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THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES AND GOVERNANCE IN AN ECONOMIC CRISIS†

J. Mertens de Wilmars and
J. Steenbergen***

I. INTRODUCTION

An economic crisis with the dimensions of the one raging in the world today confronts the judiciary — as well as business undertakings, parliaments and governments, workers, their trade unions and other organizations — with new responsibilities. New areas of law suddenly come to the forefront and even those matters which would appear to be the most firmly settled call for a critical reexamination. Such rethinking may maintain what might otherwise be swept away, or improve what deserves to be changed by way of judicial decisions, or demonstrate that legislative action is both necessary and urgent.¹

The evolution of the case law reflects the duty of the judges and of all those who assist in the administration of justice to play their part in the search for remedies to the evils which beset their contemporaries. That duty applies at every level of the judicial structure, but it bears particular force in the case of courts that not only have to resolve the actual disputes before them but also have the task of regulating the activity of other courts with a view to ensuring uniformity and coherence in the case law. Due to specific characteristics of the Communities and their legal order, the Court of Justice of the European Communities is faced with this challenge to an unusual degree.

A. The Framework of the Treaties and the Economic Crisis

It goes without saying that the steel crisis presents the European Coal and Steel Community (ECSC) with a major challenge. In view of the crisis, the Commission used its extensive powers under article 58 of the ECSC

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1. See, e.g., *European Coal and Steel Community (ECSC) v. Ferriere Sant'Anna* (Case No. 168/82), 1983 E. Comm. Ct. J. Rep. 1681 (Preliminary Ruling).

Treaty² which has led to new policies and complex quota mechanisms.

It is perhaps less obvious that the current economic crisis presents the framework of the European Economic Community (EEC) Treaty³ with at least as powerful a challenge. Article 2 of that Treaty establishes as the Community's primary task the promotion of harmonious development of economic activities by establishing a common market and progressively approximating the economic policies of Member States. The EEC Treaty thus seeks to dismantle the barriers between the economies of the Member States and is intended to give all those who operate on the market greater opportunities. The free movement of goods enhances diversification of the sources of supply and provides access to other markets. The free movement of persons and capital opens up new avenues for employment and investment. The corollary to the EEC's underlying approach is that businesses in Member States have to contend with keener competition, and that it necessarily becomes more difficult to protect individual enterprises. Rules designed to open up Member States' economies are bound to conflict with schemes that seal off markets, that grant preferential assistance to particular enterprises or that distort competition in any other way. The competition law of the EEC⁴ and the provisions on State aids,⁵ coupled with article 30 of the Treaty (elimination of measures having an effect equivalent to that of quantitative restrictions on imports), are therefore essential for the purpose of achieving and protecting the objectives laid down in the Treaty.

It has often been emphasized that this approach remains relevant at a time when there is a slowdown in economic activity.⁶ However, economic difficulties almost always foster protectionist tendencies and ten years of economic crisis are bound to cause a spreading distrust of the mechanisms that failed to prevent that crisis. For example, it is inevitably a matter of concern for many people that the granting of State aids to businesses experiencing difficulties is governed by very strict criteria and is normally regarded as being incompatible with the mechanisms provided in the Treaty. Taken together, these factors put the *raison d'être* and basic mechanisms of the Communities to a difficult test.

This state of affairs is further aggravated by the division of powers between the Communities and the Member States. The Communities do have the powers to make many of the key decisions in the field of industrial policy, since they can set limits within which national policies of adjustment must be developed. But they can seldom adopt independently the measures of social policy which demonstrate that the Communities' industrial policies form part of a consistent set of options that can be justified from a socio-political as well as from an economic point of view.

These developments and pressures constitute in the first instance a challenge to the Council and the Commission to develop policies in confor-

2. Treaty instituting the European Coal and Steel Community, Apr. 18, 1951, art. 58, 261 U.N.T.S. 140 (1957) [hereinafter cited as ECSC Treaty].

3. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty].

4. EEC Treaty, *supra* note 3, arts. 85-90.

5. EEC Treaty, *supra* note 3, arts. 92-94.

6. See, e.g., 7 REP. COMMN. EUR. COMM. COMPETITION POLY. 11 (1978).

mance with the Treaties that will help to overcome the present difficulties. These institutions, which are subject to the supervision of the Court in the manner established by the Treaty provisions on legal remedies, must distinguish between rigid imperative rules of substantive law and rules which confer powers upon the Community institutions defining margins for policymaking. The Court has held, for example, in interpreting articles 113 *et seq.* of the EEC Treaty in relation to commodity agreements:

[A]lthough it may be thought that at the time when the Treaty was drafted liberalization of [external] trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade.⁷

However, the recent economic pressures challenge not only the Council and the Commission, but also the Community's legal system.⁸ But, in order to understand the nature of that challenge, one must realize that the pressures arising from the economic crisis do not always constitute a threat to the mechanisms set up by the Treaties.

The inadequate economic performance of the Communities is sometimes attributed not to the deficiency of the concepts but rather to the inadequate implementation of the provisions contained in the Treaties. For example, in regard to free movement of goods and the rules of State aids, both the Member States⁹ and the Commission¹⁰ now insist more vigorously on the application of articles 92 to 94 of the EEC Treaty than ever before, although in many quarters a more lenient attitude was expected towards subsidies during a period of high unemployment. Certain issues thus become more sensitive during the present economic crisis because some interest groups grow more sensitive to trade barriers and distortions of competition while others develop protectionist reflexes. The approach to the textile and steel problems in terms of trade policy further illustrates the growing belief that a large number of the economic problems faced by the European societies cannot be resolved on the national level, or at least can be more efficiently dealt with on a Community level.

Thus, the Court has to decide on the maintenance or development of its case law, for example, on the free movement of goods and rules of competition, in cases which often deal with highly sensitive issues such as national State-aid schemes for ailing industries,¹¹ the financial reform of social se-

7. International Agreement on Natural Rubber, Advisory Opinion 1/78, 1979 E. Comm. Ct. J. Rep. 2871, 2913.

8. See J. STEENBERGEN, G. DE CLERCQ & R. FOQUÉ, *CHANGE AND ADJUSTMENT* 103 *et seq.*, 175-183, 329-339 (1983).

9. See, e.g., *Federal Republic of Germany v. Commission of the Eur. Communities* (Case No. 84/82) (Ct. J. Eur. Comm. Mar. 20, 1984, not yet published) an action brought by the German Government against a Commission decision authorizing Belgian textile subsidies.

10. Thirteen cases were brought between January 1, 1982 and October 31, 1983, whereas only seventeen cases were brought between 1961 and 1981.

11. See, e.g., *Germany v. Commission* (84/82); *Commission of the Eur. Communities v. France* (Case No. 52/83) (Ct. J. Eur. Comm. Nov. 15, 1983, not yet published), *digested in* 1983 ECJR 124; *Order of the Court in Commission of the Eur. Communities v. France* (Case No. 171/83-R) (Ct. J. Eur. Comm. Sept. 20, 1983) (request for interim measures), 26 O.J. EUR. COMM. (No. C 282) 6 (Oct. 19, 1983).

curity systems,¹² the rights of employees in the case of take-overs of bankrupt businesses,¹³ the Community's steel policy¹⁴ and so on. Sometimes it has to decide whether it is possible to maintain rules and views, reasonably well established in more prosperous times, which have lately come under great pressure, and sometimes it must undertake an appraisal of rather ambitious schemes developed by the other Community institutions in order to meet new challenges and to use new opportunities for common action.

B. *The Court and the Development of the Community*

When discussing the Court's contribution to governance in an economic crisis, one must also remember that this crisis coincided with other changes affecting the Court's role and working conditions. It is not always possible to distinguish between the Court's reactions to developments specifically linked to the crisis, and those relating to developments of a more general nature.

Until 1975 the Court's case law revolved around a small number of themes which have become familiar to the practitioners of Community Law, namely:

- (i) The institutional structure of the Communities in the broad sense of that term (the Court established and clarified the special nature of the Community legal order and its essential features — autonomy, direct effect, and the irreversible nature of transfers of powers), the external powers of the Community and the main characteristics of the nature of the relationships between institutions or between Member States and the institutions;
- (ii) The abolition of obstacles to the free movement of persons, goods and services, with its logical consequences in matters of the prohibition of restrictive agreements and practices and in the field of fiscal equality — in short, "negative integration;"
- (iii) Review of the legality of the Community's action in the field of the Common Agricultural policy;
- (iv) The concern to make truly effective the protection afforded to workers by Community law, in particular, but not exclusively, in the field of social security.

These themes did not comprise the whole of the case law but formed the essential part of it, and the Court's major contribution to the development of the Communities was concerned with the establishment of the Community's legal order by case law, a process which Professor Stein has analyzed

12. *See, e.g.*, Duphar BV v. Netherlands (Case No. 238/820) (Ct. J. Eur. Comm. Feb. 7 1984, not yet published) (Preliminary Ruling), *digested in* 1984 ECJR 18; Roussel Laboratoria v. Netherlands (Case No. 181/82) (Ct. J. Eur. Comm. Nov. 29, 1983, not yet published) (Preliminary Ruling), *digested in* 1983 ECJR 136.

13. *See, e.g.*, Industriebond FNV v. Netherlands (Case No. 179/83) (Ct. J. Eur. Comm. filed Aug. 19, 1983) (Preliminary Ruling); Abels v. Bestuur van de Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie (Case No. 135/83) (Ct. J. Eur. Comm. filed July 11, 1983) (Preliminary Ruling).

14. Eighty-four cases were brought before the Court between the date of the introduction of the steel quotas pursuant to article 58 of the EEC Treaty and October 30, 1983.

with unusual clarity.¹⁵

Since 1975, the center of gravity has gradually shifted from establishing the Community's legal order by confirming the scope of provisions of the Treaties to interpreting those provisions in relation to increasingly more complex situations and provisions of secondary Community law, involving problems often referred to as "second generation issues."¹⁶ The more complex secondary law becomes, the less direct is the link between provisions of the Treaties and their implementation and the greater is the likelihood of conflicts concerning the legality of Community measures.

Notwithstanding the ever growing body of secondary Community law in fields such as agriculture and steel policy, Community decisionmaking in the Council has often been overtaken by factual developments, and secondary Community law thus is not always enacted within the prescribed time limits. These much discussed difficulties confront the Court not only with a proliferation of secondary Community law in some areas, but also with intricate legal disputes caused, to cite but two instances, by a lack of common rules in fields such as fisheries and by the fact that the common policy on the approximation of laws cannot catch up with the multiplication of various technical standards.

C. Some Quantitative Data

The combined impact of the economic crisis and the general development of the Communities is both qualitative and quantitative. As to the quantitative impact, it is enough to point out that between 1960 and 1970 the Court delivered between 10 and 50 decisions each year,¹⁷ but by 1981 the number had increased to 134 and in 1982 it reached 200.¹⁸ In order to cope with this case load, the Court now sits either *in plenum*, in two Cham-

15. See Stein, *Towards Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491 (1965), reprinted in 48 RIV. DIR. INTERN. 3 (1965).

16. Koopmans, *Problemen van de tweede generatie*, in LIBER AMICORUM JOSSE MERTENS DE WILMARS 119 (1982).

17. Statistics supplied by the Court Registry indicate that between 1954 and July 15, 1960 the Court with exclusive jurisdiction under the ECSC Treaty delivered 58 judgments.

18. Statistics on caseload supplied by the Court Registry:

ACTIONS BROUGHT	1953-1980	1981	1982	1983	Total
	3586	340	367	297	4590
COURT DECISIONS	1953-1980	1981	1982	1983	Total
1. The full Court	897	55	83	51	1,086
2. Chambers	357	73	102	100	632
a. decisions in staff cases	267	42	31		
b. preliminary rulings	86	29	56		
c. other	4	2	15		
3. Orders on application for interim measures	113	6	15	25	159
Total	1,367	134	200	176	1,701*

* The marked divergence between the total number of actions brought before the Court and the total number of Court decisions is explained by the fact that often cases are joined and then decided by a single judgment, and by the fact that each year a number of cases are settled prior to judgment.

bers of five judges or in three Chambers of three judges.¹⁹ And whereas between 1953 and 1981 48.2% of all of the 3,926 cases brought before the Court were staff cases, 24.1% requests for a preliminary ruling, 23.9% direct actions and 3.6% applications for interim measures, in 1982, of 366 cases brought before the Court, the largest group was direct actions (35.7%), followed by requests for preliminary rulings (35.2%), staff cases (down to 23.2% but not decreased in number) and applications for interim measures (5.7%).²⁰

These developments are partly a consequence of the economic crisis. For example, between June 1980 (introduction of the steel quota system) and October 30, 1981, eighty-four cases brought before the Court involved steel quotas or fines imposed because of infringements of quotas. But crisis measures are not the only reason for the increase in the Court's case load. Just as an increase in proceedings brought by Community institutions against Member States suggests that the self-confidence of the institutions has increased,²¹ more frequent recourse to judicial control of Community measures²² constitutes both an indication of a greater maturity of the Community and a prerequisite for the gradual development of the mechanisms of judicial review which are necessary in order to safeguard the rule of law in mixed-economy systems.²³

II. THE COURT AND THE MECHANISMS OF JUDICIAL REVIEW OF COMMUNITY MEASURES

The Court's main contribution to the present stage of the Community's

LENGTH OF PROCEEDINGS IN 1982

Preliminary rulings:	Between 8.5 and 19.5 months, mostly between 9 and 13 months
Other cases	Between 6 months and 5 years and 10 months, mostly between 10 and 16 months

Perhaps more significant is the fact that once the written procedure is closed, the oral proceedings can usually be fixed for a date one to two months ahead.

Similar statistics can be found in 14 COMM. EUR. COMM. GEN. REP. ACTIVITIES EUR. COMM. 353-55 app. (1980); 15 *id.* § 35, at 32, 338-40 app. (1981); 16 *id.* § 51, at 31, 338-40 app. (1982).

19. The two chambers of five judges each have been in existence since October 7, 1982 and the three-judge chamber since 1953.

20. See generally note 18 *supra*.

21. Cases brought before the Court against Member States:

1953-1980	116	(direct actions — 14.1%)
1981	50	(direct actions — 41.6%)
1982	46	(direct actions — 35.1%)

Similar statistics can be found in 15 COMM. EUR. COMM. GEN. REP. ACTIVITIES EUR. COMM. § 819, at 294 (1981); 16 *id.* §§ 37-38, at 307 (1982).

On the institutions' initial self-restraint, see also Sandalow & Stein, *On the Two Systems: An Overview*, in COURTS AND FREE MARKETS 12 (T. Sandalow & E. Stein eds. 1982).

22. Cases brought against Community institutions:

1953-1980	700	(direct actions — 85.2%)
1981	67	(direct actions — 55.8%)
1982	85	(direct actions — 64.8%)

23. See Mertens de Wilmars, *The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems*, in 1982 LIEI, No. 1, at 1.

development and to governance in an economic crisis is to be found in its case law on judicial review of the legality of economic policy. By developing methods of judicial review, the Court has forged the instruments for ensuring compliance with the rule of law in the crisis management of a complex mixed-economy system, while at the same time safeguarding the scope of the policy-making power of the politically responsible Community institutions. This has enabled the Court to participate in the search for adequate responses to present challenges within the limits imposed by its status as a judicial body. It has also helped to define the Community's institutional framework more clearly with regard to the various constitutional traditions of the Member States of the Community.

The last-mentioned aspect has become no less important at the present stage of the Community's development. At first, the Court's main task was to establish the Community's legal order and to assert Community powers as a prerequisite for enabling the Community to fulfill the tasks conferred upon it by the Treaties. At present, the Community institutions must give real substance to the Community by participating actively in the search for responses to current challenges. It follows that the constitutional or institutional scene (i.e., the relationship between the Community institutions and the Member States) is now often set by decisions which are primarily concerned with developments of substantive law, such as those determining the factual scope and degree of enforcement of Community rules in the field of subsidies,²⁴ the case law on nontariff barriers to trade, and so on. In other words, while there may be fewer *prima facie* institutional cases, the institutional impact of the Court's case law certainly has not diminished nor has its impact on the actual distribution of powers and decision making between Member States and Community institutions. It is therefore not surprising that considerations relating to the management of an economic crisis and arguments specifically relating to the facts of a particular case before the Court are frequently interspersed in the Court's decision making with considerations of a more general or institutional nature.²⁵ And it remains true that the consolidation of an institutional framework requires that due regard be given to traditions and reflexes firmly rooted in the Member States' legal systems, both in order to profit from the experience of those States and to indicate the specific characteristics of Community law with a view to consolidating its independent status.

A. *Actions for Annulment and Proceedings for an Assessment of the Validity of Community Measures*

The need to articulate Community law concepts vis-à-vis attitudes inspired by national constitutional traditions in order to safeguard the scope and cohesion of the Community legal system is, especially with regard to continental constitutional traditions, well illustrated by the Court's case law on the relationship among articles 173 (action for annulment), 177(b) (pre-

24. See, e.g., the proceedings of the conference *Discipline Communautaire et Politiques Économiques Nationales*, organized jointly by the Community Law reviews and the Institut d'Études Européennes of the University of Brussels (ULB), Brussels, May 19-20, 1983.

25. Professor Stein, among others, has described this process. See Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INTL. L. 1 (1981).

liminary rulings on the validity of Community measures) and 184 (objection of illegality) of the EEC Treaty²⁶ in which the Court determined the main outlines of the Community system of legal remedies.²⁷ This case law also illustrates the usefulness of a historical perspective, if one desires to avoid "fly[ing] in the face of both history and present-day reality"²⁸ when describing the Community model.

The relationship between the action for annulment under article 173 of the EEC Treaty and the reference for a preliminary ruling on validity under article 177 is not yet entirely clear.²⁹ This lack of clarity does not result merely from the differences of opinion on the practical advantages or disadvantages of the solutions adopted or on the similarities and differences of the two forms of proceedings. Its origins reach back much further and in reality have their roots in the conflicting conceptions which, during the nineteenth century, inspired the constitutional systems of the European States and determined the manner in which the principle of the separation of powers was applied to relationships between the judiciary and the political branches. Thus, the lack of clarity derives to a large extent from the vicissitudes of history, which means that it constitutes the reflections of social and juridical factors which are different — sometimes extremely different — from those prevailing at the present time. The uncertainties occasioned by the transposition of old solutions should therefore come as no surprise.

These different historical backgrounds have given, in each Member State, a special coloration to the more general philosophical and legal conceptions which, from the second half of the eighteenth century, inspired the gradual evolution toward the "*État de droit*," "*Rechtsstaat*" or "Rule of law." It is this special quality which has often conferred on each national system of legal redress its own coherence. Notwithstanding the common fund constituted by recognized public freedoms and fundamental rights or the democratic institutions which function in all of the Member States of the Community, these special features have, in Community law, enduring consequences and, sometimes, unexpected effects. The statement that the life of law has not been logic but experience is a half-truth, but an important one.

None of the Community institutions and none of the concepts used by

26. EEC Treaty, *supra* note 3, arts. 173, 177(b) & 184. For a more detailed discussion, see Mertens de Wilmars, *Annulation et Appréciation de Validité dans le Traité CEE: Convergence ou Divergence*, in *EUROPÄISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT — FESTSCHRIFT ZUM 70. GEBURSTAG VON HANS KUTSCHER* 283 (W. Grewe, H. Rupp & H. Schneider eds. 1981).

27. A brief but clear description was given by Stein & Sandalow, *supra* note 21, at 9-15.

28. *Id.* at 4.

29. See, e.g., T. VAN RIJN, *EXCEPTIE VAN ONWETTIGHEID EN PREJUDIËLE PROCEDURE INZAKE GELDIGHEID VAN GEMEENSCHAPHANDELINGEN* (1978); G. VANDERSANDEN & A. BARAV, *CONTENTIEUX COMMUNAUTAIRE* 303-11 (1977); Bebr, *Examen en Validité au Titre de l'Article 177 du Traité CEE et Cohésion Juridique de la Communauté*, 11 CAH. DR. EUR. 379 (1975); Koopmans, *Retrospectivity Revised*, 39 CAMBRIDGE L.J. 287 (1980); Trabucchi, *L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes*, 10 REV. TRIM. DR. EUR. 56 (1974); Vandersanden, *De l'autorité de la chose jugée des arrêts préjudiciels d'interprétation rendus par la Cour de justice des Communautés européennes*, 26 REV. CRIT. JURIS. BELGE 508 (1972).

Community law — however profoundly innovative may have been the enterprise undertaken in 1951 — emerged, like Minerva from the head of Jupiter, from the pen of authors of the Treaties. All the institutions and concepts have affinities with one or more national models with which the negotiators and their legal advisers had experience and by reference to which they gave their consent to form the Communities. A comparison among articles 173, 177 and 184 of the EEC Treaty provides the proof of this.³⁰

At first sight article 173 appears to be modeled on the action for annulment before the Conseil d'Etat in the form in which that action is structured in France. However, important differences between the French and Community systems appear even upon a first reading of the article. For example, access to the Community procedure is more restricted than in France. Only the Member States and certain institutions — privileged applicants — may contest Community regulations. Natural and legal persons may challenge only decisions addressed to them or actions in the form of a regulation or a decision addressed to another person that are of direct and individual concern to them. Also, the second paragraph of article 174 enables the Court to limit both the effect *erga omnes* and the effect *ex tunc* of a judgment annulling a Community measure. The Court may state, if necessary, "which of the effects of the regulation which it has declared void shall be considered as definitive."³¹ Several of these special features have been borrowed, it would seem, from well-known conceptions in the constitutional and administrative law of the Federal Republic of Germany and, to a lesser extent, of the Kingdom of the Netherlands.

The result of the dual paternity of article 173 is that its relationship with articles 184 and 177 may be interpreted differently if one refers to the French or, alternatively, the German system. Such an examination could be supplemented by consideration of other variants, which illustrate not only that, as Lord Denning pointed out,³² Community law requires an approach which can be different from the traditional attitudes of English lawyers, but also that Community law is not to be identified with any one of the continental legal systems.

If the French or Belgian approach were adopted, article 173 would appear as a system for the institution of proceedings for annulment, the admissibility of which is subject to stricter conditions, particularly as regards legislative measures, than under the corresponding national system. It is supplemented by a system under which objections of illegality may be raised before the national court and which is accompanied by procedures for ensuring the uniform application of that objection. If the German approach were adopted, article 173 would appear as an exceptional mechanism of *abstrakte Normenkontrolle*, which is regarded with little favor. On the other hand, article 177 applies a technique of *konkrete Normenkontrolle* before the national court, the result of which is, as in the case of national

30. EEC Treaty, *supra* note 3, arts. 173, 177 & 184.

31. EEC Treaty, *supra* note 3, art. 174.

32. LORD DENNING, *THE DISCIPLINE OF LAW* 17-19 (1979) (referring to *H.P. Bulmer, Ltd. v. J. Bollinger, S.A.* [1974] 1 Ch. 401, 411 (C.A.)).

statutes to which Community regulations may be assimilated, that the issues are brought before a single court.

The French approach, taken in isolation, probably gives insufficient weight to what distinguishes article 177 from an objection of illegality of the classic type in a system in which the availability of the action for annulment is severely limited. The German approach, again taken in isolation, probably does not do full justice to the differences between the conditions governing the compulsory referral of matters to the Bundesverfassungsgericht and those governing the way in which the cooperation between national courts and the Court of Justice is arranged under article 177, as well as the fact that the latter provision is not supplemented by a text making it possible, as does article 174 of the Treaty, to regulate the consequences of an annulment *erga omnes*.

What are, at the present stage of the evolution of its case law, the solutions applied by the Court of Justice to the problems arising from the historical ambiguity of the relationships between articles 173 and 177? The decisions on point are rather "scattered" and, as in the case of a jigsaw puzzle, the pieces have to be fitted together. The result would seem to be as follows:

(i) The Court has espoused the restrictive interpretation of the conditions governing admissibility set out in article 173, as regards an action for annulment directed against regulations of the Council and the Commission. On various occasions it has decided that the more liberal case law established by it on the basis of article 33 of the ECSC Treaty³³ cannot be transposed to article 173 of the EEC Treaty.³⁴ Different opinions may be held on the merits of and the reasons for this strict approach, but it must be said that it is unlikely that the Court will diverge substantially from it in the near future. It should be observed, however, that the admissibility of an action is judged not only on the basis of the relationship between the applicant and the contested decision *sensu strictu*, but also in regard to whether the applicant has taken part in an administrative procedure under Community law leading to the contested decision. The Court decided to this effect in the matter of procedures under competition law,³⁵ but it is perhaps even more significant that the Court has just given a similar decision in the matter of anti-dumping procedures, a particularly sensitive area in a time of crisis.³⁶

(ii) The Court takes the view that the system of legal redress set up by the EEC Treaty would not be very satisfactory if article 177 did not enable natural or legal persons to obtain, under the preliminary rulings procedure, appropriate legal redress against an illegal exercise of legislative power. As a result, it has given to the concept of invalidity a broad interpretation corresponding to that which it has given to the concept of infringement of the

33. ECSC Treaty, *supra* note 2, art. 33.

34. EEC Treaty, *supra* note 3, art. 173.

35. *Metro SB v. Commission of the Eur. Communities* (No. 26/76), 1977 E. Comm. Ct. J. Rep. 1875.

36. *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v. Commission of the Eur. Communities* (Case No. 191/82), Slip Op. (Ct. J. Eur. Comm. Oct. 4, 1983), 1984 COM-MON MKT. REP. (CCH) ¶14,013, *digested in* 1983 ECJR 96.

law and has thus rejected suggestions that would confine that concept to the most gross and obvious forms of illegality. The legality of a legislative measure is, under article 177, judged by the Court according to the same criteria as would be applied in a judgment of the legality of the same measure in proceedings brought under article 173.

(iii) The case law of the Court maintains a difference not only between the conditions of admissibility but also between the effects of an annulment under article 173 and the effects of a declaration of invalidity under article 177. This distinction does not necessarily follow the classic dividing line between *erga omnes* and *intra partes* in the sense in which these legal constructs are used in the judicial systems of the Member States. Intermediate solutions may prove to be more appropriate.

(iv) An examination of this case law reveals nevertheless the existence of a tendency toward the maintenance of a certain parallelism between the consequences of a preliminary ruling by way of interpretation and those of such a ruling by way of a declaration of invalidity. This is so not only because the two aspects of the procedure for obtaining a preliminary ruling are governed by a single text but also because the effects of a judicial decision interpreting the law and those of a decision declaring a rule to be contrary to the law are not so different as might first appear to be the case. The judgment to be given on a rule's conformity with the law may depend to a substantial degree on the interpretation given to that rule. Furthermore, the interpretation given by the Court to a rule of Community law has frequently resulted in disclosing the existence of illegal situations deriving from a previous mistaken interpretation and, as a consequence, erroneous implementation of the rule in point. A ruling by way of interpretation, like a ruling by way of a declaration of invalidity, is liable to have an adverse effect on situations which arose prior to the ruling. It must be borne in mind, however, as Bebr pointed out in 1975,³⁷ that although it was reasonable to allow courts other than those of last instance themselves to interpret Community law by confining the obligation to seek a preliminary ruling to those courts from whose decisions no appeal lies, the freedom granted to the former to rule on the validity of a Community measure raises more serious problems. Whatever one may think of this from a theoretical point of view, one is quickly forced to the conclusion that the different views held by the courts of the Member States as regards the validity of a Community measure — and in particular of a regulation — produce effects which are more harmful, and above all, more immediately harmful, than differences of interpretation. A particularly serious danger arises from the consequences of a declaration of invalidity as regards the primacy of Community law over the national law of the Member States.

B. *The Review of the Exercise of Discretionary Powers*

Measures most relevant to the management of economic crises are in many instances adopted pursuant to Treaty provisions granting discretionary powers. These are provisions which merely define the scope of such powers by general formulae identifying the subject matter, and state only in

37. Bebr, *supra* note 29, at 381.

the broadest terms the aims to be achieved. Examples of such provisions include article 58 of the ECSC Treaty (providing for the establishment of quotas in a period of manifest crisis),³⁸ article 85(3) of the EEC Treaty (containing exceptions to antitrust provisions), and articles 92 and 93 of the same Treaty (dealing with State aids).³⁹ Let us therefore now consider the means the Court of Justice has at its disposal for reviewing the legality of the exercise of discretionary powers in order to ensure that they are not used arbitrarily.⁴⁰

Article 33 of the ECSC Treaty, article 173 of the EEC Treaty, and article 146 of the Euratom Treaty⁴¹ set out the various grounds of illegality on which an action for annulment may be brought. They are (a) lack of powers (on the part of the authority which adopted the measure); (b) infringement of an essential procedural requirement; (c) infringement of the law (i.e., infringement of the substantive terms of a legal provision); and (d) misuse of powers. More recent authorities on continental administrative law regard the first two forms of illegality as affecting the external legality of the measure subject to judicial review and the last two forms as affecting its internal legality.

If a court is called upon to review the legality of a measure involving the exercise of a discretionary power, it will naturally be inclined to look first at the grounds of external illegality on which the contested measure may be vitiated. The legal provisions governing the authority adopting the measure and the essential procedural requirements which must be observed will generally impose clear limits or conditions on the exercise of the powers and in most cases there will be no difficulty in deciding whether the legal limits have been transgressed.

The difficulties begin, however, when the internal legality of a measure is examined. The regulatory subject matter and procedure will often be described in vague terms, which may permit powers ranging from limited powers of appraisal to the widest possible discretionary powers. In such cases the Court proceeds step by step.

The first step is to determine whether the authority acted within its discretionary sphere of competence. Although that sphere will often be defined by a vague provision, which in many cases will refer to an economic concept, the Court will not hesitate to extend the scope of its investigation. For example, the Court recently considered whether a Commission Directive on the transparency of financial relations between Member States and public undertakings⁴² was compatible with articles 90, 92, 93 and 94 of the EEC Treaty.⁴³ A number of Member States asked the Court to declare the directive void. The issue was whether both the Commission's duty under

38. ECSC Treaty, *supra* note 2, art. 58.

39. EEC Treaty, *supra* note 3, arts. 85, 92 & 93.

40. For a more detailed discussion, see Mertens de Wilmars, *supra* note 23, at 5 *et seq.*

41. Treaty establishing the European Atomic Energy Community, Mar. 25, 1957, art. 146, 298 U.N.T.S. 167 (1958).

42. Commission Directive 80/723/EEC, 23 O.J. EUR. COMM. (No. L 195) 35 (June 25, 1980).

43. France v. Commission of the Eur. Communities (Nos. 188-90/80), 1982 E. Comm. Ct. J. Rep. 2545.

article 90 of the Treaty to check whether public undertakings in the Member States were complying with the rules of the Treaty, particularly those on competition, and the investigatory powers entailed by such surveillance extended to aid granted by Member States to such public undertakings. The reason for the doubt was that State aid is governed by special provisions in articles 92 to 94, which may also provide for investigatory procedures. The Court held that articles 90 and 92 to 94 have different objectives and that although provisions specifically concerning aids granted to public enterprises could be adopted by the Council using its general powers under article 94, this did not preclude the exercise by the Commission of its powers under article 90.

The next step for the Court is to verify that the factual preconditions for the exercise of the discretionary power actually exist. The Court will determine whether the factual circumstances relied upon actually exist and whether the relevant authority attributed the proper legal significance to them. The Treaties teem with provisions of this kind and they usually refer to economic circumstances that must have arisen before the Council or Commission may lawfully act.

If the Commission must decide whether or not a particular, often complex, situation exists, it may quite frequently be difficult to say whether the Commission is exercising a power of appraisal or a discretionary power. The Court of Justice readily accepts this and emphasizes the frequently marginal nature of its powers of review by declaring contested measures illegal only in cases in which it finds a manifest error of judgment.⁴⁴

With the third step we come to the very core of the judicial review of internal legality. The question is no longer one of verifying the legal and factual preconditions to the exercise of discretionary power but of judging the legality of the actual exercise of that power. Since one of the courts' tasks is to prevent arbitrariness on the part of others, it is right for the courts, and indeed their duty, to beware of such a trait in themselves, however well-intentioned it may be. They therefore seek to establish general criteria which may be applied from case to case. Since those criteria are not to be found directly in the provision laying down the guidelines for the authority — the purpose of such a provision being precisely to give the authority wide discretion — they must be sought in certain general legal principles whose purpose and effect is to ensure that the authority retains the necessary freedom of action while placing such restrictions on its action as are necessary to prevent it from adopting arbitrary decisions.

Those general principles of law were not invented by the courts. They are not rules of law laid down by the legislature *expressis verbis* but are rules which are used by the law in a whole range of specific legal provisions. It is by virtue of this recurrent practice in specific instances that it is permissible to deduce that a general rule exists. As the Court of Justice has frequently acknowledged, the peculiarity of the Community legal system is

44. See, e.g., *Sàrl Maïseries de Beauce v. Office National Interprofessionnel des Céréales (ONIC)* (Case No. 109/79), 1980 E. Comm. Ct. J. Rep. 2883, 2907-09 (Preliminary Ruling); *S.A. Roquette Frères v. France* (Case No. 29/77), 1977 E. Comm. Ct. J. Rep. 1835, 1843 (Preliminary Ruling); *Merkur-Aussenhandels v. Commission of the Eur. Communities* (Case No. 43/72), 1973 E. Comm. Ct. J. Rep. 1055, 1074.

that such recurrence may be due not only to the repeated application of such principles in the Treaties, but also to their application in the national law of the Member States. Articles 5, 164 and 215 of the EEC Treaty make it possible to draw on the legal systems of the Member States.⁴⁵

There is, however, an inherent ambiguity in the concept of general principles which we must try to dispel. In the case law of the Court, the concept is used in two senses which, although similar, are distinct. Sometimes it is used to designate general concepts relating to the institutional, economic or social foundations of the Community. These are principles whose normative, or at least binding, character is relatively weak, but which are of great importance for interpreting the meaning and scope of the prohibitions and obligations imposed by the Treaties on the Member States and the provisions conferring powers on the Community institutions. This first category of general principles includes solidarity (expressed, among others, in article 5 of the EEC Treaty), Community preference (expressed, for example, in article 41 of the EEC Treaty) and the principle that conditions must be established which resemble as closely as possible those of a domestic market.

In other cases, however, the concept of general principles is used to denote binding, though unwritten, rules, which must be observed if Community action is to be lawful. These apply even, and indeed particularly, to Community institutions' exercise of discretionary powers.

This second category of general principles may be divided into three groups. The first group comprises general principles borrowed from the foundations of the democratic system and as such are to be found in the constitutions of the Member States. They are the principles of the protection of fundamental rights and freedoms and the principle of nondiscrimination. The second group comprises the principles of so-called sound and proper administration. This concept is taken from the administrative law of the Netherlands where such principles are called *algemene beginselen van behoorlijk bestuur*. The principles in question are the balancing of interests, proportionality and the protection of legitimate expectations. The general principles relating to the concept of legal certainty — that laws must not be retroactive and that acquired rights must be respected — comprise the third group. The principle of the protection of legitimate expectations arguably belongs to this third group rather than the second.

III. REVIEW BY THE COURT OF JUSTICE OF THE LEGALITY OF ECONOMIC POLICY IN AN ECONOMIC CRISIS

Let us now look at some of the Court's decisions in which it reviewed the legality of certain measures of economic policy adopted to deal with the economic crisis, by using the methods described in the previous section.

A. *The Court's Decisions Regarding the Consequences of Monetary Instability (Monetary Compensatory Amounts)*

The Court of Justice has ruled on the consequences of monetary insta-

45. See EEC Treaty, *supra* note 3, arts. 5, 164 & 215.

bility in areas as diverse as the remuneration of officials,⁴⁶ the conversion into national currency of fines for breach of competition rules or of the value of imported goods in order to calculate customs duties⁴⁷ and social security,⁴⁸ but most of its decisions in this field have been concerned with the system of monetary compensatory amounts. At least three types of problems have been presented to the Court:

(i) The Court first accepted that it was necessary to correct temporarily the effects of fluctuations in exchange rates which in a market organization system based on uniform prices might cause "disturbances in trade,"⁴⁹ and found, not without some hesitation, that the introduction of monetary compensatory amounts was compatible with the Treaty. The Court then was called on to review the legality of the Council's decisions to introduce monetary compensatory amounts or refuse to introduce them in respect of specific products or groups of agricultural products. On each occasion it was necessary to determine whether fluctuations in exchange rates were such as to disturb trade. As already noted, the Court's aim in this regard is to carry out only a limited review. It consciously seeks to respect the discretion vested in the Council or the Commission.⁵⁰ Such discretion may permit the competent institution to undertake a comprehensive assessment or to make a rough estimate; it may, for reasons of practicability, deal with each group of products one by one; it may assess the chances of the market's being disturbed either at the level of the basic agricultural product or at the level of the derived agricultural products; and monetary compensatory amounts may be introduced in intra- and extra-Community trade at different times. On the other hand, the fluctuation in exchange rates must exceed that authorized by the International Monetary Fund,⁵¹ and the monetary compensatory amounts applicable to a derived product must never exceed those applicable to the various basic products from which the derived product is obtained.⁵²

(ii) A second set of judgments concerned the right of traders not to be taken by surprise by unexpected changes in the method of calculating monetary compensatory amounts which might upset the balance of the parties'

46. See, e.g., *Battaglia v. Commission of the Eur. Communities* (Case No. 1253/79), 1982 E. Comm. Ct. J. Rep. 297.

47. See, e.g., *Générale Sucrière v. Commission of the Eur. Communities* (Nos. 41, 43, 44/73), 1977 E. Comm. Ct. J. Rep. 445; *Glunz v. Hauptzollamt Hamburg-Waltershof* (Case No. 248/80), 1982 E. Comm. J. Rep. 197.

48. See, e.g., *Romano v. Institut National d'Assurance Maladie-Invalidité* (No. 98/80), 1981 E. Comm. Ct. J. Rep. 1241 (Preliminary Ruling).

49. See, e.g., *Balkan-Import-Export v. Hauptzollamt Berlin-Packhof* (Case No. 5/73), 1973 E. Comm. Ct. J. Rep. 1091, 1106 (Preliminary Ruling).

50. See, e.g., *Merkur*, 1973 E. Comm. Ct. J. Rep. at 1073.

51. See *Hans Spitta & Co. v. Hauptzollamt Frankfurt am Main-Ost* (Case No. 127/78), 1979 E. Comm. Ct. J. Rep. 171, 178-79.

52. See *S.A. Roquette Frères v. France* (Case No. 145/79), 1980 E. Comm. Ct. J. Rep. 2917, 2941-42 (Preliminary Ruling); *Sàrl Maiseries de Beauce v. Office National Interprofessionnel des Céréales (ONIC)* (Case No. 109/79), 1980 E. Comm. Ct. J. Rep. 2883, 2909 (Preliminary Ruling); *Société Coopérative "Providence Agricole de la Champagne" v. ONIC* (Case No. 4/79), 1980 E. Comm. Ct. J. Rep. 2823, 2849 (Preliminary Ruling); cf. *Dulciora S.p.A. v. Amministrazione delle finanze dello Stato* (Case No. 95/78), 1979 E. Comm. Ct. J. Rep. 1549, 1564 (Preliminary Ruling) (compensatory amounts should be equal).

interests under contracts already concluded. This was a typical application of the principle of the protection of legitimate expectations which the Court enunciated in the *CNTA* judgment.⁵³

(iii) A third set of judgments concerned the distinction between the criteria for fixing levies and export refunds and those governing the calculation of the monetary compensatory amounts. The latter must be limited to what is strictly necessary in order to neutralize the effect of fluctuations in exchange rates in a system of floating currencies.⁵⁴

B. *The Court's Case Law and the Community's Steel Policy*

Of more recent origin is the litigation produced by the steel crisis and the increasingly coercive measures which the Commission has been compelled to adopt in order to deal with it. Litigation in the European Coal and Steel Community, which had become dormant in periods of economic prosperity, came to life again in 1978. The ECSC Treaty requires steel companies to make price lists public at all times and to adhere to them. The purpose of this is to ensure that what is considered an oligopolistic market remains transparent. Under the pressure of competition made unduly keen by the search for markets at all costs, some businesses could not resist the temptation to undercut their list prices, and the earliest instances of litigation arose from the imposition of fines penalizing this practice.⁵⁵ At the time, the Court showed some understanding for the businesses concerned and reduced the fines on the ground that in times of disturbance leading to frequent fluctuations in the market it was more difficult to adhere to list prices than in less unsettled times.

In 1977 the Commission took a first step toward direct intervention by introducing a system of minimum prices under article 61 of the ECSC Treaty in certain sectors in which prices had collapsed. The legality of the system was challenged, in particular by a group of Italian companies, the famous "*Bresciani*." They criticized the Commission for adopting a price system rather than a system of production quotas and for leaving a loophole in its decision, inasmuch as minimum sale prices were imposed on manufacturers but not on dealers with the result that price-cutting competition continued among the dealers. Their argument was that the manufacturers were being asked to make a needless sacrifice — since the minimum prices did not produce a rise in prices on the market — and the principle of proportionality of means had therefore been infringed. The Italian companies also contended that there was no manifest crisis or reduction in demand, which article 58 of the ECSC Treaty requires to exist before a quota system may be introduced.⁵⁶ They in fact proved that they had no difficulty in selling their production, particularly in non-member countries.

53. *Comptoir National Technique Agricole (CNTA) v. Commission of the Eur. Communities* (Case No. 74/74), 1975 E. Comm. Ct. J. Rep. 533, 550.

54. *See Roquette*, 1980 E. Comm. Ct. J. Rep. at 2935-36; *Sàrl Maiseries*, 1980 E. Comm. Ct. J. Rep. at 2906-07; *Providence Agricole*, 1980 E. Comm. Ct. J. Rep. at 2846-47.

55. *See, e.g., Metallurgica Luciano Rumi v. Commission of the Eur. Communities* (Case No. 149/78), 1979 E. Comm. Ct. J. Rep. 2523.

56. ECSC Treaty, *supra* note 2, art. 58.

In *Valsabbia*,⁵⁷ the Court gave a judgment that was relatively severe on the Commission inasmuch as it found that the system did contain a loop-hole owing to "its failure to require the independent dealers to observe the minimum prices immediately"⁵⁸ and that the Commission was slow to fill that gap. The Court then considered "whether in view of the omissions established the obligations imposed upon the undertakings cast disproportionate burdens upon the applicants"⁵⁹ but held that despite its imperfections the system had achieved some objectives set forth in the Commission's decision. The Court, in reply to the arguments of the "*Bresciani*" companies, strongly emphasized the principle of Community solidarity by observing that "these infringements were committed at a time of crisis which jeopardized the existence of numerous undertakings in the sector and entailed the implementation of an anti-crisis plan based mainly on the principle of solidarity."⁶⁰

When the situation in the steel industry became worse, the Commission was again compelled to rely on article 58 of the ECSC Treaty and to introduce a system of production quotas. This action immediately brought sharp attacks from numerous enterprises, who questioned whether general decisions introducing the system were in accordance with Community law and challenged the way in which the general decisions were specifically applied to them. It is not possible in this Article to undertake a detailed analysis of all the juridico-economic issues raised by the quota system, but we shall look at some of the ways in which the Court has resolved them.

Although there is no longer any argument about whether a manifest crisis exists — this has, alas, become all too plain — the criteria chosen by the Commission for calculating the quotas still have been sharply criticized. The quotas are fixed every quarter for each company in proportion to its production in a given reference period. Several companies attacked this criterion on the ground that the only economically justifiable and equitable method of allocating quotas (article 58 requires an "equitable" allocation) was to fix them on the basis of production capacity. The Court rejected this argument in its *AlphaSteel*⁶¹ and *Klöckner*⁶² judgments. After declaring that article 58 allows the Commission to choose from among several criteria, the Court held that the criterion chosen constituted an objective basis of assessment which avoided the uncertainties inherent in determining a factor — much more conjectural than at first appeared — such as production capacity. Secondly, that criterion — and this was the most critical argument — enabled total production to be reduced without altering the positions of the enterprises on the market as between each other,⁶³ which was in accord-

57. *Ferriera Valsabbia v. Commission of the Eur. Communities* (Case Nos. 154, 205-06, 226-28, 263-64/78 & 31, 39, 83, 85/79), 1980 E. Comm. Ct. J. Rep. 907.

58. 1980 E. Comm. Ct. J. Rep. at 1015.

59. 1980 E. Comm. Ct. J. Rep. at 1017.

60. 1980 E. Comm. Ct. J. Rep. at 1026.

61. *AlphaSteel v. Commission of the Eur. Communities* (Case No. 14/81), 1982 E. Comm. Ct. J. Rep. 749, 767.

62. *Klöckner-Werke v. Commission of the Eur. Communities* (Case No. 119/81), 1982 E. Comm. Ct. J. Rep. 2627, 2654.

63. 1982 E. Comm. Ct. J. Rep. at 2654.

ance with the principle of nondiscrimination. It must be added that the Court took into account the fact that the Commission's general decision contained provisions allowing quotas to be adjusted.⁶⁴

A second set of actions concerned the derogations made possible by the above-mentioned provisions. It is provided in article 4, points 4 and 5, of the Commission decision that enterprises may have their reference production, and consequently their quotas, increased if, after July 1, 1980, they have activated a new plant that has not received an unfavorable opinion from the Commission or if their reference production is made lower as a result of restructuring measures which they have voluntarily undertaken.

In its *Krupp* judgment,⁶⁵ the Court granted partial relief by accepting the applicant's interpretation of the method of computation called for by article 4, point 4, and accordingly voided the Commission's notification refusing to allow Krupp to choose the most favorable of two possible methods of adjustment. But the Court also held that the enterprise could not benefit from a cumulation of the two possible increases. Other cases were concerned with the generalized application the Commission made of article 14 of its decision by virtue of which quotas may be adjusted if the restrictions imposed cause an enterprise exceptional difficulties.⁶⁶

Another aspect of the legality of the quota system that attracts fierce controversy is the fact that article 58(1) of the ECSC Treaty couples the establishment of a production quota system to the Community's external commercial policy by providing that the quota system is to be "accompanied, to the extent necessary, by the measures provided for in Article 74," these being measures for restricting imports from non-member countries.⁶⁷ In the view of the applicant enterprises, that meant that before the Commission could compel Community enterprises to restrict their production, it had to restrict imports from non-member countries by exercising the powers conferred upon it in this regard by article 74 of the Treaty. The Court replied to this argument in its *Valsabbia* judgment by stating that the Commission, in the exercise of its discretion (see the phrase "to the extent necessary" in article 58), could take into account the fact that the Community was a clear net exporter of steel products and therefore had no wish to provoke retaliatory measures by unilaterally restricting non-member imports.⁶⁸ The Commission had not exceeded its powers or based the measure in question on materially incorrect facts.

Finally, in pleading a state of necessity, some enterprises raised the question whether an enterprise may avoid its obligations if compliance with them would cause such serious losses that it could no longer survive. It was

64. Commission Decision 80/2794/ECSC (establishing a system of steel production quotas for undertakings in the iron and steel industry, arts. 4, 14), 23 O.J. EUR. COMM. (No. L 291) 1 (Oct. 31, 1980) [hereinafter cited as Commn. Dec. 80/2794/ECSC].

65. *Krupp Stahl v. Commission of the Eur. Communities* (Case Nos. 275/80 and 24/81), 1981 E. Comm. Ct. J. Rep. 2489, 2514-15.

66. See Commn. Dec. 80/2794/ECSC, *supra* note 64.

67. ECSC Treaty, *supra* note 2, art. 58(1).

68. 1980 E. Comm. Ct. J. Rep. at 1015-16.

submitted, particularly in another *Klöckner* case,⁶⁹ that a state of necessity arose in the first place from the fact that the general level of the quotas was too low and in the second place from the particular difficulties encountered by the applicant enterprise. In its judgment in this *Klöckner* case, the Court did not rule on the question whether the doctrine of necessity is, in principle, recognized in Community law.⁷⁰

C. *The Court's Decisions on Strengthening the Mechanisms of the Common Market*

The most striking feature of the Court's decisions in the economic crisis is its determination, in the face of new protectionist pressures, not only to give effect to but also to strengthen the Common Market's mechanisms for liberalizing trade within the Community. In the Court's view, the rules on the free movement of goods *sensu largo* remain one of the cornerstones of the Community edifice. Here again one is struck by an intertwinement of (policy-oriented) substantive law and institutional considerations that goes some way toward explaining certain differences in approach to the interpretation of "free-market rules" between the Court of Justice of the European Communities and the Supreme Court of the United States.⁷¹ The approach adopted by the Court of Justice is illustrated by its decisions on articles 30 to 36 (non-tariff trade barriers), article 95 (discriminatory taxation), and articles 92 and 93 (State aids) of the EEC Treaty.⁷²

The case law on articles 30 to 36 of the EEC Treaty, as crystallized in the *Dassonville* judgment⁷³ and the *Rewe (Cassis de Dijon)*⁷⁴ judgment has been developed or confirmed in a series of judgments concerning products as diverse as alcoholic beverages, animal feed, apples and pears, bread, fish, margarine, meat preparations, milk, mutton and lamb, pharmaceuticals, pork, plants, plant-protection products, potatoes, poultry, solvents and varnish, souvenirs, vinegar and vitamins, and dealing with such matters as advertising rules, customs regulations, health and safety standards, certification procedures, industrial property rights and price regulations.⁷⁵

The Court's policy regarding the free movement of goods was clearly expressed in the *Cassis de Dijon* judgment. The Court held that obstacles to trade within the Community arising from disparities in the national laws governing the marketing of products must be accepted insofar as such provisions are necessary to satisfy overriding requirements of, in particular, effective fiscal supervision, the protection of public health, fair trading and

69. *Klöckner-Werke v. Commission of the Eur. Communities* (Case Nos. 303, 312/81), slip op. at 8, 12 (Ct. J. Eur. Comm. May 11 1983), *digested in* 1983 ECJR at 92.

70. *Klöckner* (303, 312/81), slip op. at 42; *digested in* 1983 ECJR at 92.

71. See Sandalow & Stein, *supra* note 21, at 24-36.

72. EEC Treaty, *supra* note 3, arts. 30-36, 92-93 & 95.

73. *Procureur du Roi v. Dassonville* (Case No. 8/74), 1974 E. Comm. Ct. J. Rep. 837 (Preliminary Ruling).

74. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (Case No. 120/78), 1979 E. Comm. Ct. J. Rep. 649 (Preliminary Ruling).

75. See, e.g., VerLoren van Themaat, *La Libre Circulation de Marchandises après l'Arrêt "Cassis de Dijon,"* 18 CAH. DR. EUR. 123, 136 (1982) (listing 35 judgments delivered between Mar. 28, 1979 and Mar. 2, 1982). In 1983 alone the Court added another 20 judgments.

consumer protection.⁷⁶ The Court's ruling, while enabling Member States to satisfy overriding requirements, strengthens the mechanisms of the Common Market. It contrasts with the policy of approximating laws under article 100 of the EEC Treaty,⁷⁷ which had produced inadequate results. By establishing the dual test of "ends and means" the Court found a Community solution to proliferating technical standards and the nontariff barriers to trade. The Court recognized that the majority of such barriers are not the result of trade policies but are the product of policies, such as consumer protection, that are typical of modern welfare states,⁷⁸ and that a preliminary or timely harmonization, however desirable, is usually not feasible. The Court, therefore, did not prohibit such measures outright but held that importing Member States may not prevent imports through the enforcement of rules whose purpose, no matter how legitimate, is adequately served by the regulations in force in the exporting Member State. Thus the Court demonstrated in striking fashion that it is possible for a common market such as the European Economic Community to develop solutions going far beyond anything that can be achieved in forums of inter-governmental negotiation such as GATT.⁷⁹

The same neo-protectionist temptation has inspired what appear at first sight to be objective distinctions in the differential taxation of a number of products. To give just one commonplace example, all that is needed to seal off a market is to adjust the rate of taxation on spirits according to their alcohol content.⁸⁰ The Court's case law under article 95 of the EEC Treaty has consistently imposed rather strict criteria.

The actions recently brought before the Court concerning State aids are no less complex. The sheer extent of this problem is demonstrated by the fact that applications to the Commission for approval of State aids increased from 21 in 1970 to 232 by 1982. However, as already pointed out, it is no less remarkable that in this area, which is particularly sensitive in times of crisis, greater respect for the rules is being shown. Particular difficulties arise in actions concerning State aids for the restructuring of industries or aids given to regions affected by structural unemployment. These actions are of two kinds. The first raises essentially procedural issues, which are nonetheless important, and concerns cases in which a Member State introduces an aid without resorting to the consultation and approval procedures provided for in article 93 of the EEC Treaty. The Court takes a severe view of such cases and strongly condemns States that attempt to

76. *Rewe* (120/78), 1979 E. Comm. Ct. J. Rep. at 662.

77. EEC Treaty, *supra* note 3, art. 100. Article 100 remains a major instrument for Community development which certainly has not yet been put to the fullest possible use. It can hardly be denied that, for various reasons, the hopes described by Professor Eric Stein, *see, e.g., Stein, Assimilation of National Laws as a Function of European Integration*, 58 AM. J. INTL. L. 1 (1964), have not yet been fulfilled.

78. *See, e.g., M. KRAUSS, THE NEW PROTECTIONISM IN WELFARE STATE AND INTERNATIONAL TRADE* 35-38 (1978).

79. *See Agreement on Technical Barriers to Trade (GATT Standards Code)*, Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616; *see also* J. STEENBERGEN, G. DE CLERQ & R. FOQUÉ, *supra* note 8, at 195-96.

80. *See Commission of the Eur. Communities v. Denmark* (Case No. 171/78), 1980 E. Comm. Ct. J. Rep. 447 (Danish aquavit case).

present the Community and the other Member States with such a *fait accompli*.⁸¹

The second type of case concerns the actual nature of the aids and brings before the Court a wide range of diverse measures. For example, the Court has been asked to rule on, *inter alia*, measures concerning the restructuring of the textile industry in France and Belgium, Italian aid to the Sicily region, the compatibility with the Treaty of the Belgian Government's participation in an enterprise in financial difficulty, the obligation imposed on importers by Greek legislation to pay for imports in cash and the obligations imposed on Irish wholesalers of oil products to obtain a certain proportion of their supplies from a nationalized refinery. Some of these actions are the result not of the Commission's initiative but that of Member States contesting the validity of the authorization granted by the Commission to another Member State or of the initiative of private businesses challenging a refusal to allow their Member States to grant aid. There then arises a problem concerning the admissibility of applications, which the Court resolved in its judgment in the *Philip Morris* case⁸² by holding that enterprises are directly and individually concerned by decisions relating to the authorization of aid which a Member State proposes to grant to them.⁸³ In that case an action was brought before the Court by the Philip Morris Company for the annulment of a Commission decision refusing the Netherlands Government authorization under article 92 of the Treaty to grant that company aid for investment in an area which the Netherlands Government considered an area of structural unemployment. Article 92(3)(a) of the EEC Treaty provides that, subject to the Commission's approval, "aids intended to promote the economic development of regions where the standard of living is abnormally low or where there exists serious under-employment" may be considered compatible with the Common Market.⁸⁴ The Court held that the Commission, which clearly has discretion under that provision, had exercised it properly in assessing the level of underemployment not by reference to the national average but by reference to the level of underemployment in the Community.

IV. CONCLUSIONS

We would like to conclude this brief account of legal remedies and the application of economic law in times of crisis with two general observations. First, economic law is frequently referred to as a new branch of legal science. We do not think that this is an accurate image, and it has the drawback that it is more confusing than it need be. Civil codes, for instance, contain a large number of economic provisions. Taken as a whole, they both reflect and regulate the economic system as it prevailed in the nineteenth century, and they were designed and applied to do just that. Far

81. See Order of the Court in Commission of the Eur. Communities v. France (Case No. 171/83-R) (Ct. J. Eur. Comm. Sept. 20, 1983) (request for interim measures), 26 O.J. EUR. COMM. (No. C 282) 6 (Oct. 19, 1983).

82. Phillip Morris Holland v. Commission of the European Communities (Case No. 730/79), 1980 E. Comm. Ct. J. Rep. 2671.

83. 1980 E. Comm. Ct. J. Rep. at 2687.

84. EEC Treaty, *supra* note 3, art. 92.

from being accidental, the fact that that economic system found its expression essentially in private law corresponded in all respects with the views prevailing at that time on how the economic process should best operate. The three essential legal instruments of the classic form of a market economy are (i) the laws on property and the procedures for its transfer; (ii) freedom of contract as the expression of private economic initiative; and (iii) the law on liability seen as constituting a guarantee of the system and as a sanction for offenses against it.

In the mixed-economy systems which at present prevail in the Member States of the Community, these legal instruments continue to play the same economic role as before, although often in greatly altered forms. We need only consider the collectivization of property by means of modern company law and industrial conglomerates, the increasing use of standard form contracts and collective bargaining agreements, and the gradual changes in the law of public and private liability, whether as the result of the application of theories of strict liability or, at the more pragmatic level, of the impact of widespread recourse to insurance. These traditional legal instruments of economic management are accompanied by a further legal instrument, namely State intervention in its multifarious forms — incentives, disincentives, coercion, regulation, participation in management and so forth.⁸⁵

In the nineteenth century and the first half of the twentieth, judges had acquired a quite remarkable mastery of the legal instruments of the liberal economic system and were never in doubt about their powers and capacity to intervene in the economic relations reflected in the civil codes, inasmuch as they awarded damages, modified property rights or annulled contracts or varied contractual obligations. Similarly, judges and all those who assist in the administration of justice in the second half of the twentieth century must master the new legal instruments of the mixed-economy systems in order to ensure that, in those systems as well, the rule of law is upheld.

The way to uphold the rule of law lies partly in controlling the wide discretionary powers that public authorities presently have in economic matters. The Court of Justice has become a testing ground for the most recent methods of upholding the rule of law. Besides contributing to European integration, the Court's case law in this field can also contribute to the development of law in a democratic society.

And secondly, as we said at the beginning, judges cannot remain indifferent to the misfortunes which beset their contemporaries. As far as their jurisdiction allows them, they have the duty to assist in the search for appropriate remedies. However, it must be added that they are powerless to replace political will. A true European Community will not be forged merely by judgments of the Court of Justice. That will above all require lucid and courageous political decisions. Whenever political will has been expressed, however, albeit in incomplete or ambiguous texts — which is almost inevitable at the outset of any fundamental transformation — the law in general and judges in particular can help to turn that will into binding and effective rules of law.

85. See generally Mertens de Wilmars, *Le juge et le droit Économique*, 91 JT 717 (1976).