171 of the EEC Treaty by the Court are both "declaratory" by nature. On the other hand, the state concerned might find it useful to have some direction. This is particularly the case when the failure established is related to an obligation that follows from a provision difficult to interpret.³

¹ Cf. Verdross, *Völkerrecht*, Vienna 1964, pp. 403 ff. Cf. the Court's advocate Lagrange in Rec. 1962, p. 539. See also Zuleeg, p. 38. On one occasion (Rec. 1960, pp. 826 ff.) the Court rejected a plea for interest raised against the High Authority. According to the opinion of the Court, the claim was dismissed for the reasons that, if the plaintiff had interest for default in view, no such right was provided under Community law and, if he meant "intérêts compensatoires", the applicant had not established any factual loss.

² See further Rec. 1961, pp. 159 ff., 620 ff.

³ E.g., one of the Community provisions that pronounce a prohibition of "discrimination" (in particular, art. 4 (b) of the ECSC Treaty and art. 7 of the EEC Treaty). The notion of discrimination under art. 7 of the EEC Treaty has been examined in the present author's book *Nondiskriminering i EEC*, Stockholm 1973.

The problem came to the forefront for the first time in a case concerning the ECSC Treaty.⁴ In a decision under art. 88, the High Authority had pointed out some concrete measures that it considered should be taken by the member states in order to bring a situation into conformity with the Treaty. Italy lodged an appeal before the Court, submitting that the High Authority had no competence under art. 88 to impose upon a member state any "obligations particulières d'ordre normatif".⁵ The High Authority objected that it had to define the infringement and that that would sometimes require the mentioning of what measures might be taken in order to put an end to the violation.⁶ Mr Karl Roemer, the Court's advocate, argued as follows. Art. 88 rules that the High Authority shall take note of a failure. Such a statement would be of no use if it only mentioned the provisions held to be neglected. Art. 88 requires, explicitly and logically, that the High Authority shall give the reasons for its decision. This means that it has to specify the infringement, and that cannot be done without a thorough interpretation of the Community rules judged applicable. The interpretation can either consist of pointing out concretely the measures required from the member states in order to comply with the obligation or it can be limited to denunciation in more or less broad language, leaving it to the state to decide how to proceed in detail.⁷ The Court found that, in a decision under art. 88, the High Authority cannot create new obligations to be imposed upon a member state but may decide to set a period within which the state must comply with an obligation existing beforehand by virtue of the Treaty.⁸

As to the EEC, the opinion prevailing among scholars is that the Court cannot, in its decision under art. 171, impose an obligation upon a state to take any special measures.⁹ There is good reason to analyse the problem.

A decision of the Court under art. 171 aims at establishing whether a member state has failed to fulfil its obligations. A state guilty of an infringement is bound to take necessary measures for implementing the judgment of the Court. The question whether these measures may be prescribed in the decision of the Court is not directly answered by the Treaty. Logically, there are three possibilities: (a) the Court has no competence to prescribe concrete measures; (b) the Court has a duty to

⁴ Rec. 1960 (VI), p. 663.

⁵ Rec. 1960 (VI), p. 678.

⁶ *Ibid.*

⁷ Rec. 1960 (VI), p. 708.

⁸ Rec. 1960 (VI), p. 691.

⁹ von der Groeben-von Boeckh, at art. 171 (1), Quadri-Monaco-Trabucchi, p. 1231, Eynard, p. 121, Rasquin, p. 33, Colin, p. 176, Ferriere, p. 57, Cahier in *Cah.dr.eur.* 1967, p. 158, Schulze-Eggert, pp. 52-53, Dauber, p. 80, *Dissertations*, however, Wohlfarth-Everling-Glaesner-Sprung, at art. 171 (2).

point out what measures are required for the implementation of its decision; (c) the Court is competent but not obliged to indicate such measures.

Assuming that the Court is not allowed to do anything more than simply to establish the fact that a member state has failed to fulfil a certain obligation under the Treaty, and also assuming that the state misjudges the question what measures are required for the implementation of the judgment, it then follows from what has been said before that the Commission will be entitled to lay a new complaint before the Court alleging that the state has failed to comply with its obligation under art. 171. Again the Court would not be competent to proceed further than to issue a statement that art. 171 has been violated by the state. In a difficult case, where it would be hard to conclude exactly what measures are required under art. 171, one can well imagine several subsequent actions before the Court. It is true that in its statement of reasons the Court may express its view upon the matter, but this part of the judgment is not binding upon the state, which may take a different view. Such practical inconveniences are, of course, not decisive. It is, however, hard to see any legal reason to deny the Court the competence to indicate in its decision what specific measures are required from the defendant state. The function of the Court, according to art. 164, is to ensure a stable and firm interpretation and application of the Treaty. This task applies to the whole Treaty, including art. 171.

Thus, there seem to be strong arguments in favour of the view that the Court is at least competent to decide authoritatively what measures a member state must take in order to comply with its obligation under art. 171. Is this interpretation in accordance with the Court's practice? In fact, the Court has always been content to establish in its decisions under art. 171 that the defendant member state, by some action or inaction defined, "has failed to fulfil the obligations which lie upon it by virtue of" one or more specified provisions. However, in the case *Assistance for reconversion of mining districts*, the Court declared in its statement of reasons: "As the Treaty aims at actually removing infringements and their effects for the past and in future, the institutions of the Community entrusted with the task to ensure the application of the Treaty may decide to what extent the obligation incumbent upon the member state concerned can, as the case may be, be substantiated in a reasoned opinion . . . issued by virtue of . . . Article 169 . . . or in a complaint before the Court."¹ The Court did not explicitly declare itself competent in this respect, but a logical

¹ Rec. 1973, p. 829.

consequence of its reasoning is that the competence referred to applies to the Court's decisions as well.²

Is the Court even bound to point out the measures required for the implementation of its judgment? In the context here discussed, the question is only interesting if such an obligation, provided it does exist, means that the member state in breach is not bound to take any other measures than those prescribed by the Court. However, this cannot possibly apply, because the Court can never absolve a state from an obligation incumbent upon it by virtue of the Treaty.³

From the foregoing it follows that, in a decision under art. 171, the Court is competent but not obliged to prescribe the measures required for the implementation of its judgment. In practice, however, the Court has not up to now ever given such indications. This restraint seems wise. First, the use of such competence would involve a considerable risk of mistakes; it is usually easier to establish what is wrong than, additionally, to point out the measures required to restore the status of legality. Furthermore, the implementation of the judgment has to be carried out within a national framework, which is more familiar to the state than to the Court. It may be added that, from a psychological point of view, it is important that the member states should have as little occasion as possible to conceive of the activity of the Community as a menace to their sovereignty.

Whether or not the Court indicates special measures to be taken by a member state in breach, the obligation under art. 171 remains. Certainly the same applies to decisions of the Commission under art. 88 of the ECSC Treaty. From a legal point of view, the duty of the state in breach to implement a judgment has no more weight than any other obligation under Community law. But what, then, ensures that a verdict will actually be implemented? In this respect, the two Treaties differ from each other.

The ECSC Treaty provides for special sanctions:

If the State has not fulfilled its obligation by the time limit set by the High Authority, or if it brings an action which is dismissed, the High Authority may, with the assent of the Council acting by a two-thirds majority:

- (a) suspend the payment of any sums which it may be liable to pay to the State in question under this Treaty;
- (b) take measures, or authorise the other Member States to take measures, by way of derogation from the provisions of Article 4, in order to correct the effects of the infringement of the obligation.

² Cf. Millarg, in *EuR* 1973, p. 352, and Cahier in *Cah.dr.eur.* 1974, p. 29.

³ Cf. Mertens de Wilmaris and Verougstraete, p. 404. To be sure, it is unthinkable that the Court could ever—even indirectly—absolve a State from the respect of Community law."

Proceedings may be instituted before the Court against decisions taken under subparagraphs (a) and (b) within two months of their notification; the Court shall have unlimited jurisdiction in such cases.

If these measures prove ineffective, the High Authority shall bring the matter before the Council.

These sanctions have never been applied; member states have never refused to comply with the decisions taken by the Court under art. 88. Generally speaking, the special sanctions laid down in art. 88 are not likely to be effective, should they ever be applied. As to the suspension of payments, the member state refusing to comply with the Court's decision is likely to consider its interest in continuing the infringement more important than the payment; besides, there are no such payments nowadays.⁴ With reference to the measures named under (b), these cannot go any further than is required in order to parry the effects of the infringement.⁵ In the last resort, "if these measures should prove ineffective", the Commission is supposed to "refer the matter to the Council". The Treaty is silent on the question of what measures may be taken by the Council in order to deal with such a situation. Marchesini comments that, at this stage, the procedure is of a purely political character; the crisis then at hand cannot be removed by any other means than political negotiation.⁶ From a legal point of view, however, it may be presumed that the general principles of international law apply.⁷

The EEC Treaty does not provide for any procedure at all in a case where a member state does not comply with the Court's decision. This "retreat" in comparison with the order instituted by the ECSC Treaty has been explained in different ways. According to Aubenas, it is a reflection of "l'évolution d'idées en matière de supranationalité".⁸ Mühlhölfer points out "die grössere Elastizität . . . für den inneren politischen Spannungsausgleich".⁹ Wohlfarth holds that the authors of the EEC Treaty simply considered it as "selbstverständlich" that the member states will comply with the decisions of the Court.¹ Rasquin takes the view that the EEC Treaty expresses "plus de réalisme" than does the ECSC Treaty. It is

⁴ Van der Esch, pp. 560 ff.

⁵ Cf. Rasquin, pp. 22 ff., Reuter, p. 104, Ferriere, pp. 37 ff., and Marchesini, no. 1037. Mason, however, holds (at p. 39) that "it would seem entirely possible to turn this power of sanctions into a formidable weapon by such means as boycotts or embargoes". See also van der Esch, p. 561.

⁶ Cf. Marchesini, no. 1039, Rasquin, p. 24, and Cahier in *Cah.dr.eur.* 1967, p. 158.

⁷ To the same effect Bindschedler, p. 247, and Schulze-Eggert, p. 64 footnote 241. Colin (p. 168) does not discuss this question but mentions that the representatives of the governments of the member states could then decide to suspend all the provisions of the Treaty with respect to the recalcitrant member state.

⁸ Aubenas, p. 460.

⁹ von der Groeben-von Beckh, at art. 169 (4). Journal of International Law 1957-2009

¹ Wohlfarth-Everling-Glaesner-Sprung, at art. 171 (1).

even possible to imagine other explanations: for example, it may have been impossible to attain unanimity on the matter and the authors may therefore have chosen to leave the problem unsolved. However this may be, from a legal point of view it can hardly be said that the Treaty excludes the possibility that a member state taking the view that it is not bound by the rules of the Treaty (this would be the logical conclusion to be drawn from a refusal to implement a verdict pronounced by the Court) will be exposed to sanctions applied by other member states under the rules of international law.

CONCLUDING REMARKS

There are certain differences between ECSC and EEC with regard to the rules on failure of a member state to comply with its obligations. The EEC Treaty does not provide for any other sanction than the Court's establishing of the violation, whereas the ECSC Treaty, in addition to a procedure that the Commission in a reasoned decision (open to the Court's general jurisdiction) shall take note of the failure, provides for economic sanctions and, in the last resort, for political measures to be taken by the Council. Furthermore, under the ECSC Treaty the Commission has a duty to intervene if it considers that a member state has failed to comply with its obligations, whereas the EEC Treaty confers wide freedom upon the Commission to use its discretion, the only limit being that the matter shall have the object of putting an end to an infringement.

In practice, however, these differences are of little bearing. Up to now, there has been no other sanction applied under the ECSC Treaty than the pure establishment of failures. Economic sanctions have never been applied and are not likely to be effective. Sanctions decided by the Council would be conceivable only in a very serious crisis, where the existence of the Community would be shaken to its very foundations. The fact that under the EEC Treaty there is more room for discretion than under the ECSC Treaty with respect to the initiation of proceedings against member states is of no real importance, either theoretically or practically, because if the Commission does not take action, a member state may initiate the procedure. Actually, the Commission does not seem to make any difference between ECSC and EEC in this respect.

It is typical of the European Communities that by virtue of the Court's decisions Community law has great firmness. This applies to the rules of the Treaties as well as to the obligations following from secondary Community law issued by the Council or Commission by virtue of the

Treaties. The procedure established by each of the Treaties in order to bring infringements before the Court is likely to ensure impartial and uniform interpretation of Community law. It is a peculiar feature of the European Communities that a special administrative institution, the Commission, is entrusted with the task of detecting infringements. Violations are therefore brought under the jurisdiction of a court of law to a much wider extent than otherwise occurs under international law. In practice, both the Commission and the Court seem to execute their duties in conformity with the intentions expressed in the Treaties.

Even private persons affected by an infringement committed by a member state have certain possibilities of having a matter brought before the Court. Under the ECSC Treaty they may lodge an appeal against the Commission's refusal to take note of the violation. As to the EEC Treaty, private parties do not have the same competence, but by resort to a municipal court as intermediary they may have the Court pronounce an opinion on the question whether a member state has violated the Treaty.

It is true that, as a matter of principle, a defendant state may "invoke any justification whatsoever of the failure". However, many submissions which may at first sight appear to be proper justifications, e.g. economic, social and political crises or the objection that the failure was a kind of "self-help" against illegal behaviour on the part of the Community institutions, do not bar the Court from finding that a violation has taken place. This practice involves two important advantages. First, it fortifies the rule of law. Secondly, a member state which has been found to be in breach does not have to feel pilloried, because it has become a normal phenomenon that divergences on the correct interpretation of Community law are settled by such verdicts.

Under these circumstances, would it be justifiable to state that the EC Treaties have solved the problem of making international law effective? It would certainly be going too far to answer this question in the affirmative. What has been achieved is to ensure that each member state will know what is right or wrong. In the last resort, the effectiveness depends on the loyalty of the member states; this applies to the ECSC in practice and to the EEC both in practice and legally.

With respect to the past, it seems correct to say that the member states have shown the loyalty necessary for an effective functioning. None of them has refused to comply with the Court's judgments. Admittedly, delays in implementation have sometimes occurred, but, after all, the fundamental thing is that the member states should acknowledge—in a credible way, of course—that they are bound by the decisions pronounced by the Court and willing to implement them. As long as this condition is

fulfilled, Community law constitutes a genuine legal order, which may even be compared to the national legal systems of the member states.

However, it would be unwise to rely upon the persistence of this situation. Short-run national interests are powerful and may, from a national point of view, appear very legitimate. At present, the situation within the different states of Western Europe is quite remarkable: nearly everywhere, governments are in a precarious situation, faced with an opposition comprising little less than half of the nation. In such a situation short-run interests are more powerful than ever.

On the other hand, there is no doubt that the legal order of the European Communities is a safeguard against destructive forces. Those who wish the Communities to survive hope that this safeguard, in addition to the economic interdependence that has been established, will prove strong enough to resist protectionist currents.

LITERATURE REFERRED TO IN FOOTNOTES

- | | |
|--|--|
| Amphoux, Jean | Recours en constatation des manquements des Etats. Les Traités C.E.E. et Euratom. In <i>Les Nouvelles, Droit des Communautés européennes</i> , Brussels 1969 |
| Aubenas, Benoît | Quelques considérations sur les infractions contre les traités de Paris et de Rome. In <i>R.M.C.</i> 1969, pp. 448-64 |
| Bindschedler, Rudolf R. | <i>Rechtsfragen der europäischen Einigung</i> , Basle 1954 |
| Cahier, Philippe | Le recours en constatation de manquements des Etats membres devant la Cour des Communautés européennes. In <i>Cah.dr.eur.</i> 1967, pp. 123-62 |
| Cahier, Philippe | Les articles 169 et 171 du Traité instituant la Communauté Economique Européenne à travers la pratique de la Commission et la jurisprudence de la Cour. In <i>Cah.dr.eur.</i> 1974, pp. 1-38 |
| Colin, Jean-Pierre | <i>Le gouvernement des juges dans les Communautés Européennes</i> , Paris 1966 |
| Däubler, Wolfgang | Die Klage der EWG-Kommission gegen einen Mitgliedstaat. In <i>N.J.W.</i> 1968, pp. 325-31 |
| Eynard, S. F. | L'article 169 du traité de Rome: douze ans d'application de la procédure d'infraction à l'égard des Etats membres de la CEE. In <i>Riv.Dir.Eur.</i> 1970, pp. 97-125 |
| Ehle, Dietrich | <i>Klage- und Prozessrecht des EWG-Vertrages</i> , Berlin 1966 |
| Ferriere, Georges | <i>Le contrôle de la légalité des actes étatiques par la Cour de Justice des Communautés Européennes</i> , Paris 1968 |
| Gayet, Marie-France
Simon, Denys | Observations. Constatation de manquement et effet direct du droit communautaire. In <i>Cah.dr.eur.</i> 1973, pp. 301-24 |
| von der Groeben, Hans
-von Boeckh, Hans | <i>Kommentar zum EWG-Vertrag</i> , Baden-Baden-Bonn 1960 |
| Ipsen, Hans Peter | © Stockholm Institute for Scandianvian Law 1957-2009
<i>Europäisches Gemeinschaftsrecht</i> , Tübingen 1972 |

- Knöpfle, Robert Anmerkung. In *EuR* 1970, pp. 263–66
- Lauwaars, R. H. *Lawfulness and Legal Force of Community Decisions*, Leiden 1973
- Louis, Jean-Victor Ordre public communautaire et intérêts des Etats dans la procédure en constatation de manquements. In *Miscellanea W. J. Ganshof van der Meersch II*, Brussels 1972, pp. 225–39
- Mason *The European Coal and Steel Community*, The Hague 1955
- Marchesini, Giuseppe Recours en constatation des manquements des Etats. Le Traité CECA. In *Les Nouvelles, Droit des Communautés européennes*, Brussels 1969
- Mertens de Wilmars, J. Proceedings against member states for failure to fulfil their obligations. In *C.M.L.Rev.* 1970, pp. 385–406
- Verougstraete, I. M.
- Pescatore, Pierre Responsabilità degli Stati membri in caso di trasgressione delle norme comunitarie. In *Il diritto negli scambi internazionali* 1972 (XI), pp. 352–70
- Quadri, Rolando–
Monaco, Riccardo–
Trabucchi, Alberto *Trattato Istitutivo della Comunità Europea*, Milan 1965
- Rasquin, G. *Les manquements des Etats membres des Communautés européennes devant la Cour de Justice*, Heule 1964
- Reuter, Paul *La Communauté Européenne du Charbon et de l'Acier*, Paris 1953
- Schulze-Eggert *Die Verletzung von Vertragspflichten durch Mitgliedstaaten der Europäischen Gemeinschaften und die Gegenmassnahmen der supranationalen Instanzen (Diss.)*, Bonn 1966
- Van der Esch, Bastiaan Der Gerichtshof als Verfassungsgericht. In *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Cologne–Berlin–Bonn–Munich 1965, pp. 559–65
- Wohlfarth, Ernst–
Everling, Ulrich–
Glaesner, Hans Joachim–
Sprung, Rudolf *Die Europäische Wirtschaftsgemeinschaft. Kommentar zum Vertrag*, Berlin–Frankfurt am Main 1960
- Zuleeg, Manfred *Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich*, Cologne–Berlin–Bonn–Munich 1969