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The European Community Court: Its Role in the Federalizing Process

The European Economic Communities may someday provide the base for a united Europe. Professor Feld examines the Court of Justice of the European Communities as an instrument of federalization. He finds evidence in the Court's opinions of movement towards establishment of a federal system.

Werner J. Feld*

INTRODUCTION

The dream of a European federation was articulated as far back as the 1920's, yet today it is still very far from realization. However, the first outline of such a federation may be seen in the structure created by the treaties underlying the three European Communities— the Coal and Steel Community (ECSC), the Economic Community (EEC), and the Atomic Energy Community (Euratom). These treaties can be meaningfully compared to the constitution of a state. They form the juridical basis for the various Community agencies, delineate the relationships among these agencies, and regulate the relationships between the three Communities and the member states. While the three Communities have been labeled a "functional" federation, the vice-presi-

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1. The signers of the three treaties are West Germany, France, Italy, Belgium, the Netherlands, and Luxembourg.

2. Treaty Constituting the European Coal and Steel Community (1951) [hereinafter cited as ECSC Treaty].


5. The ECSC High Authority and the EEC and Euratom Commissions are bodies independent of the member states. They are empowered on their own, or in cooperation with the Council of Ministers, to issue regulations of a quasi-legislative nature, and administrative decisions which are binding on individuals and business enterprises in the member states.

dent of the ECSC High Authority has expressed a more traditional view: "[T]he structure of the Communities presents something half-way between a true federal structure and the kind of international cooperation we have seen in the past."

Any appraisal of the nature of this structure requires more than a legal analysis of the Community treaties, for it is insufficient to consider federalism merely in terms of a static pattern of division of powers. Federalism should also be seen as "a process by which a number of separate political organizations . . . states or any other kind of associations, enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems." In this process the possibility of change in the pattern of shared values and beliefs and the extent of common interests and objectives of the people in the entities involved plays a significant role. If the autonomy of the entities is not impaired by participation in the larger community, and if the needs of the states are best served by community action, the federalizing process is likely to proceed forward. According to Professor Friedrich, the crucial factor for a progressive federalizing of frontiers between states in economic, social, and certain technical fields; the existence of organs with independent power to act extending beyond the "deliberative and [the] consultative"; agencies with direct access to the citizens of the member states.

Some of the organs of the Communities meet these qualifications. The ECSC High Authority and the EEC and Euratom Commissions are independent of the member states. They have the power to issue on their own, or in cooperation with the Council of Ministers, regulations of a quasi-legislative nature as well as administrative decisions binding on individuals and business enterprises in the member states. See ECSC Treaty arts. 9, 14, 92; Euratom Treaty arts. 126, 161; EEC Treaty arts. 157, 189. Beginning in 1966 the functions of the High Authority and the two Commissions are to be exercised by a unified body. See N.Y. Times, March 2, 1965, p. 1, col. 5.


process is a workable community executive body existing apart from the governments of the states. This body should become the spearhead of federalization, usually aided, however, by an arbitral or judicial tribunal of last resort. If the judgments of this adjudicating agency have a centralizing tendency, the federalizing process can be speeded; if they manifest a decentralizing tendency, retardation of the process is probable.

The basic structure of the European Communities with its executive and judicial organs obviously fits Friedrich’s description of a potentially successful federalizing process. This Article focuses on the role of the Court of Justice of the European Communities [hereinafter referred to as the Court], in the process of European federalization. It shall examine the relevant functions and powers of the Court as specified by the three treaties, and survey the pertinent case law developed by the Court over the last twelve years.

The Court is the direct successor of the Coal and Steel Community Court which functioned from 1952 until 1958 when the EEC and Euratom came into being. Seven judges are chosen by the governments of the member states for terms of six years. The justices are assisted by two advocates-general who present impartial and independent conclusions on the disputes brought before the court. Member states, organs of the Communities, and private individuals and business enterprises affected by the three treaties have access to the Court. Judgments are enforceable in the member states against private parties in the same manner as judgments of national courts. However, judgments against governments of member states can only be enforced under the ECSC Treaty under certain conditions. The later Rome Treaties have eliminated enforcement against member states.

I. CONTROVERSIES BETWEEN COMMUNITY ORGANS AND GOVERNMENTS OF THE MEMBER STATES

The legal relationship between the Communities and the

11. See ECSC Treaty arts. 44, 88, 92.
member states best demonstrates the resemblance of the Communities' structure to a federal system. Particularly, disputes between Community agencies and member state governments justifies viewing the Court's jurisdiction as "federal."

Such controversies often arise from allegations by the High Authority and the EEC and Euratom Commissions that treaty provisions have been violated. The High Authority and the Commissions have been endowed with certain powers to ensure fulfillment of treaty obligations by the member states. The ECSC Treaty requires the High Authority to notify the member state of an alleged treaty violation, allowing time for compliance. The state has the right to appeal to the Court which then rules on the justification of the High Authority's allegation. If the appeal fails or if no appeal is taken within two months, the High Authority, acting jointly with the Council of Ministers, may invoke certain economic sanctions against the offending state. 8

Under the Rome Treaties, the EEC and Euratom Commissions must request a member state to meet its treaty obligations. Failure to comply within a set period allows the Commission to refer the matter to the Court. If the Court finds a treaty violation, the state government is merely obliged, as a signer of the treaty, to implement the Court's judgment, because under the Rome Treaties no economic sanctions are available to enforce judgments. 14 This lack of enforcing power may be seen as undermining the federalizing process. On the other hand, the prospect of offending public opinion may be a sufficient sanction. Furthermore, any enforcement action in such a rudimentary federation might arouse strong reactions in the offending state to the detriment of the federalizing process.

In a number of instances member states have been charged with violations of the ECSC and EEC Treaties. Although many of these cases have been or are being settled, some disputes do reach the Court. Two 1960 Court decisions grew out of High Authority orders requiring member states to set public motor freight rates. The Italian and Dutch governments refused to acknowledge such an obligation and appealed to the Court. The Court ruled that the High Authority lacked the power to make

13. See ECSC Treaty art. 88.
14. See EEC Treaty arts. 169, 171; Euratom Treaty arts. 141, 143. See also EEC Treaty art. 225, which permits the Commission to appeal immediately to the Court without first consulting the State concerned if the alleged treaty violation has the effect of distorting conditions of competition in the Common Market.
the request. The national interests involved were thus accommodated and the High Authority's efforts to eliminate discriminatory freight rates within the Community — an avowed objective of the ECSC Treaty — were weakened.15

The High Authority's drawn out struggle to remove discriminatory German freight rates applying to Ruhr coal going to French steel plants was more successful. The Authority disallowed some of the existing German rates, and at the same time permitted the continuance of others for various reasons. The Court was swamped with appeals against this decision. Basically the Court upheld the High Authority16 and the German government later reconsidered its entire freight rate structure and introduced a general low rate for coal applicable to both internal and international traffic.

Four later cases17 brought by the EEC Commission against member states for impeding the flow of goods across national borders resulted in the Court declaring the actions of the member

15. See Gouvernement de la République Italienne contre Haute Autorité, July 15, 1960, 6 Rec. de la Jurisprudence de la Cour [hereinafter cited as C.] 683; Gouvernement du Royaume des Pays-Bas contre Haute Autorité, July 15, 1960, 6 C. 728. In view of the text of ECSC Treaty art. 70, § 31, this decision is highly questionable. For a juridical base of the order to publish freight rates the Court could also have resorted to the doctrine of "implied powers" which it had developed in an earlier decision, Fédération Charbonnière de Belgique contre Haute Autorité, November 29, 1956, 2 C. 199. The Court, however, explicitly denied the applicability of that doctrine and in fact retreated from the position it had taken in 1956. In a later decision the Court recognized at least the right of the High Authority to "recommend" to the member governments the publication of freight tariffs, Gouvernement du Royaume des Pays-Bas contre Haute Autorité, July 12, 1962, 8 C. 413. See also Lister, Europe's Coal and Steel Community 374-76 (1960).


states to be violations of their treaty obligations. The governments involved complied promptly with the Court's rulings; as a matter of fact, in the first case against Italy the import restrictions were lifted before the Court pronounced its judgment.

There are two possible explanations why member states have permitted such obvious violations of the EEC Treaty to reach the Court. First, strong national interest groups may have pressured a government into instituting measures protecting an industry or commodity. Conceivably, the government may have wished to make the trade restriction stick. However, the member state may have shifted an unpopular decision to the community structure to retain the good will of the pressure group. Second, there may have been strong dissension within the national government in regard to a proposed protective measure. Instituting the potentially violative measure may have been done to allow the Court to act as the final arbiter. Whatever the reasons, this apparently intentional shifting of final decision-making from the state to the Community enhances the authority of the Community structure as a whole and the authority of the Commission and the Court in particular, and contributes significantly to the federalizing process.

Disputes over the relationship of the Communities to the member states resulting from decisions of the High Authority or the EEC Commission can also be brought before the Court by the member governments. For example, Germany complained about insufficient import quotas for oranges and raw materials.

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18. See ECSC Treaty arts. 33, 35; Euratom Treaty art. 148; EEC Treaty arts. 173, 175. The specific grounds are legal incompetence, major violations of procedure, infringement of the treaties or of any legal provision relating to their application, and abuse of power (détourment de pouvoir). Under the Rome Treaties a member state may also appeal to the Court against acts of the Council of Ministers. ECSC Treaty art. 38 permits an appeal, although more limited, for the annulment of a resolution of the European Parliament or the Council of Ministers.

In addition, under ECSC Treaty art. 37 a member state may appeal to the Court if a High Authority decision would provoke fundamental and persistent disturbances in that state's economy. In the event of such an appeal the Court possesses exceptionally broad powers to review the cogency and expediency of the High Authority's decision. This provision establishes a method for reconciling serious clashes of national and Community interests, a proper task for any federal supreme court. See Niederrheinische Bergwerks-Aktiengesellschaft Unternehmensverband des Aachener Steinkohlenbergbaues contre Haute Autorité, July 13, 1961, 7 C. 259, 263. See also EEC Treaty art. 226 which has a similar purpose but is much more restricted in its application.

for the manufacture of brandy from countries outside the Common Market. In another case Italy asserted that the Commission had unduly impeded its export of refrigerators to France. Although the Court sustained the German claim in the brandy case, primarily on procedural grounds, the Commission's actions were supported in the other two cases.

Admittedly, such decisions do not have great economic and political significance. However, they do reveal acceptance of the Court as a fair and equitable arbiter of conflicts involving national economic interests. This confidence in the Community-level decision making and arbitration mechanism does not mean that other methods of attaining more important economic and political objectives, such as direct interaction between member governments, have been discarded. But it appears that the Community mechanism is presently being utilized to settle low-key economic and political issues. Some decisions suggest a decentralizing tendency because they tend to reduce the authority of the Community decision-making apparatus. However, taken as a whole, the Community apparatus is being strengthened, a centralizing tendency is evident, and the long-run effect is a furthering of the federalizing process.

Two judgments of the Court which were not rendered in response to an appeal by one of the member governments throw light on relations between member states and the Community. In the first, a Dutch association of coal mining firms complained the High Authority had refused to prohibit a German government subsidy for German coal miners. The Court held the German laws authorizing the payments were incompatible with the ECSC Treaty, and thus the High authority should have taken steps to


prohibit the payments. The Court commented on the distinction between powers of the Community and those "reserved" to the member states:

The Community is founded on a common market, common objectives, and common institutions . . . . Within the specific domain of the Community, i.e. for everything which relates to the pursuit of the common objectives within the common market, the institutions [of the Community] are provided with an exclusive authority. . . . Outside of the domain of the Community, the governments of the Member States retain their responsibilities and [powers] in all sectors of economic policy . . . . They remain masters of their social policy; the same undoubtedly holds true for large segments of their fiscal policy.23

Germany later amended its laws to bring them into agreement with the ECSC Treaty and the judgment of the Court. This action illustrates the influence the Court can exert upon the social policies of the member states, although the Court recognizes the states "remain masters of their social policy."

The second case dealt with a controversy between a member government and a Community official. The problem was typical of a federal system — whether a state could impose its income tax on an official of the central government.24 Civil servants of the Communities are exempted from national taxes on salaries paid to them by the Communities.25 The wife of a Belgian ECSC official had a separate, taxable income in Belgium. The Belgian Internal Revenue Service requested the ECSC official to declare his income from the Community so Belgian authorities could determine the combined income of husband and wife for the purpose of assessing the wife's tax. Although the dispute was brought by a Belgian national against his government, the Court declared itself competent to hear the case. The Court sustained the official's claim, holding that no member state could take any measure constituting a direct or indirect tax levy on salaries paid by the Communities to its civil servants; Community salaries could not even be used to determine the rate applicable to other incomes. Although powerless to invalidate an administrative or legislative act of a member state, the Court said such actions

25. See Euratom Treaty art. 192; Protocol on the Privileges and Immunities of the European Economic Community art. 12.
contravene Community law. The Court found the Belgian government obligated under the ECSC Treaty to abide by Court decisions and thus duty bound to rectify the effects of its illegal actions. The Belgian government complied with the Court's decision.

II. CONTROVERSIES BETWEEN MEMBER STATES

Federal supreme courts are usually competent to decide public law controversies between component units of the federation. The three treaties grant the Community Court exclusive jurisdiction to hear and decide such disputes. Therefore, no member state can bring such a dispute to the International Court of Justice at the Hague. In disputes involving private parties regarding the application and interpretation of the treaties, the domestic courts of the member states also remain competent.

Any dispute between member states which cannot be settled by any other method provided by the ECSC Treaty, may be submitted to the Court by one of the parties. Such a general clause was omitted in the Rome Treaties which allow member states to bring an interstate dispute before the Court only after the alleged treaty violation has been referred to the Commission. The Commission involved must first ask the states concerned for comments and then issue an official opinion.

The Court may also be asked to arbitrate any dispute between member states regarding the object or purpose of the treaties if such a dispute is submitted under the terms of an arbitration clause. No preliminary proceedings of the Commission are then required. However, arbitration of alleged treaty violations by a member state is not available.

To date no member state has employed the provisions outlined in this section. Most conflicts of national interest between member states have reached the Court through attacks on decisions of the High Authority and the EEC Commission.

27. See U.S. Const. art. III, § 2; Basic Law of the Federal Republic of Germany art. 93.
29. See Euratom Treaty art. 155; EEC Treaty art. 188.
30. ECSC Treaty art. 89.
31. See Euratom Treaty art. 142; EEC Treaty art. 170.
32. ECSC Treaty art. 89; Euratom Treaty art. 154; EEC Treaty art. 182.
A federal supreme court must interpret the federal constitution. In carrying out this duty, the court will pass judgment on the validity of federal and state legislation. The Community Court may be considered as having comparable responsibilities with respect to treaty interpretation, but its powers in regard to member state laws are not as far reaching as those of a true federal supreme court. Disputes involving the application and interpretation of rules creating obligations on residents of member states may be brought before either the Community or national courts. Thus national courts may interpret the treaties underlying the Communities.

In order to prevent six different interpretations and applications of the treaties, and the quasi-legislative and other acts of the Communities, the Court has powers to ensure uniformity of law. Under the ECSC Treaty, domestic courts must refer any case in which the validity of an act by the High Authority or Council is contested to the Court. In other cases the domestic courts may interpret, without restriction, the ECSC Treaty as well as quasi-legislative and other acts of the organs of the Coal and Steel Community. Under the Rome Treaties, domestic courts of last resort must refer all cases which require interpretation of

33. See EEC Treaty arts. 100–02.
34. See Euratom Treaty art. 155; EEC Treaty art. 183. The ECSC Treaty does not have a similar provision, but the legal situation is assumed to be similar. See ECSC Treaty art. 41; Bebr, op. cit. supra note 28, at 178–79, 182–84.
35. Under the Rome Treaties “acts” may be “regulations,” “decisions,” or “directives.” “Regulations” resemble American statutes inasmuch as they are binding on and directly applicable to private parties in the member states. A “decision” binds only the addressee named therein. “Directives” are addressed to and binding on member states only. See Euratom Treaty art. 161; EEC Treaty art. 189. The ECSC Treaty distinguishes between “general” and “individual” decisions which are somewhat similar to the “regulations” and “decisions” of the Rome Treaties. In addition, an “act” may also be a “recommendation” which resembles the “directive” of the Rome Treaties except that it may also be addressed to private parties who then will have the choice of means for attaining the desired objectives. ECSC Treaty arts. 14, 33; Bebr, op. cit. supra note 28, at 37–49.
36. See ECSC Treaty art. 41. This article speaks of “resolutions” of these organs, but this term has been accepted as meaning the same as acts. See Bebr, op. cit. supra note 28, at 182, 186. Chevallier, Le droit de la Communauté Européenne et les Juridictions Francaises, 78 Revue du Droit Public et de la Science Politique 646, 660 (1962).
the treaties, or acts of Community agencies to the Court.\textsuperscript{37} Lower courts may also request such "preliminary decisions." The decision of the Community Court on the meaning of Community rules or actions binds the domestic court.\textsuperscript{38}

The first request for a preliminary decision under the EEC Treaty came from the Court of Appeals at The Hague (Netherlands)\textsuperscript{39} and pertained to the interpretation of a treaty antitrust regulation.\textsuperscript{40} The issue was whether a distribution agreement restricting competition was null and void if in contravention of the treaty's antitrust provisions.

The Court had three choices in this matter. First, it might have taken a very strong anticartel position by literal acceptance of the treaty language which states agreements prohibited by the antitrust regulations are "null and void."\textsuperscript{41} Second, it could have taken the rather weak view that prohibitions in the antitrust provisions merely pronounced general principles which required implementing regulations to become effective law. Third, it could have assumed an intermediate stand and declared that the antitrust prohibitions constituted immediately effective law, empowering the Community and the member states to determine the restrictive effects of the facts presented in each case.\textsuperscript{42} The Court adopted the last position. As a consequence, objectionable agreements are not null and void \textit{ab initio}, but are subject to an evaluation by the authorities of the member states or the Commission to determine whether they actually contravene the antitrust regulations of the treaty.

This judgment, commonly known as the \textit{Bosch} decision, is one of the landmarks in the Court's jurisprudence. Although the decision did not give full effect to the antitrust provisions of the treaty, it did meet the needs of many economic interest groups. A more militant interpretation of the antitrust provisions would have created many problems and a great deal of legal uncertainty. Although the lives of a number of cartels were prolonged by the

\textsuperscript{37} See Euratom Treaty art. 150; EEC Treaty art. 177.

\textsuperscript{38} \textit{Ibid}.

\textsuperscript{39} Demande de Décision Préjudicielle, Société Kledingverkoopbedrijf de Geus en Uitdenbogerd contre 1) Société de Droit Allemand Robert Bosch GmbH 2) Société Anonyme Maatschappij tot Voortzetting van de Zaken der Firma Willem Van Rijn, April 6, 1962, 8 C. 89, 115.

\textsuperscript{40} See EEC Treaty arts. 85-89.

\textsuperscript{41} See EEC Treaty art. 85(2).

\textsuperscript{42} The three positions have been labeled "positive law theory," "program theory," and "power theory" respectively. See Oberdorfer, Gleiss & Hirsch, \textit{Common Market Cartel Law} 86-87 (1963).
decision, the Court insured legal stability in the Community—a sine qua non for orderly implementation of the EEC Treaty.

A second preliminary decision of the Court was announced in February of 1963. A Dutch administrative court of last resort requested an interpretation of article 12 of the EEC Treaty. A Dutch firm refused to pay import duties under a tariff which it considered to be an increase over a previous tariff applied to the same product. Despite strong objections by the Netherlands and Belgium and the recommendations of the advocate-general, the Court held in the Van Gend & Loos decision that article 12 was directly applicable within the national law of member states, and that it created a right for private parties enforceable in the domestic courts. Declaring that the EEC Treaty was more than an agreement creating mutual obligations between the contracting states, the Court pointed out:

The Community constitutes a novel judicial order of international law, in favor of which the States within certain areas have limited their sovereign rights and of which the subjects are not only the State, but also their citizens. . . . The Community law, independent of the legislation of the States, is capable of creating rights which enter into the legal system of the States.

This clear affirmation that certain treaty provisions create rights and obligations for both individuals and governments enforceable in national courts definitely has given impetus to the federalizing process.

The Court's most significant preliminary decision was delivered in 1964 in the case of M. Flamino Costa contre E.N.E.L. This eagerly awaited decision involved a serious conflict of opinion between the Court and the Italian Constitutional Court. A resident of Milan refused to pay his electric bill of slightly more than three dollars, claiming the nationalization of the electric utilities contravened certain articles of the EEC Treaty. The matter was referred by the trial court to both the Community Court and the Italian Constitutional Court.

The Italian court upheld the validity of the nationalization,

43. N. V. Algemene Transport-En Expeditie Onderneming Van Gend & Loos contre Administration Fiscale Néerlandaise, February 5, 1963, 9 C. I. 44. Id. at 23.
46. EEC Treaty arts. 37, 63, 98, 102 allegedly were violated. These articles deal with member state obligations in connection with enactments of laws likely to distort the Common Market, state aids, restrictions on the right of establishment, and state monopolies.
examining only the constitutional question of whether a law rati-
ifying an international treaty which imposed certain restrictions
on Italy's sovereignty could be altered by a subsequent Italian
law changing these restrictions of national powers. Acknowledg-
ing that the Italian Constitution specifically permitted such a limita-
tion of sovereignty, the Italian court nevertheless gave prece-
dence to the subsequent nationalization over the law instituting
the EEC Treaty. The opinion did not inquire into alleged
treaty violations nor explore the legal nature of the treaty.

In the famous *Costa* decision, the Court of the European Com-

**Contrary to other international treaties, the Treaty instituting the
EEC has created its own legal order which was integrated with the
national order of the member states the moment the Treaty came into
force and which the domestic courts have to take into account; as such
it is binding upon them. In fact, by creating a Community of unlimited
duration, having its own institutions, its own personality and its own
capacity in law, the right of international representation, and more
particularly, real powers resulting from a limitation of competence or
a transfer of duties from the states to the Community, the member
states, albeit within limited spheres, have restricted their sovereign
rights and created a body of law applicable both to their nationals and
to themselves. The integration, with the laws of each member state, of
provisions having a Community source, have as their corollary the
impossibility for the member states to give precedence to a unilateral
and subsequent measure which is inconsistent with . . . a legal order
accepted by them upon a basis of reciprocity. . . . [T]he rights created
by the Treaty by virtue of their specific original nature, cannot be
judicially contradicted by an internal law, . . . without undermining
the legal basis of the Community. . . . [A] subsequent unilateral law,
incompatible with the concept of the Community, cannot prevail.**

47. See Const. of Italian Republic art. 11.

48. For a partial text of the judgment, see 2 Common Market L. Rev.
224–25 (1964). For an analysis of this decision by Nicola Catalano, former
Justice of the Court of the European Communities, see id. at 225–35.

49. Request for a Preliminary Decision by the Justice of Peace in Milan
in the case of M. Flaminio Costa contre E.N.E.L., July 15, 1964, 10 C. 1143,
1158–60. (Translated by author.) The basic notion underlying the statement
quoted was reaffirmed by the Court a few months later in Commission de la
Communauté Économique Européenne contre Grand-Duché de Luxembourg et
Royaume de Belgique, November 13, 1964, 10 C. 1217. The Court rejected the
argument by the governments of the two states that since the Commission had
failed to comply with certain of its own obligations resulting in unfavorable
consequences for Luxembourg and Belgium, the two governments were justified
in not fulfilling their obligations as well.

[Such a] relationship between the obligations of parties to the [EEC]
The Court rejected the Italian argument that the Milan judge's referral of the case to the Community Court was "absolutely inadmissible" because a national court is bound to apply only national law. It pointed out that its preliminary decision "would not be given upon the validity of an Italian law, but upon the interpretation of ... [certain] articles ... in connection with the problem raised by the Milan judge." The Court also declared that if national tribunals fail to protect a citizen's rights created by Community treaties, the EEC Commission can charge the member state with violating the treaty and bring the matter before the Community Court.

This courageous decision of the Court reflects new thinking. Instead of merely labeling the treaties a "novel judicial order of international law" as it did in the Van Gend & Loos decision, the Court spoke of a "legal order which was integrated with the national order of the member states the moment the [EEC] Treaty came into force ..." The Court made it clear that rights and obligations of nationals may arise directly or indirectly from the treaties without action by the member states and that domestic courts are required to observe and uphold these rights and obligations.

Although constitutional objections to this decision are anticipated not only in Italy but elsewhere, there can be little question

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Treaty cannot be recognized within the framework of Community law. For the Treaty not only creates reciprocal obligations between the different persons to whom it applies, but establishes a new legal order which regulates the powers, rights and duties of such persons, as well as the necessary procedure for determining and adjudicating upon any possible violation thereof.

Consequently, in addition to the cases expressly covered by the Treaty, its concept involves the prohibition on the part of members from taking justice into their own hands.

*Id.* at 1232.


51. See text accompanying notes 43-44.

the *Costa* decision has a strong centralizing tendency and will become an active agent in the Community federalizing process. The pattern of preliminary ruling referrals from domestic tribunals to the Court is also significant. After *Bosch*, an increasing number of domestic courts began to request preliminary decision. National courts in all states except Belgium have now asked the Court to render authoritative interpretations of Community law in cases before them. However, the bold spirit of integration which characterized the *Costa* and the *Van Gend & Loos* decisions is lacking in these other rulings.

The growing number of requests for preliminary rulings suggests a rising confidence, certainly among the judiciary, and perhaps among people in general, in the Court as the final interpreter of Community law. The Court’s increasingly frequent exercise of this function will continue to be an operative factor in the federalizing process. But some domestic courts are reluctant to make referrals, even when obligated to do so. Some of these courts justify their refusal by finding Community law irrelevant to the decision. Other decisions eliminate Community law by “interpreting it away.” The Court has no power to compel a referral; has been referred to the German Federal Constitutional Court for review. For a recent German reaction to the *Costa* decision, see Ehle, *Verhältnis des Europäischen Gemeinschaftsrechts zum nationalen Recht*, 17 *Neue Juristische Wochenschrift* 2531-33 (1964).

53. See *BEBR*, op. cit. supra note 28, at 195-97, listing a number of cases where German and Dutch courts did not request a preliminary decision from the Court although they were obviously required to do so under the terms of the EEC Treaty.

54. See, e.g., Request for a Preliminary Decision by the Administrative Tribunal of Frankfurt M. in the case of Deutschmann contre République Fédérale d’Allemagne, July 8, 1965, 11 C. 601; Request for a Preliminary Decision by the Civil Tribunal in Rome in the case of S.A.R.L. Albatros contre Société des Pétroles et des Combustibles Liquides (Sopéco), February 4, 1966, 11 C. 2. The judgments in *Albatros*, and *Deutschmann*, indicate that the Court is exercising great caution not to encroach on the sovereignty of the member states, and not to assess the validity of national legislation and administrative regulations.


56. Cf. Hay, *Federal Jurisdiction of the Common Market Court*, 12 *Am. J. Comp. L.* 21, 31 (1968). Hay points out that as long as a case can be decided on independent “state law grounds,” the failure to apply Community law is justified as it is under the federal law of the United States. *Cf.* NAACP
for the sake of uniformity, hopefully some means will be found to ensure compliance with the referral provisions. Because Treaty revision in the near future is unlikely, parallel legislation in the member states might be necessary to solve the problem.\textsuperscript{57}

\textbf{IV. ADVISORY OPINIONS OF A CONSTITUTIONAL NATURE}

Federal supreme courts do not normally issue advisory opinions.\textsuperscript{58} However, there seems no reason inherent in the federal system to prevent authorizing a supreme court to give advisory opinions under certain circumstances. Seemingly this would enable the court to execute its primary function: definition of the limits of power of the central government and its component units.\textsuperscript{59}

The Court may render advisory opinions in a number of circumscribed situations. The most important of these areas concerns revision of the ECSC Treaty.\textsuperscript{60} While agreement by the member states is a prerequisite to major ECSC Treaty revisions, the community organs have a strictly limited revision power which must be exercised under the control of the Court.\textsuperscript{61}

To initiate a "small revision,"\textsuperscript{62} the High Authority makes a

\textsuperscript{57}See Hay, \textit{supra} note 56, at 40.

\textsuperscript{58}The West German Federal Constitutional Court was initially empowered to render such opinions, but this authority was withdrawn in 1956. See Pleische, \textit{Contemporary Government of Germany} 129-31 (1962).


\textsuperscript{60}See ECSC Treaty art. 95. The EEC and Euratom Treaties may be revised or amended only by the governments of the member states, a procedure in which the Court does not participate at all. See Euratom Treaty art. 256; EEC Treaty art. 286.

\textsuperscript{61}ECSC Treaty art. 95.

\textsuperscript{62}A "small revision" can be carried out only in the event of unforeseen difficulties in the application of the treaty or in the case of a profound change in the economic and technical conditions directly affecting the Common Market for coal and steel. Given the existence of these conditions the revision can only deal with a modification of the rules governing the exercise of the power of the High Authority necessary to remedy the unforeseen difficulties or counteract the effects of the changed economic and technical conditions. Moreover, the revision must not alter or infringe on the basic objectives of the treaty. Also, it must not result in an alteration of the existing relationship between the powers of the High Authority and those of the other organs of the Community. See generally Carstens, \textit{Die Kleine Revision des Vertrages über die Gemeinschaft für Kohle und Stahl}, 21 \textit{Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht} 1-37 (1961).
revision proposal. If supported by five-sixths of the Council, both organs jointly submit the proposed revision to the Court. If the Court finds the proposed revision within the power of the Community agencies and justified by existing conditions, the revision proposal is submitted to the European Parliament for final approval. Approval by the Parliament makes the revision binding on the member states without ratification.

The Court has taken its responsibility of examining the "constitutionality" of proposals for small ECSC Treaty revisions very seriously. The first revision to come before the Court sought to give the High Authority increased powers to grant assistance to individual coal mines. In a very thorough opinion the Court found the proposed revision unacceptable, primarily because it feared the equilibrium of powers envisaged by the treaty was likely to be disturbed since the proposed new powers applied to the coal but not the steel industry. The proposal was revised in accordance with the decision and was then approved by the Court as modified. The Court also rejected a proposed revision of the treaty's antitrust provisions.

The Court's authority to examine the "constitutionality" of a proposed treaty revision is actually more than a mere veto power since the Court can suggest the general outlines of an acceptable revision in its opinion. These opinions illustrate the Court's strong concern for maintenance of the balance of powers at the Community level. They also demonstrate a reluctance to permit revisions which tend toward decentralization.

The Rome Treaties allow the Court to render advisory opinions concerning external relations of the Communities. The EEC, as a legal personality and a subject of international law, is authorized to conclude certain international agreements with other states and international organizations. Once concluded, these agreements are binding on the Community and the member states. In view of the far-reaching consequences of such agreements, the Council, the Commission, or a member state may request the Court's opinion on the compatibility of the proposed agreement with the treaty. If the Court issues a negative opinion, the agreement cannot enter into force.

63. See Avis émis par la Cour de Justice, December 17, 1959, 5 C. 551.
64. Id. at 555–62.
66. Avis de la Cour, December 13, 1961, 7 C. 505, 514.
67. See BEBr, op. cit. supra note 26, at 161, 162.
68. See, e.g., EEC Treaty arts. 114, 228, 238.
Euratom may also conclude agreements with third party states and international organizations, but the treaty does not provide for preliminary control by the Court. The reason for this difference may be that Euratom agreements do not directly bind the member states. However, the Court may be asked to issue an advisory opinion on the compatibility of an international agreement which a member state intends to conclude with a third country with the Euratom Treaty. If the Commission raises objections to the contemplated agreement, the member state may either meet the Commission's objections or petition the Court for a ruling as to the compatibility of the proposed draft with the treaty. If the member state loses, it cannot conclude the agreement unless it is modified in compliance with the Court's opinion.

Clearly the Court's authority to issue advisory opinions under the EEC and Euratom Treaties places it in a strategic position to influence the external relations of the two Communities. In view of the increasing responsibilities which the Community organs have for the conduct of external relations, the Court's authority is a necessary safeguard for the transfer of selected external powers from the member states to the Communities. Since the foreign relations of a federation are usually controlled by the central government, this authority to render advisory opinions with respect to the external relations of the EEC and Euratom has potential significance for the federalizing process in the Community.

V. CONCLUSION

The jurisdictional powers of a constitutional nature assigned to the Court of the European Communities by the Treaties of Paris and Rome strongly suggest a judicial position similar to a supreme court in a federation. Many of these powers have been exercised in response to increasing requests by organs of the Communities, governments of the member states, and national courts. From its inception in 1952 until July 1965, the Court has rendered more than 150 decisions and opinions — thirty-three involving

69. Euratom Treaty art. 206.
70. See Euratom Treaty arts. 103-05.
72. See Wheare, op. cit. supra note 59, at 178-96.
73. This is an impressive record for a multinational court, especially if compared with an international tribunal of the traditional order such as the International Court of Justice which has rendered less than 50 judgments in its twenty years of existence.
disputes or questions typical of issues which might be decided by a federal supreme court. Of these thirty-three decisions, sixteen dealt with controversies between Community organs and member states. Many of the sixteen controversies involved major conflicts of national economic interests. Fourteen of the 150 decisions were preliminary rulings requested by domestic courts interpreting the Community law. Three were advisory opinions.

Without question, the _Van Gend & Loos_ and the _Costa_ decisions have made the greatest contribution to furthering federalization. They have defined the Community legal system as a superstructure that must be accorded precedence over the legal systems of the member states. These decisions, as well as others settling disputes between Community organs and member states or pronouncing final interpretations of Community law, have also given impetus to the federalizing process by underscoring the predominance of the Community-level decision making process. Finally, the continued compliance by member governments with adverse judgments of the Court, the rising number of requests for preliminary rulings by national courts, and the increasing number of appeals in general,\(^{74}\) permit two inferences. First, the prestige of and the confidence in the Court among member governments and possibly even among the people is high; and second, the Court is accepted as meeting some of the expectations and needs of the people in the Community and is enhancing a number of their interests.\(^{75}\)

It is difficult to measure the impact of a high court's activities on the beliefs and attitudes of the people under its jurisdiction. Nevertheless, it is reasonable to assume that as the Court meets the needs and expectations of important interest groups and individuals it will develop attitudes favorable to the emergence of a federal system in which it might become the supreme judicial body. Conversely, if its judgments do not satisfy these needs and expectations, the federalizing process will be retarded.\(^{76}\)

Looking at the Court's contribution to the federalizing process strictly in terms of Professor Friedrich's criterion of whether the

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74. In 1963 the Court rendered 19 judgments and in 1964, the number of judgments rose to 27. A large number of suits are still pending at the present time.

75. In this connection it is also significant that large numbers of civil servants have petitioned the Court for the relief of grievances. Cf. Feld, _The Civil Service of the European Communities: Legal and Political Aspects_, 12 J. Pub. L. 68 (1963).

76. See the comments on functional jurisprudence and law in _Haas, Beyond the Nation-State_ 40-47, 490-91 (1964).
judgments have a centralizing or decentralizing tendency, it would seem the majority of the judgments have had a centralizing tendency. Thus the Community Court has done its part in furthering the federalizing process in the European Community. Of course, as Friedrich points out, the main burden for setting this process in motion and maintaining its movement lies with the central executive and not with the judiciary.77 Furthermore, the executive’s role in the Community is likely to be enhanced by the prospective fusion of the High Authority and the two Commissions into a single agency in 1966.78 But even a politically astute and enthusiastic executive may have little success in furthering the federalizing process if powerful political factors outside its control—for example, strong political opposition in one of the component entities—work persistently against the process.


78. See N.Y. Times, March 3, 1965, p. 1, col. 5. It should be noted the merger of the three bodies does not mean that the three treaties are also fused into one treaty. Rather, similar to the Council of Ministers, the unified executive will exercise its functions in accordance with the treaty which applies to the subject matter under consideration. For example, if the executive should deal with a coal or steel matter, the provisions of the ECSC Treaty will govern its actions.