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ENFORCEMENT TECHNIQUES WITHIN THE EUROPEAN COMMUNITIES: FLYING CLOSE TO THE SUN WITH WAXEN WINGS*

BY WERNER F. EBKE**

I. INTRODUCTION

THE MEMBER STATES of the European Communities¹ ordinarily comply with the law of the Communities.²

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¹ Although the "European Communities" are often thought of as a single entity, there are three legally independent Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). See Treaty Instituting the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140 (1957) [hereinafter cited as ECSC Treaty]; Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty]; Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167 (1958) [hereinafter cited as Euratom Treaty]. The Merger Treaty of 1965 did not merge the three Communities as such; rather, the Treaty instituted a single Commission to replace the High Authority of the European Coal and Steel Community and the Commissions of the European Economic Community and the European Atomic Energy Community, and a single Council to replace the separate councils of the three Communities. See Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965, 4 I.L.M. 776 (1965). For background and effects of the Merger Treaty, see Houben, *The Merger of the Executives of the European Communities*, 3 COMMON MKT. L. REV. 37 (1965-66); Weil, *The Merger of the Institutions of the European Communities*, 61 AM. J. INT'L L. 57 (1967).

² The following countries are today members of the European Economic Community (in alphabetical order): Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, and the

For the most part, they consider the long term benefit of compliance to outweigh any short term gain which they might realize from non-compliance with a particular norm, measure of the Commission, or judgment of the Court of Justice. The desire for a good name, the will to play the role demanded, and the wish to conform for the sake of the common objectives are almost as powerful a motive among the members of the Communities as they are among individuals in national states. Yet, not invariably, the member states of the European Communities, like individuals, sometimes fail to abide by Community law for a variety of reasons. Unfortunately, there are no systematic empirical studies revealing the motives of recalcitrant member states. It is safe to generalize, however, that the motives range from the mere attempt to gain extra time for the national implementation of the Communities' policies and laws,³ to the openly avowed intent to use the default as a weapon in attempts to secure concessions from the other member states.⁴

To remedy violations by a member state of the law of the European Communities, the Treaties of Rome and Paris,⁵ the Communities' equivalent of a constitution, provide, both on the supra-national and the national level, a

United Kingdom. Spain and Portugal are now preparing to enter the Communities. For details, see *THE SECOND ENLARGEMENT OF THE EEC: THE INTEGRATION OF UNEQUAL PARTNERS* (D. Seers & C. Vaitos eds. 1982); Dagtoglou, *The Southern Enlargement of the European Community*, 21 *COMMON MKT. L. REV.* 149 (1984). On February 1, 1985, Greenland, a self-ruled Danish territory, became the first country to pull out of the European Economic Community in the Community's 27-year history.

³ See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (1981). "When Member States break the Treaty — as they sometimes do quite consciously — they usually intend their action to be only temporary: they know they will have to come into line eventually but try to put it off as long as possible." *Id.* at 308.

⁴ An often-cited example of this proposition is the famous case *Commission v. France*, Case 232/78, [1978] *European Court Reports* 2729 (commonly known as the "Sheepmeat" case).

⁵ The ECSC Treaty, *supra* note 1, was signed by Belgium, France, Germany, Italy, Luxembourg, and The Netherlands on April 18, 1951, in Paris and is commonly referred to as the *Treaty of Paris*. It was entered into force on July 25, 1952. See *ECSC Treaty*, *supra* note 1, at 140. The EEC Treaty, *supra* note 1, and the Euratom Treaty, *supra* note 1, were signed by the same states in Rome on March

number of administrative and judicial procedures committed to ensuring the respect and enforcement of Community law.⁶ Recent years have witnessed a rapid increase in enforcement actions, especially those initiated by the Commission of the European Communities under article 169 of the EEC Treaty.⁷ Infrequent in the early 1960's,

25, 1957, and became operative on January 1, 1958. See EEC Treaty, *supra* note 1, at 11; Euratom Treaty, *supra* note 1, at 167.

⁶ See generally, H. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (2d ed. 1979); G. BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES (1981); K. LIPSTEIN, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 313-32 (1974); FÉDÉRATION INTERNATIONALE POUR LE DROIT EUROPÉEN, REMEDIES FOR BREACH OF COMMUNITY LAW (1980); 2 A.G. TOTH, LEGAL PROTECTION OF INDIVIDUALS IN THE EUROPEAN COMMUNITIES. REMEDIES AND PROCEDURES (1978).

⁷ The following table reproduces the figures regarding proceedings under EEC Treaty, *supra* note 1, art. 169 and Euratom Treaty, *supra* note 1, art. 141:

Year	Proceedings Initiated	Reasoned Opinions	Reference to the Court of Justice	Judgments
1959	2	1	—	—
1960	20	3	—	—
1961	22	6	3	1
1962	8	5	2	3
1963	8	4	3	—
1964	17	7	1	2
1965	28	5	1	1
1966	25	3	—	—
1967	18	5	—	—
1968	20	12	2	—
1969	46	21	11	3
1970	50	16	2	8
1971	42	4	1	1
1972	40	18	3	1
1973	30	7	4	3
1974	30	11	1	1
1975	60	23	2	1
1976	90	38	6	2
1977	68	28	8	3
1978	100	46	15	5
1979	200	79	18	8
1980	240	82	28	20

C.D. EHLERMANN, *Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten durch die Kommission*, in EUROPÄISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT, Festschrift zum 70. Geburtstag von Hans Kutscher 135, 146-47 (W.G. Grewe, H. Rupp & H. Schneider eds. 1981). In 1981 and 1982 there was a dramatic increase in enforcement proceedings initiated by the Commission, whereas in 1983 the number of enforcement proceedings declined slightly. In

enforcement actions of the Commission have, by 1984, ripened into an astonishingly complex and indeed very powerful administrative means of persuasion and enforcement in the hand of the Commission of the European Communities, with judicial proceedings in the Court of Justice looming ahead if political persuasion on the administrative level should fail. The Commission's enforcement activities together with the Court's direct and indirect enforcement rulings must, no doubt, rate as the most profoundly successful instruments designed to foster the evolution of Community law and the normative integration within the Communities.

Rather than plunging into the technical details of the enforcement provisions of the Treaties and their implementation, this article analyzes the concepts and prospects of enforcing Community law against defaulting member states. The primary objective of this article is to suggest that the law of the European Communities is not merely entrusted with the maintenance of the existing political and institutional structures, and with preserving the Communities' self-contained servile role of functional bureaucracy; but the law of the European Communities in general and the enforcement procedures under articles 169 and 170 of the EEC Treaty in particular can also be used to encourage and to stimulate progressive developments within the Community toward "an ever closer union among the European peoples."⁸ While enforcement actions may not ultimately transform the present political system of the European Communities, they may well be able to create a normative atmosphere in which an acceptance of the need for political and institutional

1983, 289 procedures were initiated compared with 332 in 1982 and 243 in 1981. The number of reasoned opinions was also lower in 1983, almost half the 1982 figures: 82 reasoned opinions were sent to the 10 member states, compared with 166 the previous year. The Commission brought 42 cases before the Court of Justice, versus 46 in 1982 and 50 in 1981. See COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 317 (1984) [hereinafter cited as *Seventeenth General Report*].

⁸ EEC Treaty, Preamble, *supra* note 1.

transformation can grow. Outside such an environment, the necessary shift in values, behavior, and structure is not likely to occur.

It is the author's perception that the European Communities, being one of the world's largest trading units with a population of over 270 million and linking some of the most prosperous and technologically most advanced countries in the world, need to overcome the present state of political inefficiency and institutional lethargy to be able to contribute more actively, and more effectively, to the current endeavor of restructuring and reforming the world order.⁹ For, at a time of growing inequity and desperation in almost all edges of the world, territorial and national constraints in political thought, behavior, and planning cannot appease those who, like me, are thoroughly convinced that only global thinking and planning well ahead into the future can achieve a perspective on human problems and prospects. The same unconstrained, reformist thinking is also needed within the European Communities to revitalize the idea of a European union. In this process of reform there are, without question, still numerous undiscovered possibilities for enhancing the roles and perspectives of the law and of lawyers in service to the future, the future of the European Communities and the world at large.

II. THE RAGING CONTROVERSY: PRESERVATION VERSUS DEVELOPMENT

Despite their general acceptance of the obligations of membership, the member states of the European Communities are apt to be deflected by national interests. While the member states seem to realize that the economic, political, and normative intertwining that has resulted from the membership in the European Communities cannot be disentangled without self-inflicted hardship, na-

⁹ B.H. WESTON, R.A. FALK & A.A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 1109-48 (1983).

tional pressures and egoism occasionally become so dominant as to lead member states to disobey their obligations¹⁰ under the law of the European Communities.¹¹ The member states apparently assume that the political, institutional, and normative frame of the Communities will prove to be durable enough to cope with occasional, and usually only temporary, violations.¹² Yet, even minor

¹⁰ Much has been written on the origin and nature of community obligations and on what constitutes a violation of these obligations. See, e.g., T.C.HARTLEY, *supra* note 3, at 286-91; G. BEBR, *supra* note 6, at 278-79; Daig, Artikel 169 annot. 32-51, in 2 KOMMENTAR ZUM EWG-VERTRAG (H. von der Groeben, H. von Boeckh, J. Thiesing & C.D. Ehlermann eds. 3d ed. 1983). For our purposes it is sufficient to state that the law of the European Communities imposes obligations on both member states and individuals. The obligations may arise from the three founding Treaties. See *supra* notes 1 and 5 and accompanying text. It also may arise from secondary legislation generated by the Communities or general principles of law implied by Community law. See *infra* note 11 and accompanying text. An omission can constitute a failure to the same extent as a positive action. Each member state is responsible for the conduct of its organs, agencies, and subdivisions. The enforcement procedure under article 169 of the EEC Treaty, *supra* note 1, may therefore be instituted against a member state based upon legislative, judicial, or administrative actions or omissions on the federal level, the state level, or the local level of a member state. See EEC Treaty, *supra* note 1, art. 169. The conduct of a semi-public institution of a member state, such as the social security and welfare administration in the Federal Republic of Germany, may also subject a member state to enforcement proceedings. The conduct of private parties, on the other hand, is not covered by the EEC Treaty. *Id.* A member state may, however, be held responsible for lack of appropriate supervision. See A. BLECKMANN, *EUROPARECHT: DAS RECHT DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT* 150 (3d ed. 1980).

¹¹ Under the EEC Treaty, *supra* note 1, as well as under the Euratom Treaty, *supra* note 1, enforcement actions may be brought only if a member state has failed to fulfil an obligation under this Treaty. EEC Treaty, *supra* note 1, arts. 169-70; Euratom Treaty, *supra* note 1, arts. 141-42. Enforcement actions, however, may be based on violations of provisions other than those of the constitutive Treaties. A violation of an obligation under the laws generated by the organs of the Communities under one of the founding Treaties may also be subject to enforcement proceedings. Violation of those laws constitutes a violation of the Treaty provision empowering their enactment. Similarly, the Treaties regard a violation of an obligation created by a treaty between one of the Communities and a non-member state as a violation of the constitutive Treaty under which the respective Community was empowered, either expressly or impliedly, to conclude an agreement. See T. C. HARTLEY, *supra* note 3, at 286; A. BLECKMANN, *supra* note 10, at 151.

¹² The non-implementation or incorrect implementation of Directives is a frequent source of violations. For a discussion of the nature and scope of Directives, see T. C. Hartley, *supra* note 3, at 81-86, 204-18. The failure of a fair number of states to implement the important Fourth Company Law Directive, though the transformation time limit has already expired, is a prominent example of this

violations not only have an effect on the smooth functioning of the Communities on the day-to-day basis, but, because of leverage effects, they also imperil the possibility of attaining the common objectives laid down in the three constitutive Treaties of the European Communities. For, as political, economic, and monetary difficulties increase, the number of cases of non-compliance with Community law is also likely to increase.¹³ Member states may in turn use the failure of other member states and/or institutions of the European Communities, such as the Commission, under similar or even different circumstances as *political*¹⁴ defense of their own default.

The effects that a member state's violation of Community law may have on the Community system depend upon the relative significance of the obligation disobeyed, the relative magnitude and intensity of the violation, and the intention(s) of the wayward state. Yet, regardless of how one looks at the nature and perspectives of the European Communities, violations of Community obligations, both

proposition. See W. EBKE, WIRTSCHAFTSPRÜFER UND DRITTHAFTUNG 12 n.6 (1983). For a concise description of the contents and purposes of the Fourth Company Law Directive, see Ebke, *Book Review*, 37 Sw. L.J. 1217, 1222 n.17 (1984). Dr. Everling has recently stated that almost 50 percent of all of the infringement proceedings decided by the Court of Justice between 1973 and 1982 concerned the non-implementation or incorrect implementation of Directives. Everling, *Die Mitgliedstaaten der Europäischen Gemeinschaft vor ihrem Gerichtshof*, 18 EUROPARECHT 101, 107 (1983). In 1983, the percentage of violations relating to Directives declined in proportion to the increased protectionism practiced by the member states, however. Approximately only one-third of the enforcement cases brought before the Court of Justice still concerned Directives. SEVENTEENTH GENERAL REPORT, *supra* note 7, at 317.

¹³ In this context it is interesting to note that in 1983, most of the violations of community obligations for which the Commission of the European Communities initiated proceedings against member states, concerned the EEC Treaty, *supra* note 1, art. 30 ("free movement of goods"). This is apparently the result of renewed protectionism by the member states. See SEVENTEENTH GENERAL REPORT, *supra* note 7, at 317.

¹⁴ Legally it is, of course, no defense that the Commission and/or the Council is also in breach of Community law; nor is it a defense that the act or omission constituting a violation was committed in retaliation for a comparable violation by another member state; nor may a member state defend the case on the ground that another member state was doing exactly the same and no proceeding was brought against it. A. BLECKMANN, *supra* note 10, at 152; Daig, *supra* note 10, Artikel 169 annot. 47-49.

minor and fundamental, lessen the confidence and respect not only in the law of the European Communities but also in the Communities themselves. Both those who advocate a system of integration and ultimate political union in Europe and those who favor a model that stresses national sovereignty and looser political union will agree that even minor violations will ultimately do more harm than good to the European Communities as well as to the member states.

The law of the European Communities supports this view. From the outset, the Treaties of Rome and Paris left it for the independent Commissions of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), and the High Authority of the European Coal and Steel Community (ECSC) constantly to remind the Communities and the member states of the fundamental objectives of the Communities and to seek the achievement of those objectives to the fullest extent.¹⁵ The institutional merger of the Communities in 1965¹⁶ has not changed the outlook of the Treaties in this respect. Thus, for example, under article 155 of the EEC Treaty,¹⁷ the Commission has the duty of ensuring that the provisions of the Treaty and the measures pursuant to it taken by the institutions are carried out. Article 124 of the Euratom Treaty contains the same provision. En-

¹⁵ D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND THE INSTITUTIONS OF THE EUROPEAN COMMUNITIES 105 (1973).

¹⁶ See *supra* note 1.

¹⁷ EEC Treaty, *supra* note 1, art. 155 reads as follows:

With a view to ensuring the functioning and development of the Common Market, the Commission shall:

- ensure the application of the provisions of this Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof;
- formulate recommendations or opinions in matters which are the subject of this Treaty, where the latter expressly so provides or where the Commission considers it necessary;
- under the conditions laid down in this treaty dispose of a power of decision of its own and participate in the preparation of acts of the Council and of the Assembly;
- exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter.

abling the Commission to fulfill this function, article 169 of the EEC Treaty¹⁸ gives the Commission the authority to respond directly, yet flexibly, to violations in order to secure both respect and enforcement of the law of the Communities.¹⁹

¹⁸ EEC Treaty, *supra* note 1, art. 169 reads as follows:

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

See also Euratom Treaty, *supra* note 1, art. 141 and ECSC Treaty, *supra* note 1, art. 88 which can be summarized as follows: 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. 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 authorize the other Member States to take measures, by way of derogation from the provisions of Art. 4, in order to correct the effects of the infringement of the obligation. 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.

The procedure under ECSC Treaty, *supra* note 1, art. 88 is briefly discussed by G. BEBR, *supra* note 6, at 321-26.

¹⁹ The enforcement actions under Article 169 of the EEC Treaty, *supra* note 1, and Article 141 of the Euratom Treaty, *supra* note 1, known in the French shorthand of Community law as *recours en constatation de manquement*, have attracted the attention of numerous commentators. See, e.g., G. BEBR, *supra* note 6, at 277-326; T. C. HARTLEY, *supra* note 3, at 283-323; A. BLECKMANN, *supra* note 10, at 148-56; H.A.H. AUDRETSCH, SUPERVISION IN EUROPEAN COMMUNITY LAW (1978); H. SCHERMERS, *supra* note 6, at 200-29; A. PARRY & S. HARDY, EEC LAW 94-100 (1973); G. RASQUIN, LES MANQUEMENTS DES ÉTAT MEMBRES DES COMMUNAUTÉS EUROPÉENNES DEVANT LA COURT DE JUSTICE 1-39 (1964); Everling, *supra* note 12; de Bellescize, *L'article 169 du traité de Rome, et l'efficacité du contrôle communautaire sur les manquements des états membres*, 13 *Revue Trimestrielle du Droit Européen* 173 (1977); Nafilyan, *La position des états membres et les recours en manquement des articles 169 C.E.E. et 141 C.E.E.A.*, 13 *Revue Trimestrielle de Droit Européen* 214 (1977); Barav, *Failure of Member States to Fulfil their Obligations under Community Law*, 12 *COMMON MKT. L. REV.* 369 (1975); Mertens de Wilmars & Verougstraete, *Proceedings Against Member States for Failure to Fulfil their Obligations*, 7 *COMMON MKT. L. REV.* 385 (1970); Cahier, *Le recours en constatation de manquements des États membres devant la*

Article 155 of the EEC Treaty places the Commission's watch-dog function on a par with the executive powers specifically conferred upon the Commission by the Treaty and other functions specifically entrusted to the Commission by the Council of the Communities.²⁰ While article 155 reflects the intentions of the draftsmen of the Treaty of Rome, it says very little about the actual practical significance of the control function of the Commission compared to the Commission's role as initiator and co-ordinator. For a better understanding of the Commission's control function in regard to its role as initiator and co-ordinator, some historical grounding is not only illuminative, but necessary.

1. *Initiation, Co-ordination, and Enforcement*

The Commission has always been well aware of its function as guardian of the constitutive Treaties and the perspectives of its supervision rights. It has, traditionally, been relatively reluctant, however, to use its power to enforce the laws of the Communities against a defaulting member state.²¹ It was not until the late 1970's that the Commission, under the presidency of Roy Jenkins, began to enforce, more offensively, obligations of the member

Cour des Communautés Européennes, 3 Cahiers de Droit Européen 123 (1967); Däubler, *Die Klage der EWG-Kommission gegen einen Mitgliedstaat*, 21 Neue Juristische Wochenschrift 325 (1968).

²⁰ EHLMANN, *supra* note 7, at 136.

²¹ For statistical data, see *supra* note 7. See also Everling, *supra* note 12, at 106. It has been suggested that, prior to the mid-1970's, the Commission tended to commence enforcement actions only with regard to matters of secondary importance. See Ehlermann, *supra* note 7, at 147. This criticism may have been a valid criticism for the time prior to 1977. Since then, however, the Commission has frequently demonstrated its willingness to enforce the law of the Communities even in politically important cases as demonstrated by the actions brought against Germany and Ireland concerning certain restrictions on the freedom to carry out cross-frontier insurance operations. See *Commission v. Federal Republic of Germany*, Case 205/84, 27 Official Journal of the European Communities No. C 233/3 (Sept. 4, 1984); *Commission v. Ireland*, Case 206/84, 27 Official Journal of the European Communities No. C 236/4 (Sept. 6, 1984). See also *Commission v. Italy*, Case 163/82, [1984] 3 COMMON MKT. L.R. 169 (regarding sex discrimination). See also EHLMANN, *supra* note 7, at 147-48.

states toward the European Communities.²² The initial reluctance on the part of the Commission does not surprise those familiar with the nature, scope, and requisites of enforcement actions under article 169 of the EEC Treaty. The commencement of an official enforcement procedure is a highly political step, as it puts the member state's prestige in issue.²³ This is true for all stages of the procedure.²⁴ The initial informal investigations of the Commission require discretion to avoid publicity and embarrassment that might result for the member state concerned.²⁵ The issuance of a reasoned opinion,²⁶ at the end of the formal phase of the administrative enforcement procedure, is a serious, cumbersome, and delicate task.²⁷ The opinion is to be designed in a way that does not close the door to the defaulting member state which may eventually be prepared to accept voluntarily the position of the Commission and to implement it nationally.²⁸ The final

²² EHLERMANN, *supra* note 7, at 141.

²³ T. C. Hartley, *supra* note 3, at 294, citing Advocate General Roemer.

²⁴ Enforcement proceedings under EEC Treaty, *supra* note 1, art. 169 and under Euratom Treaty, *supra* note 1, art. 141, are divided into two stages: the administrative stage and the judicial stage. The administrative stage itself can be subdivided into the informal phase and the formal phase. For details, see 5 H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY. A COMMENTARY ON THE EEC TREATY* 5-324-36 (1982); T.C. Hartley, *supra* note 3, at 291, 302; G. BEBR, *supra* note 6, at 280-87. In addition to the basic proceedings under articles 169 and 170 of the EEC Treaty and articles 141 and 142 of the Euratom Treaty, the law of the European Communities provides accelerated procedures in special cases. See, e.g., EEC Treaty, *supra* note 1, arts. 180(a), 93(2), and 225; Euratom Treaty, *supra* note 1, arts. 38 and 82. These articles do not, however, preclude use of EEC Treaty, *supra* note 1, art. 169 and Euratom Treaty, *supra* note 1, art. 141, even where they apply. A.PARRY & ST.HARDY, *supra* note 19, at 94. For a discussion of the procedure under EEC Treaty, *supra* note 1, art. 93, see Dashwood, *Control of State Aids in the EEC: Prevention and Cure under Article 93*, 12 COMMON MKT. L. REV. 43, 53-57 (1975); Germany v. Commission, Case 84/82, [1985] 1 COMMON MKT. L.R. 153 (regarding state aid to Belgian textile industry).

²⁵ T. C. Hartley, *supra* note 3, at 292.

²⁶ A "reasoned opinion" is a coherent exposition of the reasons which led the Commission to believe that the member state in question has failed to fulfil an obligation under one of the constitutive Treaties. Commission v. Italy, Case 300/81, [1984] 2 COMMON MKT. L.R. 430, 446.

²⁷ G. BEBR, *supra* note 6, at 279.

²⁸ In this context it is interesting to note that in 1983, as in previous years, the number of cases actually brought before the Court was relatively low, considering the large number of procedures initiated and reasoned opinions sent in 1982.

decision to bring the case before the European Court of Justice is probably the most political of all of the decisions to be made by the Commission at the various stages of an enforcement proceeding under article 169 of the EEC Treaty, as this decision leads to a direct confrontation between the Commission and the member state in default as well as to public discussions of the acts or omissions of the recalcitrant member state.

Given the political sensibilities of the member states concerned, it is no wonder that each of the measures mentioned have always been thought to be measures of last resort, to be used only when and if the Commission does not succeed with its efforts to settle the dispute amicably.²⁹ Consequently, given a choice, the Commission seems to have preferred to enforce obligations in cases in which the relative risk of ultimately losing the case in the Court of Justice appeared to be comparatively small.³⁰ As a general rule, this approach does seem to be legally acceptable, as there is no absolute obligation on the Commission to commence enforcement proceedings whenever it appears that there are reasonable grounds for believing that a violation of the EEC or Euratom Treaty has occurred.³¹ Nor is there an absolute obligation on the part

SEVENTEENTH GENERAL REPORT, *supra* note 7, at 317. See also Everling, *The Member States of the European Community before their Court of Justice*, 9 EUR. L. REV. 215, 237 (1984). The reason for the low number of cases actually litigated is that the member states in most cases finally decided to comply with the view of the Commission or that a compromise was reached. See also T. C. HARTLEY, *supra* note 3, at 316, for the development between 1959 and 1976.

²⁹ G. BEBR, *supra* note 6, at 280.

³⁰ EHLMANN, *supra* note 7, at 140.

³¹ T. C. HARTLEY, *supra* note 3, at 294; A. Parry & St. Hardy, *supra* note 19, at 95. See generally Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 EUR. L. REV. 442 (1979). It goes without saying, however, that the Commission's decision whether or not to commence an enforcement proceeding under the EEC Treaty or Euratom Treaty must be based upon objective criteria. See EEC Treaty, *supra* note 1, art. 169; Euratom Treaty, *supra* note 1, art. 141. In exercising its function as guardian of the Treaties, the Commission is required to use its best judgment and independent discretion. The Commission's failure to initiate an enforcement action against a defaulting member state on the grounds of inappropriate use of discretion ("Ermessensmissbrauch") can be challenged under article 175 of the EEC Treaty. See EEC Treaty, *supra* note 1, art. 175. In appropriate cases, actions can be brought against the Commission in tort (or, in

of the Commission to issue a reasoned opinion if the wayward member state is not prepared to accept voluntarily the Commission's view,³² or to bring the case before the Court of Justice if the member state in default chooses to disobey the reasoned opinion.³³ As a general rule, the Commission needs to weigh the "macro" effects of a member state's default on the Communities, their institutions, and member states against the "micro" effects that the investigatory procedure, the reasoned opinion, or the proceeding before the Court of Justice may have on the recalcitrant member state.

In this context, it must be remembered that neither the EEC Treaty nor the Euratom Treaty provide for sanctions against a member state which does not obey the opinion of the Commission or the final judgment of the Court.³⁴ Consequently, there is always the possibility that a member state will simply ignore any ruling rendered against it.³⁵ In balancing the various interests, the Commission needs to consider that excessive resort to formal enforcement actions might do more harm than good to the Communities.³⁶ In light of these facts, the Commission's initial reluctance to proceed under article 169 of the EEC Treaty was a perfectly understandable and, no doubt, reasonable approach of an institution that was seeking to gain and to retain the respect and support of the constituency of the Communities in fulfilling its functions. One

European terminology, "non-contractual" liability) for damages. The potential of these actions has not yet been tested. Everling, *supra* note 12, at 106. *But see* Ehlermann, *supra* note 7, at 138 n.8, questioning whether in light of EEC Treaty article 170, a member state could challenge the Commission's decision not to institute an enforcement action under article 169 of the EEC Treaty. For a general discussion of the liability of the European Communities, see G. LYSÉN, *THE NON-CONTRACTUAL AND CONTRACTUAL LIABILITY OF THE EUROPEAN COMMUNITIES* (1976).

³² T. C. HARTLEY, *supra* note 3, at 295.

³³ *See* G. Bebr, *supra* note 6, at 283; J.A. USHER, *EUROPEAN COURT PRACTICE* 30 (1983); Everling, *supra* note 12, at 106; A. Parry & St. Hardy, *supra* note 19, at 95, 97.

³⁴ T. C. HARTLEY, *supra* note 3, at 294.

³⁵ *See infra* text accompanying notes 103-115.

³⁶ T. C. HARTLEY, *supra* note 3, at 294.

can only speculate, however, about the reasons that led the Commission in the late 1960's and early 1970's to continue its policy of pursuing its control function in this reluctant manner.

A European commentator has suggested that, prior to the mid-1970's, a certain political indecisiveness of the Commission was one of the major causes for the reluctance of the Commission to commence formal enforcement proceedings against defaulting member states.³⁷ Given the potential effects that the indecisiveness might have had upon the lawyers and bureaucrats in service to the Commission ("Eurocrats"), this may well be one explanation for the reluctance of the Commission. Political indecisiveness is, however, not sufficient in itself to explain fully the fact that formal enforcement proceedings were so seldom used in practice from the mid-1960's to the mid-1970's. The more important reason seems to be that the Commission acts as both the guardian of the constitutive Treaties and the motive force of integration.³⁸ Given this twofold task and its seemingly dialectic consequences, in cases of conflicts the Commission seems to have emphasized its role as initiator and co-ordinator at the expense of its control function. The Commission apparently hoped that it could best fulfil its duties to the Communities by assisting in the formulation of future community-oriented policies.³⁹ Like many politicians, bureaucrats, and lawyers, the Commission seems to have regarded participating in the development of new Community law to be more rewarding than enforcing the existing laws of the Communities.⁴⁰

The Treaty of the European Economic Community (EEC Treaty) facilitates such a view. Unlike the ECSC and

³⁷ EHLERMANN, *supra* note 7, at 139.

³⁸ *Id.* at 136-37.

³⁹ *Id.* at 137.

⁴⁰ *Id.* at 138. See also E. STEIN, P. HAY & M. WAELEBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE (1976) [hereinafter cited as European Community Law]. "The Commission's *most significant* function is that of 'initiative.'" *Id.* at 38 (emphasis added).

Euratom Treaties, the EEC Treaty, with its wide-ranging concern for the entire economies of the member states, leaves the details of the policies that will be followed in pursuing the Community's goals to be worked out by the institutions of the Community. In this task, the Commission can play a major role and perhaps has played its most significant part. Since the merger of the institutions of the three Communities in 1965,⁴¹ the Commission of the European Communities has been able to take steps towards the formulation of common policies in such fields as industry, energy, research, and technology. By initiating and co-ordinating the policies of the Communities in these areas, the Commission has cut across the boundaries of the European Economic Community in a way which may well be regarded as a further step in the process leading to a complete merger of the three Communities.⁴²

2. *Consensuality and Status Quo*

In initiating and co-ordinating the policies of the Communities, however, the Commission was soon to face the system-maintaining approach that characterizes the European Communities. The European Communities, imposed upon Europeans as an economic and political necessity, seek to link sovereign states of different sizes, cultural heritages, wealth, and aspirations. They seek stability under constantly changing political, economic, monetary, and social conditions in Europe as well as in other parts of the world. Given the multifarious differences and the diversity of outlooks represented in the European Communities, the objectives set forth in the founding Treaties of the European Communities cannot be easily attained. The European Communities of the 1960's and 1970's acted as an aggregation of sovereign states intergovernmentally pursuing their own national interests under a common roof. They did not act as entities in-

⁴¹ See *supra* note 1.

⁴² D. LASOK & J.W. BRIDGE, *supra* note 15, at 105.

dependent of their component parts and endowed with the status, the insitutional attributes, and dynamics of legal persons, as probable and preferable supra-national alternatives to the national member states.⁴³ The outlook of the Treaties of Rome and Paris to the Communities and the members is perhaps too closely associated with sustaining particular positions and principles in the *status quo*, reflecting the strong sense of national identity and prestige of the member states.

Like other systems that aim at preserving the *status quo* rather than advancing and transforming the system, the model of the European Communities relies heavily upon consensus formation around fundamental issues in order to satisfy both individual national interests and shared objectives of the member states. The Council of the Communities, which is principally responsible for the execution of the objectives laid down in the constitutive treaties, serves as the principal forum within this consensual system. In view of article 148(2) of the EEC Treaty, the four big member states, France, the Federal Republic of Germany, Italy, and the United Kingdom, cannot, if they combine their voting powers, outvote all the small member states in the Council; any two of the big countries can, however, block a decision.⁴⁴ More importantly, the *Accords of Luxembourg* of 1966⁴⁵ ensure member states that

⁴³ In this respect, the Communities of the 1980's do not differ significantly from those of the 1960's and 1970's. As Professor Eric Stein, a distinguished commentator of the law of the European Communities, recently observed, "the Community today is an asymmetric, complex combination of quasi-federal processes and intergovernmental negotiations, with the latter appearing to be gaining the upper hand." Stein, *Book Review*, 78 AM. J. INT'L. L. 692, 695 (1984).

⁴⁴ For details, see T. C. HARTLEY, *supra* note 3, at 12, 13.

⁴⁵ The *Luxembourg Accords* read in their pertinent part as follows:

(b) *Majority Voting Procedure*

I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Art. 2 of the Treaty.

II. With regard to the preceding paragraph, the French delegation

when critical interests of one or more member states are at stake, majority voting will not be used to put through certain measures.⁴⁶ In the institutional process of aspiring to reach consensus, the role of the Commission of the European Communities can best be described in terms of initiative, preparation, mediation, and execution of the measures and decisions of the Council.⁴⁷ In this function, the Commission is subject to the limitations of the consensual system that characterizes the European Communities.

The consensus-oriented approach of the Communities results in a constant attempt to seek achievable goals that are compatible with the perceived interests of the member states. Such an approach leaves behind the idea of arriving at a single or exclusive set of common objectives without first focusing upon the interests of the large member states or a group of member states. The constant need to reduce the activities of the member states to a common denominator precludes the members from concentrating on building a more ambitious supra-national consensus concerning the direction and shape of a future-oriented

considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.

IV. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure. . . .

See EUROPEAN COMMUNITY TREATIES at 249-50 (4th ed. 1980).

⁴⁶ For a more detailed exposition of this view, see, e.g., 1 L. J. CONSTANTINESCO, DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN 431 (1977); Lahr, *Die Legende vom "Luxemburger Kompromiss"*, 1983 Europa-Archiv 223; Mosler, *National- und Gemeinschaftsinteressen im Verfahren des EWG-Ministerrates. Die Beschlüsse der ausserordentlichen Tagung des EWG-Rates in Luxemburg vom 29. Januar 1966*, 26 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1966); EUROPEAN COMMUNITY LAW, *supra* note 40, at 5, 63-66; Kranz, *Le vote dans la pratique du Conseil des ministres des Communautés européennes*, 18 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 403 (1982). The validity of the *Accords of Luxembourg* is debatable. D. LASOK & J. W. BRIDGE, INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 183 (3d ed. 1982); R. STREINZ, DIE LUXEMBURGER VEREINBARUNG (1984).

⁴⁷ Ehlermann, *supra* note 7, at 136-37. See also Noel, *The Commission's Power of Initiative*, 10 COMMON MKT. L. REV. 123 (1973).

order in Europe, even for those who endorse the shared European values and accept the need for institutional changes and shifts in behavior as a prerequisite to realization of these goals.

Moreover, the built-in concept of maintenance places stress upon technical solutions and organizational aspects, and it correspondingly tends to disregard the political and normative. Policy or normative guidance is provided for astonishingly short periods of time, or not at all, and urgently needed measures and future-oriented decisions, such as budget reform and uniform standards of emission control for new vehicles, are too often simply postponed. This lack of impetus not only hinders innovative initiatives, but also creates a tendency among the member states to withdraw their commitment to the Communities. As a result, the consensual system tends to cause political conflicts. The most prominent examples of such conflicts are the Crisis of 1965 with its "Policy of Empty Chairs"⁴⁸ and the famous *Sheepmeat* case.⁴⁹ Legally, these political conflicts were enormously difficult to handle. They seem to have contributed significantly, however, to the new enforcement policy of the Commission of the European Communities in the late 1970's and early 1980's by strengthening the Commission's position.

3. *The New Enforcement Policy of the Commission*

In a consensual system, conflicts create a tension among competitive pressures that are escalating in a period of economic stagnation, inflation, and unemployment. Under those circumstances, many frequently view obedience to law as a luxury rather than a necessity. The member states' renewed protectionism, recently observed by the Commission,⁵⁰ clearly illustrates this proposition. Even minor violations of Community obligations by one or more member states, however, lessen the confidence

⁴⁸ European Community Law, *supra* note 40, at 5.

⁴⁹ Commission v. France, Case 232/78, [1978] European Court Reports 2719.

⁵⁰ SEVENTEENTH GENERAL REPORT, *supra* note 7, at 317.

and the respect in the Communities. This in turn threatens the prospects of achieving the common objectives set forth in the constitutive treaties of the Communities. In the 1960's and 1970's these threats became more evident for two reasons: (1) the unprecedented growth of the body of law generated by the Communities under the Treaties, and (2) the increasing willingness of some member states to disobey their Community obligations.⁵¹ Thus, both the advent of new legislation further implementing the common policy and the increasing tendency toward national protectionism made aggressive enforcement of existing *and* new Community law crucial.

a) *The Commission's De Facto Enforcement Monopoly*

The growing notion of the need to ensure consistent compliance with European Community Law was accompanied by the gradual weakening of the Commission's long-standing *de facto* monopoly of enforcement. Under the EEC and Euratom Treaties, the Commission shares its function as guardian of the founding Treaties with the member states. Pursuant to article 170 of the EEC Treaty and article 142 of the Euratom Treaty,⁵² a member state may bring an action to enforce another member state's obligations towards the Communities.⁵³ Although these

⁵¹ Ehlermann, *supra* note 7, at 139.

⁵² EEC Treaty, *supra* note 1, art. 170 and Euratom Treaty, *supra* note 1, art. 142 read as follows:

Any Member State which considers that another Member State has failed to fulfil any of its obligations under this Treaty may refer the matter to the Court of Justice.

Before a Member State institutes against another Member State proceedings relating to an alleged infringement of the obligations under this Treaty, it shall refer the matter to the Commission.

The Commission shall give a reasoned opinion after the states concerned have been required to submit their comments in written and oral pleadings.

If the Commission, within a period of three months after the date of reference of the matter to it, has not given an opinion, reference to the Court of Justice shall not hereby be prevented. *Id.*

⁵³ For details of these proceedings, see, e.g., Cahier, *supra* note 19, at 125-32; Cahier, *Les articles 169 et 170 du traité instituant la Communauté Economique Européenne à travers la pratique de la Commission et la jurisprudence de la Cour*, 10 Cahiers de Droit

procedures are independent of the proceedings under article 169 of the EEC Treaty and article 141 of the Euratom Treaty,⁵⁴ they have traditionally been used infrequently.⁵⁵ Even the more progressive member states normally have tried to avoid direct confrontation with a recalcitrant member state in the Luxembourg Court. Hence, *de facto*, it was the Commission which ensured the enforcement and respect of the law in the European Communities. This *de facto* monopoly of enforcement originally led many to believe that enforcement actions of the Commission were the only way in which the law of the Communities could be enforced against defaulting members.⁵⁶

The *de facto* enforcement monopoly of the Commission was aggravated originally by the lack of private remedies under the EEC and Euratom Treaties in cases where the Commission had failed to commence an enforcement proceeding.⁵⁷ Thus, while the member states could protect themselves directly by initiating an enforcement proceeding even though the Commission might have chosen to abstain from taking action,⁵⁸ private persons were originally in a much less advantageous position where the Commission had failed to enforce directly the law of the Communities against a member state in default. The ef-

Européen 3 (1974); G. BEBR, *supra* note 6, at 304-09; A. Bleckmann, *supra* note 10, at 154-56; Daig, *supra* note 10, Artikel 170 annot. 2-24.

⁵⁴ G. BEBR, *supra* note 6, at 308.

⁵⁵ T. C. HARTLEY, *supra* note 3, at 307; de Bellescize, *supra* note 19, at 186. As in 1981 and 1982, in 1983 only two cases were brought to the Commission under article 170 of the EEC Treaty. SEVENTEENTH GENERAL REPORT, *supra* note 7, at 318.

⁵⁶ See, e.g., the arguments advanced by the Dutch and Belgian Governments in *Van Gend en Loos v. Nederlandse Tariefcommissie*, Case 26/62, [1963] 2 COMMON MKT. L.R. 105, 120-22.

⁵⁷ Ehlermann, *supra* note 7, at 138. Note, however, that under the ECSC Treaty a member state, an individual, or a firm may bring action against the Commission to obtain a ruling by the Court of Justice that the Commission has failed to fulfil an obligation under the Treaty by not making a decision under article 88 of the ECSC Treaty recording the violation of the member state in default. ECSC Treaty, *supra* note 1, art. 35. For details of actions under article 35, see T. C. HARTLEY, *supra* note 3, at 386-412.

⁵⁸ EEC Treaty, *supra* note 1, art. 170; Euratom Treaty, *supra* note 1, art. 142.

fects of the control vacuum generated by the unavailability of direct private remedies in these cases would have been less significant had the European Parliament taken a lead in exercising political control over the member states by ensuring implementation of the law, the policy, and the objectives of the Communities. Unfortunately, however, the European Parliament traditionally has paid little attention to violations of Community law.⁵⁹ Given its functions and powers, the Parliament was not obliged and probably not able to counterbalance effectively the dominating position of the member states.⁶⁰ With regard to the implementation and the enforcement of Community law in the member states, the Parliament has relied heavily upon the Commission and the Court of Justice.

b) *The Rise of Private Enforcement Actions*

Fortunately, the enforcement vacuum generated by the EEC and Euratom Treaties was gradually narrowed by the rise of private enforcement actions under the judicial oak of the "direct effect" doctrine⁶¹ and the principle of supremacy of Community law.⁶² While both concepts

⁵⁹ Bieber, *Achievements of the European Parliament, 1979-1984*, 21 COMMON MKT. L. REV. 283, 295-98 (1984); Ehlermann, *supra* note 7, at 138.

⁶⁰ For a discussion of the functions, procedure, organization, and powers of the European Parliament, see EUROPEAN COMMUNITY LAW, *supra* note 40, at 42-59; D. LASOK & J. W. BRIDGE, *supra* note 15, at 124-34; T. C. HARTLEY, *supra* note 3, at 15-19; P. SCALINGI, *THE EUROPEAN PARLIAMENT. THE THREE-DECADE SEARCH FOR A UNITED EUROPE* (1980).

⁶¹ For details of the doctrine of "direct effect", see T. C. HARTLEY, *supra* note 3, at 185-223; Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983); Bebr, *Directly Applicable Provisions of Community Law: The Development of a Community Concept*, 19 INT'L & COMP. L. Q. 257 (1970); Dashwood, *The Principle of Direct Effect in European Community Law*, 16 J. COMMON MKT. STUD. 229 (1978); Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425 (1972).

⁶² The EEC Treaty contains no provision assuring the supremacy of Community law. In the course of the negotiations of the Treaty, a clause was proposed which would have expressly guaranteed the supremacy of the constitutions of the member states. This proposal was rejected, however, as being incompatible with the objectives of the Treaty. See Wolfarth, *Europäisches Recht. Von der Befugnis der Organe der EWG zur Rechtsetzung*, 9 JAHRBUCH FÜR INTERNATIONALES RECHT 12, 30 (1959-1960). The Court of Justice in two principal cases then deduced the supremacy of Community law from the nature and the objectives of the Treaty.

have grown from little more than a legislative acorn, they have opened fresh avenues for judicial redress and private enforcement of Community law. Under the doctrine of direct effect, individuals may rely upon Community legislation as either a cause of action or as a defense before their national courts, so long as that Community legislation satisfies certain criteria of legal certainty.⁶³ The effect of this doctrine has been to place Community law within the context of national courts in actions between individuals and member states,⁶⁴ as well as in actions between private parties. An example of such private party actions are those brought under the antitrust provisions of articles 85 and 86 of the EEC Treaty.⁶⁵

The availability of private enforcement actions does not preclude an enforcement action under article 169 of the EEC Treaty.⁶⁶ However, the advent of indirect private enforcement actions before national courts does not seem to have given rise to immediate reconsideration of the traditionally cautious enforcement policy of the Commission. On the contrary, with the national courts playing a role in

For a discussion of the supremacy concept, see Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695 (1965-1966); Stein, *Towards Supremacy of Treaty Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491, 518 (1965).

⁶³ *Van Gend en Loos v. Nederlandse Tariefcommissie*, Case 26/62, [1963] 2 COMMON MKT. L.R. 105.

⁶⁴ T. C. HARTLEY, *supra* note 3, at 283-84; Matthies, *Zur Auslegung des Gemeinschaftsrechts im Vorlageverfahren (Art. 177 EWG-V)*, in RECHTSVERGLEICHUNG, EUROPARECHT UND STAATENINTEGRATION, GEDÄCHTNISSCHRIFT FÜR LEONTIN-JEAN CONSTANINESCO, 471, 473-75 (G. Lüke, G. Ress & M. Will eds. 1983); de Belles-cize, *supra* note 19, at 206-11.

⁶⁵ For an example of the application of the doctrine of "direct effect" in the context of competition cases, see Behrens & Korb—Schikaneder, *Europäisches Wettbewerbsrecht vor französischen Gerichten*, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 457 (1984); Green, *The Treaty of Rome, National Courts and English Common Law. The Enforcement of European Competition Law After Milk Marketing Board*, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 509 (1984); Jacobs, *Civil Enforcement of EEC Antitrust Law*, 82 MICH. L. REV. 1364 (1984); Picañol, *Remedies in National Law For Breach of Articles 85 and 86 of the EEC Treaty: A Review* (1983) 2 L.I.E.I. 1.

⁶⁶ *Syndicat National des Fabricants Raffineurs d'Huile de Graissage v. Inter-Huiles G.I.E.*, Case 172/82, [1983] 3 COMMON MKT. L. R. 485, 505; Daig, *supra* note 10, Artikel 169 annot. 5 at 272; H. Smit & P. Herzog, *supra* note 24, at 5-336 to 5-338.

the enforcement of Community law, the pressure upon the Commission became less acute, enabling it to operate in a more eclectic fashion. In this context, it is noteworthy that enforcement actions against public authorities of member states under article 169 of the EEC Treaty strain the Commission's manpower and financial resources. Thus, given a choice, the Commission would seem to prefer to focus its efforts upon cases revealing serious violations or important unsettled principles of European law rather than upon mundane breaches of Community law in order to save time, effort, and money.⁶⁷ Moreover, the enforcement system under the EEC and Euratom Treaties involving the Commission is inherently deficient for want of sanctions.⁶⁸ Accordingly, a wayward member state may well choose to delay compliance with an unfavorable judgment of the Court of Justice or even defy a ruling of the Court. Similar limitations generally do not exist on the private enforcement level before national courts as member states are not likely to disobey the rulings of their own courts.⁶⁹ Further, the embarrassment of a member state, when its actions or omissions are declared to be in violation of the common European law before a national court, at the behest of a private citizen to whom relief is owed, might well serve as an incentive to ensure more effective compliance with Community law.⁷⁰

Despite the advantages inherent in private enforcement activities, the Commission must not, in practice, confine its own enforcement activities to cases of serious violations of Community law. Certainly, because national courts have opened their doors to private litigants seeking to ensure compliance with the Community law, the risk of detection of violations is increased, and the general prospects for compliance are accordingly enhanced. However, given the limitations of private enforcement actions,

⁶⁷ Green, *supra* note 65, at 544 n.133.

⁶⁸ See *infra* text accompanying notes 103-115.

⁶⁹ See T. C. HARTLEY, *supra* note 3, at 294.

⁷⁰ Green, *supra* note 65, at 545.

such actions are not sufficient in themselves to ensure the respect and application of Community law.⁷¹ Although the Court of Justice is now prepared to hold most provisions of the Treaties of the European Communities directly effective, cases like *Cohn Bendit*⁷² indicate that the doctrine of direct effect is not yet uniformly accepted throughout the member states of the European Communities.⁷³

Furthermore, private enforcement activities depend upon the willingness of the private person concerned to take legal action. Under the legal cost rules governing civil and administrative litigation in member states of the European Communities,⁷⁴ a private litigant often runs a considerable financial risk ("the loser pays it all"). Individuals and companies therefore cannot always be expected to commence an action to secure a member state's compliance with Community law. Thus far, the Commission does not appear to be prepared to give financial assistance to would-be litigants for purposes of private enforcement of Community law.⁷⁵ It is also significant that the Commission, by abstaining from direct enforcement measures, impairs the procedural position of the member state in default. If the Commission does not commence an enforcement action against the wayward member state under article 169 of the EEC Treaty, the failure of the member state to comply with the Community law might eventually be challenged by a private party in the Court of Justice under article 177 of the EEC Treaty.⁷⁶ Given the

⁷¹ See T. C. HARTLEY, *supra* note 3, at 284; Daig, *supra* note 10, Artikel 169 annot. 5 at 272.

⁷² *Conseil d'Etat*, 22 December 1978, [1979] *Dalloz* 155 (jurisprudence). For a brief discussion of this case, see T. C. HARTLEY, *supra* note 3, at 235-37.

⁷³ T. C. HARTLEY, *supra* note 3, at 224-46; see also D. LASOK & J. W. BRIDGE, *supra* note 15, at 173-91.

⁷⁴ See generally Ebke, *In Search of Alternatives: Comparative Reflections on Corporate Governance and the Independent Auditor's Responsibility*, 79 NW. U.L. REV. 663 (1985). See also R. SCHLESINGER, *COMPARATIVE LAW, CASES - TEXT - MATERIALS* 343-44 (4th ed. 1980); Pfennigstorf, *The European Experience With Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (1984).

⁷⁵ T. C. HARTLEY, *supra* note 3, at 283.

⁷⁶ EEC Treaty, *supra* note 1, art. 177 reads as follows:

objective nature of the procedure under article 177, the procedural position of the member state is less strong than in an enforcement proceeding under article 169 which is basically adversary in nature.⁷⁷ Thus, the Commission runs the constant risk of being accused that its failure to act divests the wayward member state of its right of due process and fair trial.⁷⁸

c) *European Law and Language*

Another serious constraint is caused by the existence of different languages in the Communities, a point frequently not recognized by courts or commentators.⁷⁹ The existence of different languages in the member states of the European Communities creates unique problems that

The Court of Justice shall be competent to make preliminary rulings concerning:

- (a) the interpretation of this treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where, any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgement depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.

Id. For a discussion of the procedures under article 177, see, G. BEBR, *supra* note 6, at 366-452; K. LIPSTEIN, *supra* note 6, at 327-32; T. C. HARTLEY, *supra* note 3, at 247-82; A. BLECKMANN, *supra* note 10, at 176-85; Bebr, *Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty*, 82 MICH. L. REV. 1229 (1984). For a discussion of whether a decision of a national court or tribunal to request a preliminary ruling from the Court of Justice under EEC Treaty, *supra* note 1, art. 177 can be the subject of an appeal to a higher national court or tribunal, see O'Keefe, *Appeals Against an Order to Refer Under Art. 177 of the EEC Treaty*, 9 EUR. L. REV. 87 (1984).

⁷⁷ Everling, *supra* note 12, at 106-07.

⁷⁸ Ehlermann, *supra* note 7, at 142.

⁷⁹ But see generally D. LASOK & J. W. BRIDGE, *supra* note 15, at 49-66; and from a comparatist's point of view, see Grossfeld, *Vom Beitrag der Rechtsvergleichung zum deutschen Recht*, 184 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 289, 314-18 (1984); B. GROSSFELD; MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG 149-86 (1984).

are not apparent in other divided-power systems⁸⁰ such as the United States. Language, being a lawyer's main tool, has a special bearing upon the creation, interpretation, application, and administration of the law of the European Communities, on both the supra-national level and the national level. There are inevitable discrepancies in authentic translations⁸¹ and also fundamentally different legal traditions within the Communities. The accession of the United Kingdom and Ireland, bringing common law traditions into play made the problem even more complicated. Yet, even within the same legal culture where traces of common genes exist, there are numerous manifestations of mutations and acquired differences. In their endeavor to give effect to the common intentions and objectives of the parties comprised in the multi-lingual constitutive Treaties, the courts of the member states resort to their own methods and their own legal language.⁸² Law exists, as Professor Bernhard Grossfeld has pointed out recently, "through language and in language."⁸³ This makes it at least partially doubtful whether the national influence can be totally overcome. Hence, there is always the danger that Community law, in the hands of disparate courts across Western Europe, will develop along divergent and uneven lines. An inherently consistent system of law within the Communities thus would seem to be more a goal than reality, even if private enforcement actions are coupled with a liberal use of the procedure provided for

⁸⁰ For a discussion of the comparability of the two radically different divided-power systems of the European Communities and the United States, see Stein, *On Divided-Power Systems: Adventures in Comparative Law*, [1983] 1 L.I.E.I. 27 (special issue).

⁸¹ D. LASOK & J. W. BRIDGE, *supra* note 15, at 49-50. For a discussion of the problems of interpretation of the plurilingual constitutive treaties of the European Communities, see Dickschat, *Problèmes d'Interprétation des Traités Européens Résultant de leur Plurilinguisme*, [1968] REVUE BELGE DE DROIT INTERNATIONAL 40; Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Regime Linguistique in the Court of Justice of the European Communities*, 62 NW. U.L. REV. 701 (1967).

⁸² D. LASOK & J. W. BRIDGE, *supra* note 15, at 65.

⁸³ Grossfeld, *Language and Law*, 50 J. AIR L. & COM. 793 (1985); see also Grossfeld, *Sprache und Recht*, 39 JURISTENZEITUNG 1, 3 (1984).

by article 177 of the EEC Treaty.⁸⁴

d) *The End of the Commission's Selective Policy*

In view of the natural limitations of private enforcement actions and the reluctance of the member states to use the powerful enforcement weapon entrusted to them by article 170 of the EEC Treaty and article 142 of the Euratom Treaty, the Commission could no longer adhere to its selective enforcement policy of letting violations which traditionally had been deemed to be less significant escape through its enforcement net. The Commission was called upon to take a stance that was more political and normative than is characteristic of the consensual approach of the system of the European Communities. The Commission had to center on the task of establishing patterns of enforcement at the legislative, administrative, and judicial levels of the member states to ensure more effective compliance with the law of the Communities. The enforcement provisions of the EEC and Euratom Treaties enabled the Commission to take this system-advancing stance as these provisions acknowledge the need for normative adjustments within the member states as well as in relation to the member states *inter se* and *vis-à-vis* the Communities, without questioning the right of existence of the national legal orders. The enforcement actions allow further developments of the law of the Communities around the role and the predominance of the sovereign member states without changing the basic structure of the consensual, state-centric system of the European Communities.

Given the institutional and structural safeguards provided by article 169 of the EEC Treaty and article 141 of the Euratom Treaty, the new policy of the Commission of resorting more frequently to enforcement proceedings under these provisions does not seem to interfere unduly with the perceived interests of the member states. In proceedings under article 169 of the EEC Treaty, the mem-

⁸⁴ For the text of art. 177, see *supra* note 76.

ber state allegedly in default is to be given a fair opportunity to submit its observations; the declaratory opinion of the Commission is to be reasoned properly, and the member state is to be given a reasonable time to end its violation. These time limits give the defaulting member state a period of grace within which it is protected from the threat of further administrative or judicial proceedings.⁸⁵ The grace periods at the various stages of the administrative procedure of enforcement can thus be used for an evolution of cooperative initiatives; the Commission can try to persuade the member state concerned that it can attain its proclaimed national goals, such as full employment, fairer distribution of wealth, and environmental protection, by observing the common European law and implementing it nationally. The fact that in the vast majority of cases the defaulting member states have been willing to accept voluntarily the position of the Commission shows that the Commission's efforts to inspire compliance with the law of the Communities have been quite successful.⁸⁶

The gradually expanding use by the Commission of the enforcement instruments in the context of an increasingly sophisticated supra-national European law caused strong repercussions and an intensive conceptualistic debate among legal scholars in almost all of the member states.⁸⁷ Whether or not one views this growing scholarly attention as a blessing, the legal literature spurred awareness of the enforcement provisions. Lawyers began to become interested in the multifarious facets of the enforcement system under the constitutive Treaties. In this context, the fact that the enforcement provisions are part of a wholly new legal order which is independent of the national legal or-

⁸⁵ T. C. HARTLEY, *supra* note 3, at 297.

⁸⁶ *Id.* at 316.

⁸⁷ It is not a coincidence that most of the books, articles, and commentaries dealing with the various enforcement proceedings under the three founding treaties of the European Communities have been published in the 1970's. See *supra* note 19 and accompanying text.

ders of the member states⁸⁸ proved to be equally advantageous and challenging. Given the supra-national character and the pluri-lingual nature of the law of the European Communities, lawyers could no longer feel a champion of their own legal system (which, as every lawyer knows, is the best in the world); rather, lawyers had to overcome the limitations of their national training and acquired legal language. This made it easier for them to disregard unnecessary technical details and, instead, to focus upon the conceptual framework of the enforcement system, to make themselves and others conversant with the structure and the significance of the various enforcement procedures, comfortable with the analysis of cases of non-compliance, and aware of the strengths and limitations of enforcement proceedings.

4. *The Role of the Court of Justice*

One can only speculate to what extent this development has had an impact upon the new enforcement policy of the Commission. It seems to be quite certain, however, that the Commission would not have succeeded in its efforts of ensuring more effective compliance with the law of the European Communities without the affirmative support of the Court of Justice.⁸⁹ Its power to resort to a functional and teleological method of interpretation⁹⁰ has enabled the Court to ensure the functioning of the Communities and the development of their laws in the context of today's constantly changing political, economic, and

⁸⁸ See, e.g., *Commission v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Cases 90/63 and 91/63, [1965] COMMON MKT. L.R. 58; see also D. LASOK & J. W. BRIDGE, *supra* note 15, at 38-49.

⁸⁹ It is the task of the Court of Justice to ensure that in the interpretation and application of the Treaty the law is observed. See EEC Treaty, *supra* note 1, art. 164.

⁹⁰ L.N. BROWN & F.G. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 193-214 (1977); Bleckmann, *Zu den Auslegungsmethoden des Europäischen Gerichtshofes*, 35 NEUE JURISTISCHE WOCHENSCHRIFT 1177 (1982); Bleckmann, *Teleologie und dynamische Auslegung des Europäischen Gemeinschaftsrechts*, 14 EUROPARECHT 239 (1979); Slynn, *The Court of Justice of the European Communities*, 33 INT'L & COMP. L.Q. 409, 417 (1984).

social environment.⁹¹ While it is true that enforcement procedures cannot be used as a basis for imposing new obligations upon member states,⁹² it is this power that makes the Court of Justice an integral part of the process of development, integration, and transformation. In this process, the Court is guided solely by the objectives and values of the law of the European Communities and is aiming toward the construction of an internally consistent, coherent system of law and enforcement.⁹³ The decisions of the Court of Justice have almost exclusively opted for a supra-national, as distinct from a national, perspective.

This is particularly true with respect to the Court's decisions directly enforcing the member states' obligations to comply with the law of the Communities.⁹⁴ The Court has made it clear that national conditions such as constitu-

⁹¹ The jurisdiction of the Court of Justice, as defined by the Treaty, is not a substitute for the jurisdiction of the national courts of the Member States because it is confined to the administration of Community law. For a more detailed discussion of the jurisdiction of the Court of Justice, see H.J. Schlochauer, *Die Zuständigkeiten des Gerichtshofes der Europäischen Gemeinschaften*, in *ZUR INTEGRATION EUROPAS*, Festschrift für Carl Friedrich Ophüls aus Anlass seines 70. Geburtstages 167-91 (W. Hallstein & H.J. Schlochauer eds. 1965). For a general discussion of the functions of the Court and the effects of its decisions, see, e.g., *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz* (J. Schwarze ed. 1983); *La Cour de Justice des Communautés Européennes et les Etats Membres* (Association Belge pour le droit européen ed. 1981); R. Lecourt, *Europe Des Juges* (1976); L. Plouvier, *Les Decisions de la Cour de Justice des Communautés Européennes et leurs effets juridiques* (1975); E.W. Hall, *The Court of Justice of the European Communities* (1966); J.P. Colin, *Le Gouvernement des Juges dans les Communautés Européennes* (1966); A. Migliazza, *La Corte di Giustizia delle Comunità Europee* (1961); Lecourt, *La Cour de Justice des Communautés européennes vue de l'intérieur*, in *Europäische Gerichtsbarkeit und Nationale Gerichtsbarkeit*, Festschrift zum 70. Geburtstag von Hans Kutscher 261-72 (W.G. Grewe, H. Rupp & H. Schneider eds. 1983); H. Kutscher, *Über den Gerichtshof der Europäischen Gemeinschaft*, 16 *EUROPARECHT* 392-413 (1981); Nicolaysen, *Der Gerichtshof. Funktion und Bewahrung der Judikative*, 7 *EUROPARECHT* 375-90 (1972); Aubert, *La Cour de justice des communautés européennes*, 7 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 78-106 (1971).

⁹² 2 COMMON MKT REP. (CCH) Art. 169, 3819 ¶ 4616.

⁹³ T. C. HARTLEY, *supra* note 3, at 59; D. LASOK & J. W. BRIDGE, *supra* note 15, at 85-86.

⁹⁴ Everling, *supra* note 28, at 232-33; see also C. MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION* (1972); Mertens de Wilmars

tional hurdles⁹⁵ and political or parliamentary difficulties⁹⁶ are not sufficient to justify a member state's failure to fulfil its obligations under the constitutive Treaties. Although some of the Court's decisions might be controversial, the decisional law strongly indicates that the member states no longer have complete control over the development of the law of the European Communities and, more importantly, their own law.⁹⁷

This is not to say that enforcement actions have the potential of politically and institutionally transforming the present system of the European Communities. This would require the political acceptance of the need for such a transformation and of the need to diminish the role and predominance of the sovereign member states in more decisive respects than is characteristic of the present system. However, the new enforcement policy of the Commission has, without question, broken new ground in the attempt to construct a normatively integral picture of a European Community. There is no doubt that the Commission's more resolute enforcement approach, as reflected in the growing number of enforcement proceedings against recalcitrant member states, will maximize its impact upon prevailing political sensibilities and the national egoism of the member states. This factor establishes a context where, at long last, a transformation of the current system-making consensual approach becomes a realistic possibility.

5. *Legal and Political Limitations*

Obviously this possibility is somewhat impaired by the inherent limitations of enforcement actions commenced by the Commission. This is partly because of the slow-

& Steenberger, *The Court of Justice of the European Communities and Governance in an Economic Crisis*, 82 MICH. L. REV. 1377-98 (1984).

⁹⁵ See, e.g., *Commission v. Italy*, Case 100/77, [1979] 2 COMMON MKT. L.R. 655, 663.

⁹⁶ See, e.g., *Commission v. Italy*, Case 69/77, [1979] 1 COMMON MKT. L. R. 206, 213-14.

⁹⁷ Everling, *supra* note 12, at 104.

ness and cumbersome rituals for which large administrative machineries in general, and the Commission of the European Communities in particular, are notorious. Clearly, an efficient and effective system of enforcement calls for a swift, steady, and inherently consistent application of enforcement powers. That in turn requires that the Commission be aware of acts or omissions that amount to a violation of the law of the European Communities, either on the basis of information arising in the course of the Commission's normal operations or as a result of representations made by a member state or a third party. Only then can the Commission take the necessary steps. The crucial information does not seem to have been always available to the Commission in the past.⁹⁸

Even if the Commission is aware of a possible violation of community law and commences an enforcement action against the member state in default, the duration of such an action from the Commission's informal request for comments to the issuance of a reasoned opinion to the commencement of judicial proceedings to judgment casts some doubt upon the overall efficacy of enforcement proceedings under article 169 of the EEC Treaty. Although the average duration of enforcement proceedings ostensibly has become shorter in the 1970's, it still appears to be too long in too many cases.⁹⁹ In addition, in some cases member states have further limited the efficacy of such proceedings by delaying the implementation of the

⁹⁸ T. C. HARTLEY, *supra* note 3, at 315. The unavailability of information is particularly regrettable since the willingness of member states to partake in a violation of Community law will depend partly upon the Commission's ability to locate cases of non-compliance. Fortunately, the computerization of the Commission's registration and control system in the mid-1970's seems to have improved the Commission's ability to locate and to proceed against violations of the law of the Communities. See Ehlermann, *supra* note 7, at 143-45. This development has, no doubt, increased the attendant risk of detection of violations of Community law.

⁹⁹ The following figures reveal the average duration of enforcement proceedings under EEC Treaty, *supra* note 1, art. 169 and Euratom Treaty, *supra* note 1, art. 141:

Court's judgment.¹⁰⁰ In a few cases it was not until three to four years after the judgment was rendered that the member state in default ultimately complied with the ruling of the Court.¹⁰¹ In other cases, member states have even opted for defying the Court of Justice.¹⁰²

These observations lead to the principal limit of efficacy of enforcement actions: the lack of sanctions under both the EEC Treaty and the Euratom Treaty. A recalcitrant member state cannot be forced to abide by the reasoned opinion of the Commission¹⁰³ nor can it be compelled to obey the judgment of the Court of Justice.¹⁰⁴ In adjudi-

	Duration in Months	
	1960-1970 ^a	1970-1976 ^b
From request for comments to reasoned opinion	11½	8½
From reasoned opinion to commencement of judicial proceedings	11	7
From commencement of judicial proceedings to judgment	9	8½
Total duration of formal proceedings	31½	24

a This column covers cases in which the judgment was before the end of 1970, though in no case were the proceedings initiated later than the end of 1968.

b The figures in this column relate to cases in which the judgment was in 1971 or later; in no case were proceedings commenced before 1970.

See T. C. HARTLEY, *supra* note 3, at 317.

¹⁰⁰ See the answer given by Mr. Thorn on behalf of the Commission of the European Communities on June 25, 1982, 25 O. J. Eur. Comm. (No. C. 198) 33-34 (Aug. 2, 1982).

¹⁰¹ T. C. HARTLEY, *supra* note 3, at 319.

¹⁰² The most notorious case of non-compliance with a judgment of the Court of Justice is the famous *Sheepmeat* case, *supra* note 4; for a brief discussion, see T. C. HARTLEY, *supra* note 3, at 319-21.

¹⁰³ Under the EEC and Euratom Treaties, if a member state fails to abide by the reasoned opinion of the Commission, the Commission may bring proceedings against a member state before the Court of Justice. EEC Treaty, *supra* note 1, art. 169; Euratom Treaty, *supra* note 1, art. 141. Under the ECSC Treaty, on the other hand, the decision of the Commission concluding the administrative stage of the enforcement proceeding is binding. ECSC Treaty, *supra* note 1, art. 88. It is then the responsibility of the member state which wishes to contest the decision of the Commission to bring the matter before the Court of Justice for a *de novo* review of the case. EEC Treaty, *supra* note 1, art. 88.

¹⁰⁴ In the event of unreasonable delay or open refusal of the member state to comply with the Court's ruling, the Commission, under the EEC and Euratom Treaties, may commence a second action against the wayward member state, this time for violation of EEC Treaty, *supra* note 1, art. 171; Euratom Treaty, *supra* note 1, art. 143. These provisions require member states to take the necessary steps to comply with the judgments of the Court. See *infra* note 105. As of June 6, 1981, there were only two cases in which the Commission actually initiated a sec-

cating upon disputes in which member states are involved, the Court declares that a certain act or omission of the member state concerned constitutes a violation of an obligation under the law of the Communities, and then the court recommends, rather than orders, that the state in default take the necessary measures to comply with the judgment.¹⁰⁵ Furthermore, the Court of Justice generally does not specify what action the defaulting member state must take and does not set a time limit for its completion.¹⁰⁶ Finally, the Court does not have the authority to declare the legislation of a member state invalid, and the Court cannot quash a national measure found to be contrary to Community law.¹⁰⁷

The unavailability of sanctions involves, to some extent, the acceptance of the legitimacy of the *status quo*. The last vestige of sovereignty attributes to the member states and their institutions the disposition to make those adjustments and changes necessary to achieve the common objectives.¹⁰⁸ Given particularized interests within the societies of the member states, voluntary adjustments or changes in the laws of the member states often seem too high an expectation, regardless of how rational and desirable the arguments for adjustments and changes may be.

It seems fair to state, however, that the mere availability of sanctions does not in itself sufficiently assure effective-

ond proceeding. DAIG, *supra* note 10, ARTIKEL 169 annot. 2 n.5 at 270; see also T.C. HARTLEY, *supra* note 3, at 320. It should be noted that in the face of both an unreasonable delay in the performance of an obligation and a positive refusal, a second judgment by the Court of Justice based on the violation of EEC Treaty, *supra* note 1, art. 171 may be of substantive interest for purposes of establishing the basis of a liability that a member state might incur toward other member states, the Community, or private parties, as a result of its default.

¹⁰⁵ See EEC Treaty, *supra* note 1, art. 171 which states: "If the Court of Justice finds that a Member State has failed to fulfill any of its obligations under this Treaty, such State shall take the measures required for the implementation of the judgment of the Court."

¹⁰⁶ T. C. HARTLEY, *supra* note 3, at 318.

¹⁰⁷ G. BEBR, *supra* note 6, at 293-94.

¹⁰⁸ Everling, *supra* note 12, at 116.

ness in terms of prevention and repression.¹⁰⁹ The sanctions available against defaulting member states under article 88 of the ECSC Treaty¹¹⁰ have been demonstrated to be of no practical significance;¹¹¹ the provisions of article 88 have remained "dead letters."¹¹² Furthermore, the idea of retaliation which underlies every sanction hardly conforms with the idea that Community obligations are based upon solidarity rather than reciprocity.¹¹³ Thus, the enforcement of Community obligations rests not only upon the legal or moral implications of the cardinal rule of international law *pacta sunt servanda*, but above all upon self-interest, mutual trust, and Community spirit. The phenomenon of economic intertwinement and political interdependence has been demonstrated to have impact on political consciousness in a way that has profound potential;¹¹⁴ this phenomenon has created a "solidarity effect," the significance of which should not be underestimated: despite the lack of sanctions, enforcement actions under article 169 have been effective in the great majority of cases.¹¹⁵ It is to be hoped that this will remain the case in the future, as enforcement and respect of Community law are crucial for the future development of the European Communities.

III. THE FUTURE OF THE EUROPEAN COMMUNITIES IN THE FUTURE WORLD ORDER: A CHALLENGE TO THE LEGAL ARTS

The question of the future of the European Communities in the future World Order will be settled ultimately by the cumulative weight of the individual choices and decisions of the Communities' member states, the "macro" ef-

¹⁰⁹ See generally Holton, *The Judgment as an Instrument of State Deterrence in the European Communities*, 18 SYRACUSE L. REV. 548 (1967).

¹¹⁰ For the text of Euratom Treaty, *supra* note 1, art. 88, see *supra* note 18.

¹¹¹ G. BEBR, *supra* note 6, at 326.

¹¹² Stein, *supra* note 43, at 694.

¹¹³ DAIG, *supra* note 10, ARTIKEL 169 annot. 3 at 271.

¹¹⁴ D. LASOK & J. W. BRIDGE, *supra* note 15, at 194.

¹¹⁵ T. C. HARTLEY, *supra* note 3, at 323; Everling, *supra* note 12, at 108, 119.

fects of "micro" motives. These motives thus deserve our special attention. In this context it is worth noting that, because of increasing economic and financial difficulties, the member states, like individuals, more frequently seem to feel a sense of helplessness and futility about their capacity to influence the conduct of the other member states for the sake of the common objectives. These feelings often may result in an increasing willingness of at least some of the member states not to conform with Community obligations, though they may well realize and recognize that even minor violations of the law of the Communities tend to lessen public and private confidence in the Community and that this lack of confidence in turn endangers the possibilities of achieving the Communities' objectives as set forth in the constitutive Treaties.

Upon reflection, however, it would seem that the "obedient" member states, especially when working together, actually are best situated to contemplate the probable and the preferable future of a Community of European states and to exert a variety of pressures, both political and legal, that can close the gap between the Treaties' objectives and the actual performances of the member states. Obedience to law exemplifies respect for the law of the Communities, for the Community as such, and for the shared European values and common goals of the member states. Respect for the common European law of the Communities should thus be more than a platitude.

While sharing similar basic values, politicians, both on the European and the national level, do not always share a common orientation toward most issues, except possibly a shared and reciprocal acceptance of the necessity of some kind of common perspective on the problems and prospects of Europe. But even this fundamental assumption is not always uniformly supported. On matters of substance, the potential realm of agreement has been frequently demonstrated to be rather limited. Within many sectors of Community life, national pressure and egoism appear to be so great as to become the dominant actors.

In those situations, the reality of the European Communities and, more importantly, the idea of European unity is at the disposal of national forces determining the performance of the member states within the Communities and formalizing, in political and sometimes normative terms, the outcomes of negotiations on the supra-national level.

Is this the chance for law and lawyers?

Let me end my sketch with some brief, preliminary thoughts on how the legal perspective and legal studies might be reoriented so as to give concrete expression to the belief that law and lawyers can make a difference in relation to the Communities' order, and thereby to the world order at large which is increasingly vulnerable to catastrophe and decay. I do so fully aware that political positions of the member states are fairly durable and not prone to even modest change, not even for the benefit of the common objectives of the European Communities. And I am well aware that law and lawyers cannot supply the proverbial "political will" on the part of the governments of the member states.¹¹⁶ I am also well aware that given the consensuality of the system, the position of the member states *inter se* and *vis-à-vis* the Communities, as stated in the founding Treaties, will remain static unless there is unanimous desire for change.¹¹⁷ And I do so seeing quite clearly that a pessimism about the future is beginning to prevail all around us and that this pessimism is itself a major obstacle to progress within the European Communities as well as in other parts of the world. But one of the fundamental challenges of our times is, I think, to reduce immobilizing despair and to instill a posture of hope. European unity is not a matter of the government of the member states alone. Courageous integrated forethought of all concerned, including the peoples of Europe, is indispensable to progress in the decades ahead.

Given all this, what are the possibilities for enhancing

¹¹⁶ Stein, *supra* note 43, at 695.

¹¹⁷ See *supra* notes 45-46.

the role of law in service to the future of the European Communities? To what extent can we as lawyers help fashion a response to the challenge of the future of the Communities within a changing world order?

Lawyers in Community and national government service, in commerce and industry, in private practice and professional legal education have managed to overcome language barriers and have availed themselves of the important, albeit imperfect, domain known as "law of the European Communities" or "European law." This, together with the Community spirit that many lawyers have acquired, has enabled lawyers to shape and facilitate a beneficial type of development, of which the recognition of the supremacy of European law¹¹⁸ and of the direct effect of important provisions of the constitutive Treaties¹¹⁹ are probably the most important examples. This demonstrates that while the language of law tends to be static, lawyers need not be. A lawyer's skills, knowledge, and influence can become relevant, both in his professional and personal endeavors, through conscious, community-advancing and future-oriented construction of the law, legal and general education, and peaceful political actions. This task will be easier than many may expect, as, to a large extent, it requires the type of analytical and conceptual thinking and weighing of interests for which lawyers are well trained. Through exercising analytical ingenuity and engaging in creative imagination,¹²⁰ lawyers can play a significant role regarding a credible strategy of reforming the European Communities. New modes of thinking and new orientations are needed if the law of the Communities and lawyers are to achieve a dynamic, progressive perspective.

Such an outlook is particularly essential for interested jurisprudential scholars. They need to concentrate their

¹¹⁸ See *supra* note 62.

¹¹⁹ See *supra* note 61.

¹²⁰ See generally James B. White's challenging studies in the nature of legal thought and expression, J.B. WHITE, *THE LEGAL IMAGINATION* (1973).

legal analysis on a period of time long enough to be independent of current contexts of choice, yet short enough to engage the concerns of policy and decision makers. A lawyer's reformist thinking should start from the premise that many of the assumptions, policies, and conditions that have characterized relations of the member states *inter se* and *vis-à-vis* the Communities during the past quarter of a century are inadequate to the demands of today and the foreseeable demands of the foreseeable future. Thinking should be shaped by a normative and political orientation toward present and possible future arrangements of power, resources, and authority. On such an intellectual basis, a new conception of European Community can begin to emerge that is sensitive to the role of thought and reason in accomplishing an essential reunion between the objectives of the European Communities and the actual performance of the member states. In their future-oriented analysis, legal scholars should not, however, overlook historical perspectives. On the contrary, by locating themselves and the subject of their concern in the flow of time, writers will be freed from their preoccupation with current political problems and dilemmas. They will then approach the necessary process of advancing and transforming the European Communities from a slightly different perspective, which may prove to be beneficial to both the Communities and the member states.

Legal educators, too, are called upon in our present time of transition. Legal education should aim at the formation of a European constituency of lawyers who complement their national citizenship with an identity as European citizens. Such an expansion of identity and loyalty patterns is critical for transition to European unity. For, which view of the appropriate role of the law and of the perspectives of the Communities will prevail, is largely in the hand of lawyers who, in their capacities as administrators, legislators, judges, practitioners, or scholars, understand that law must contribute to, not hinder, the

solutions of the problems of today and prospects for tomorrow.

Acquisition of a new European outlook and its embodiment in thought, reasoning and conduct is necessary. Transnational actors, such as ecological groups, are already manifesting their primary allegiance to values that are European, and even global in nature, with no territorial or national constraints. With the same spirit in mind, lawyers should develop new perceptions of what is needed to make the Communities work and to evolve, as a dynamic political system, in a manner consistent with the shared European values and a general attitude of hope about the future. Such reorientation requires fundamental shifts in political values and behavior throughout the European Communities. The sooner we gain a clear vision of how to encourage effectively these shifts, the better our chances of contributing effectively to the creation of "an ever closer union among the European peoples"¹²¹ whose voice in the international concert will be strong enough to be heard adequately in the endeavor of creating a more peaceful, equitable, and socially as well as economically just world order.¹²²

IV. CONCLUSION

Some will wonder, of course, whether the stance expressed in this article is not naive and sentimental, a reflection of early conceptions of a dynamic European Community, moving inexorably toward ever closer political, institutional, and normative integration. Admittedly, given today's political climate in Europe, a new movement toward a European federation seems rather limited at this time. So why, then, should we as lawyers become more

¹²¹ EEC Treaty, Preamble, *supra* note 1. For a discussion of the political and legal difficulties associated with the Draft Establishing the European Union, see Lodge, Freestone & Davidson, *Some Problems of the Draft Treaty on European Union*, 9 EUR. L. REV. 387-400 (1984).

¹²² See also VerLoren van Themaat, *The Impact of Case Law of the Court of Justice of the European Communities on the Economic World Order*, 82 MICH. L. REV. 1422-38 (1984).

active, here and now? The short answer to this question is that our sense of self-interest compels that we try. The more involved response is that, like Icarus, we are flying close to the sun with waxen wings.

