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REGIONAL DEVELOPMENTS

European Communities*

I. Constitutional and Institutional Matters

The most important innovation in the structure of the European Communities since the accession of Spain and Portugal to the Communities (and the consequent commencement of the current transitional periods in respect of those States) has been the agreement by all Member States amending the Basic Community Treaties. Signed at Luxembourg and the Hague on February 17 and 28, 1986, the legislation is known as the Single European Act.¹ Primarily intended to create a framework for the promotion of greater political cooperation between Member States, this agreement addresses certain structural and political problems that have beset the operation of the Basic Treaties² for many years. In particular these problems are: (a) the relatively slow progress made towards the creation of the "single internal market" within Community territory due to the continued prevalence of arguably permitted quantitative restrictions and equivalent measures on trade between the Member States, and nationally divergent tax regimes, which hitherto have been considered to necessitate internal frontier controls almost as strict as those at external frontiers of the Community; and (b) doubts about the correct voting procedures to be adopted in the Council of the Communities (the primary Community legislative body) ever since the qualified majority procedures laid down in the Basic Treaties were voluntarily (though arguably, illegally) abandoned by Member States pursuant to the Luxembourg Accords of 1965-66. These procedures recognized a State's right of veto whenever

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1. Single European Act (SEA), Bulletin of the European Communities, Supplement 2/86; U.K. Command Paper Comnd. 9758, *reprinted in* 15 I.L.M. 506 (1986).

2. *I.e.*, The European Coal and Steel Community Treaty (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140; The European Economic Community Treaty (EEC), Mar. 25, 1957, 298 U.N.T.S. 11; and The European Atomic Energy Community Treaty (Euratom), March 25, 1957, 298 U.N.T.S. 167.

its own important national interests were involved, but there was no agreement as to the definition of such interests, nor as to how their existence or violation was to be determined if disputed. The resulting legal and procedural obscurity did little for intra-Community comity.

The Single European Act contains detailed provisions (especially in articles 6-10) specifying new rules on when the Council requires a unanimous and when merely a qualified majority vote will suffice. The Act also gives greater powers to influence (though not to initiate) legislation to the European (i.e., Community) "Parliament." Incidentally, the latter body is now definitively referred to as "the European Parliament," whereas the Basic Treaties advisedly called it "the Assembly." Although directly elected, the European Parliament is still not a parliament in the true sense of having its own legislative powers, which are reserved to the Council and the Commission of the European Communities. However, both by judicious use of its political opportunities, and through these provisions, the Parliament's *de facto* power to control the legislation of the Council and the Commission is steadily increasing.

The problem of the creation of the single internal market is the subject of articles 13-19. In particular article 13 takes the bold step of amending the EEC Treaty so as to commit the Community to the final establishment of the internal market, which "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."³ by December 31, 1992, at the latest. National taxation is to be given special attention,⁴ and harmonization measures in the fields of "health, safety, environmental protection and consumer protection will take as a base a high level of protection."⁵

A Member State's right to apply or permit quantitative restrictions or equivalent measures in its trade with other Member States under the safeguard provisions of article 36, EEC,⁶ or to protect the environment, is subjected to a new scrutiny procedure before the commission if in derogation from harmonization measures adopted under the single market creation policy, although such measures may themselves provide for provisional safeguards subject to Community control.⁷

Amendments are made⁸ to the Basic Treaties that allow the Council, at the request of the Court of Justice of the European Communities⁹ to

3. New art. 8A, EEC, second paragraph, *as supplied* by art. 13, SEA.

4. Art. 17, SEA, *amending* art. 99, EEC.

5. New art. 100A, EEC, third paragraph, *as supplied* by art. 18, SEA.

6. *See, e.g.*, General Agreement on Tariffs and Trade (GATT), March 24, 1948, art. XX, 55 U.N.T.S. 194, on which art. 36, EEC, is based.

7. New art. 100A, EEC, fourth and fifth paragraphs, *as supplied* by art. 18, SEA.

8. *See* arts. 4-5, 11-12, and 26-27, SEA.

9. Hereinafter ECJ.

create a new Community court of first instance, "attached to" the ECJ, with jurisdiction to hear such classes of action or proceeding as may be determined, brought by natural or legal persons, but not by Member States or Community Institutions,¹⁰ and not by way of requests for preliminary rulings on points of Community law made by a national court of a Member State.¹¹ These actions will still be heard by the ECJ, which also will hear appeals on points of law from the new Community trial court. This will be, in effect, the first Community analogy to a U.S. federal district court, in having only first instance jurisdiction. Some questions remain about the court, such as what its subject-matter jurisdiction will be; whether it will sit, like the ECJ, only in Luxembourg, or in all Member States territories; if the latter, whether in permanent session in each or on a kind of circuit; and what its relationship will be with the various complex proposals for a Community Patent Appeals Court (COPAC), to hear appeals in matters relating to Community patents under the Community Patents Convention, Luxembourg, 1975,¹² when that convention is at last brought into effect.

Other provisions of the SEA are designed to promote greater inter-Member State cooperation and coordination in the fields of economic and monetary policy,¹³ social policy,¹⁴ economic and social cohesion,¹⁵ research and technological development,¹⁶ and protection of the environment.¹⁷ To some extent these articles entail subscription to objectives going beyond those specified in the Basic Treaties.

Finally, in title III¹⁸ the Community Member States have bound themselves to cooperate in the sphere of foreign policy, i.e., to "endeavour jointly to formulate and implement a European foreign policy."¹⁹

Insofar as this commitment encompasses all kinds of matters quite outside the limited economic objectives, associated with the creation of a Customs Union and a Common Market, of the Basic Treaties, the new Act is indicative of the current movement towards a political, and not merely an economic, union in the Community. Although this movement

10. These organizations could be defendants to such actions.

11. See arts. 177, EEC; 41, ECSC; or 15, Euratom.

12. [1976] O.J.L. 17/1.

13. Art. 20, SEA.

14. Arts. 21-22, SEA, emphasizes the working environment and the health and safety of employees.

15. Art. 23, SEA, puts special emphasis on the removal of economic disparities between regions.

16. Art. 24, SEA.

17. Art. 25, SEA, reads in part: "based on the principles that . . . environmental damage should as a priority be rectified at source, and that the polluter should pay."

18. Art. 30, SEA.

19. Art. 30(1), SEA.

is still not strong outside the halls of Community institutions, the problems of South Africa and of international terrorism have recently acted as a catalyst for those favoring a more supranational approach to European foreign policy issues. The new structural element—known as European Political Cooperation—will involve the regular (at least four times a year) meeting of Member State Foreign Ministers quite apart from their (or other ministers') normal meetings to discuss and enact purely Community business in the Council.²⁰ The Commission must be associated with such meetings.²¹ Furthermore, the Commission and the Presidency of the Council must ensure, as far as possible, consistency between the policy of the European Political Cooperation and the external (i.e., purely economic) policy of the Communities.²² Moreover, the European Parliament must be informed and its views considered, on any Political Cooperation policy, which further increases the Parliament's political power.²³

The European Single Act will be given effect in the United Kingdom national law by the (U.K.) European Communities (Amendment) Act 1986, apart from title III on foreign policy, which is regarded as a matter of executive discretion not amenable to national legislative treatment. This separation between "Community Law" and "European Political Cooperation Law" is consistent with the approach of the Single Act itself, which specifies that title III does not affect the provisions of the Basic Treaties or the subsequent modifications thereto, and is not subject to the jurisdiction of the ECJ.²⁴

The European Single Act enters into force one month after the deposit of the instrument of ratification by the last Member State.²⁵

II. Competition (Antitrust) Law

A. THE LIABILITY OF MEMBER STATE GOVERNMENTS IN COMPETITION PROCEEDINGS

In the past, a frequent analysis of the competition provisions, articles 85-94, of the EEC Treaty assumed that Member State governments could only infringe articles 92-94 (on Prohibited State Aids), which are addressed solely to such governments. Articles 85 (prohibiting restrictive agreements, decisions, and practices), 86 (prohibiting abuses of a dominant position), and 90 (concerning public sector undertakings) all involved the

20. Art. 30(3)(a), SEA.

21. Art. 30(3)(b), SEA.

22. Art. 30(5), SEA.

23. Art. 30(4), SEA.

24. Arts. 31-32, SEA.

25. Art. 33(2), SEA.

activities of undertakings, and whatever that term encompasses, a government is certainly not an undertaking. Articles 87-89 are merely procedural and empowering, and article 91 (concerned with intra-Community dumping) is a spent force once internal tariff barriers are removed between member States.²⁶ A similar analysis can be applied to the analogous provisions, articles 65-67, of the ECSC Treaty.

This analysis is, of course, correct as far as it goes, but other aspects of governmental obligations under Community law are now being emphasized in relation to competition policy. A Member State can be sued before the ECJ, by the Commission under article 169, EEC, or another Member State under article 170, EEC, for a declaration that it has breached its Community obligations. These commitments include an obligation not to operate a State commercial monopoly in goods discriminatorily, under article 37, EEC; not to enact or maintain in force any measure contrary to Treaty rules, in particular, articles 85-94, EEC, under article 5, EEC, to promote and not to hinder the attainment of the Community objectives set out in article 3, EEC, which include the institution of undistorted competition in intra-Community trade (article 3(f)).

In *Cullet v. Centre Lecterc*²⁷ the French Government statutorily fixed minimum retail prices for petrol (gasoline) in order to base prices on the cost and selling prices of French oil refineries. As a result, certain oil imports, which could otherwise have benefited from lower prices at foreign refineries, were less attractive. Retailers wishing to sell imported oil below the fixed minimum sued to contest the validity of the Government's action. The ECJ it was held that while a State cannot infringe article 85, not being itself an undertaking, it could infringe articles 5 and 3(f) by legislating, or operating legislation, so as to jeopardize the proper operation of article 85. While not all governmental minimum price fixing is illegal, on the facts the French Government was infringing article 30, EEC, by restricting imports, and no de minimis principle operates on infringements of articles 30-36 as it does under article 85, (and hence presumably under articles 5 and 3(f)). In *Officie van Justitie v. Van de Haar and Kaveka de Meern*,²⁸ concerning Dutch legislation on excise duty on tobacco products, the ECJ reaffirmed these principles, adding

26. Tariff barriers, i.e., customs duties and equivalent charges, can and do exist between Member States during the transitional period following the accession of a new Member State to the Communities. Here art. 91, EEC, is admitted to have some effect. Less obviously, where a particular type of nontariff barrier has not become an "occupied field" under Community Commercial Policy provisions (arts. 113-115, EEC) Member States may retain widely differing external barriers, and in certain circumstances these could give rise to distortions of intra-Community trade to which art. 91, EEC, could also be relevant.

27. Case 231/81, [1985] 2 Common Mkt. L.R. 524.

28. Cases 177-178/82, [1985] 2 Common Mkt. L.R. 566.

that whereas individuals may invoke articles 30-36 against a government, only the Commission (or another Member State) may invoke article 5 and 3(f), i.e., under the article 169 (or article 170) procedure. However, nothing prevented individuals from urging the Commission to sue for their protection,²⁹ and the same facts might very well constitute governmental infringements of, e.g., both article 30, and articles 5 and 3(f). *AGROTAB v. Distrimas*,³⁰ before a national Belgium court, had very similar facts, and was dealt with in a similar way. In *EC Commission v. Italy, Re Import of Motor Vehicles*³¹ the Commission obtained an interim injunction from the ECJ against the Italian Government in the course of an action under article 169 for infringement of article 30, and it would seem this would also lie in respect of an article 5 infringement.

In *BNI du Cognac v. Clair*³² and *Ministère Public v. Lucas Asjes*³³ the ECJ held that agreements, e.g., horizontal price-fixing agreements, prima facie prohibited by article 85, are not exempt even where made by private associations under semipublic or statutory powers and then approved and made mandatory by a public law body (*Clair*) or by the government itself (*Lucas Asjes*). Governments have no power to permit or exempt what would otherwise be an article 85 infringement. Rather, the government may itself infringe article 5 in attempting to do so. U.S. federal antitrust law is of course somewhat similar; see *Consumers Union v. Rogers*³⁴ on the inability of the U.S. Government to exempt, by executive action, a Sherman Act violation.

Moreover, the Commission has only recently begun to use its hitherto little-remarked powers under article 90(3), EEC. This extraordinary provision permits the issuance of quasi-legislative decisions with immediate, detailed, binding effect (e.g., a cease and desist order), even against a government, where public sector operations are involved and the government is in breach of its obligations under article 90(1), EEC. Thus, the Commission is given almost the same powers directly to enforce competition policy against governments as against private individuals and corporations, apart from the power to impose fines³⁵ for infringements.

29. And if the Commission fails to respond to such urging, conceivably it could be sued by an individual (with standing to sue) for failure to act, under art. 175 procedure. The Commission has a duty to enforce the competition rules, under art. 89.

30. [1985] 3 Common Mkt. L.R. 294.

31. Case 154/85R, [1986] 2 Common Mkt. L.R. 159.

32. Case 123/83, [1985] 2 Common Mkt. L.R. 430.

33. Cases 209-213, [1986] 3 Common Mkt. L.R. 173. For more information concerning this case, see *infra* footnote number 43 and accompanying text.

34. 352 F. Supp. 1319, [1974] 1 Common Mkt. L.R. 489.

35. The powers to fine undertakings for infringements are contained in Regulation 17/62 (together with Regulation 1017/68 with respect to road, rail and inland waterway transport).

For example, in *Greece (Public Property and Public Sector Insurance)*,³⁶ the Greek Government was ordered not to apply Greek legislation that required Greek public property and public sector risks to be insured only with Greek insurers. In *U.K. Offshore Oil Licensing Policies*³⁷ the U.K. Government was ordered not to draft tenders for supply of ancillary services to offshore exploration projects in such a way as to favor British undertakings, and similarly the French Government was required to abandon practices favoring French undertakings in *French Government's Oil Distribution Licensing Scheme*,³⁸ where an infringement of article 37 was also found.³⁹ In its Notice on Public Procurement Contracts, 1986,⁴⁰ the Commission stated its intention to use articles 90(3) and 169 more widely to discipline governments and quasi-governmental bodies into acceptance of tenders on a nondiscriminatory competitive basis.

Failure to comply with an order issued under article 90(3) would again found an action by the Commission (or other Member State) against the recalcitrant government under article 169 (or article 170) before the ECJ. No government has ever ignored for long an ECJ declaratory judgment against it.

B. AIR TRANSPORT AND COMPETITION

As is well-known, whereas articles 85 and 86, EEC (the basic competition rules), apply in principle to all forms of transport, the application of regulation 17/62 (the basic implementing statute from which the Commission derives most of its competition enforcement powers) is removed from the transport sector by regulation 141/62. Regulation 1017/68 supplies those enforcement powers with respect to road, rail, and inland waterway transport, but so far the Council has not seen fit to enact a regulation giving the commission enforcement powers with respect to sea and air transport, considering these matters too politically and diplomatically sensitive for the blunt application of articles 85 and 86. Hence in particular air travel between Member States has remained very expensive compared with world rates.

Lord Bethel, a U.K. member of the European Parliament, attempted to force progress by bringing a private action against the Commission for failure to act, under article 175, EEC. The action was nonsuited by the

36. Decision 85/276/EEC, [1985] O.J.L. 152/25.

37. Press Release IP(85)303.

38. Press Release IP(86)355.

39. Art. 37, EEC, requires the nondiscriminatory operation of State monopolies of a commercial character in goods. No new such monopolies can be created: re German Cordless Telephones: Press Release IP(85)92.

40. Press Release IP(86)301.

ECJ, however, for lack of standing to sue.⁴¹ In *European Parliament v. EC Council*⁴² the Parliament brought a similar action in its own name against the Council. The ECJ held that the Parliament did have standing to sue under article 175, and that the Council's obligations under article 75, EEC, to provide rules on international transport within the framework of a common transport policy and (inter alia) the competition rules of the Treaty, had not been performed. In *Ministère Public v. Lucas Asjes*⁴³ defendants had been prosecuted under French criminal law for violations of the French Civil Aviation Code in selling air tickets at less than the licensed prices. These prices had been fixed between airlines and others, and then approved and made mandatory by the French Government in accordance with the Code. The French court sought a preliminary ruling from the ECJ as to whether this price-fixing scheme was contrary to article 85, EEC. The ECJ held that the absence of any implementing regulation conferring powers of enforcement in respect of air transport did not per se entail that there was no article 85 infringement. Either a National Authority for competition enforcement, or the Commission, could have acted against this scheme and decided it infringed article 85, under their basic enforcement powers in articles 88 (National Authority) or 89 (Commission). Since no such action or decision had been taken so far, however, the price fixing must be presumed legal and valid by the French court for the time being. This judgment is very significant in two respects. First, it indicates that the Commission has sufficient original powers under article 89 to enforce articles 85 and 86 in respect of sea and air transport, notwithstanding the absence of a special implementing regulation, i.e. at least to investigate and to issue a cease and desist order, even if the power to fine is lacking (and article 89 may even give power to penalize undertakings). Second, the ECJ seems, in upholding the presumption of the innocence or validity before national courts of agreements not yet pronounced upon—the so-called doctrine of provisional validity—to have extended the doctrine drastically. Hitherto the case law has made it clear that the doctrine only applies to “old” agreements, i.e., those that already existed before article 85 came to apply to them. At least some part of the instant scheme must have involved “new” agreements, which in the past the ECJ has held not to be protected by the presumption.

Finally, the German Federal Supreme Court has asked the ECJ for a preliminary ruling in the case of *Firma Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs*⁴⁴ on whether a scheme of

41. *Bethel v. EC Council*, Case 246/81, [1982] E.C.A. 2277.

42. Case 13/83, [1986] 1 Common Mkt. L.R. 138.

43. Cases 209-213/84, [1986] 3 Common Mkt. L.R. 173.

44. [1986] 3 Common Mkt. L.R. 158.