"The role of courts in international law"

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THE ROLE OF INTERNATIONAL COURTS

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A. Judges and Generals and Bishops

Judges, bishops and generals are in their different ways celebrities. They share certain characteristics: distinctive clothes, considerable social esteem, good working conditions, and instant visibility. If a general does not give satisfaction, the political class will replace him. If the general is ordered to withdraw from the front, in a modern democracy he will follow orders. But the judge is appointed during good behaviour, 

quamdiu se bene gessit: judges are not removed from office because their decisions are unwelcome, at least not in modern democracies. Appointments of bishops to the Church of England (a prerogative of the state and not the church) used to be as sensitive as the appointing of US Supreme Court justices, but the theological views of bishops in England today are usually not sufficiently accessible to allow most people to follow the political implications of their candidacies. Bishops and judges do not necessarily live longer, and probably are less fit than generals, but they stay on duty longer. And removing or replacing them is not easy.
These remarks consider how judgments of international courts are accepted and implemented by practitioners and commentators. When a supreme court’s judgment fails to please, the classic reproach is of law-making, judicial activism. The criticism is thus that the judge made a choice which the drafters (of the treaty or legislation) had not anticipated or which they had rejected during the drafting process. A different way of stating the reproach is that the court failed to please the critic, taking a step or making an interpretation which surprised or disappointed. Courts will usually be aware of the likely impact of a judgment, but sometimes they are startled by the subsequent excitement.

My remarks will focus on the international courts I know best: the European Court of Justice and the European Court of First Instance, both in Luxembourg, as well as the European Court of Human Rights in Strasbourg, but as part of looking at EC law I shall also consider the many cases involving national judges. My theme is that judges have made new law, and that it is naïve to pretend otherwise. Many of these judgments must have believed that there is a wholesome merit in offering a remedy to creative or energetic persons, all the more so if they lack a domestic remedy. Another way of making the proposition is that the judges were obliged to address questions which confronted them. The terms of the Treaty of Rome and of the legislation they had to interpret had been wilfully left vague by the Member States and their drafters. Some questions were absolutely fundamental. The drafters of the Treaty knew they would arise sooner or later, but they could not reach consensus on how to settle them. There was no chance that the judges given the job of interpreting the Treaty could do so without sooner or later confronting the questions left open by the drafters. The first case in history for this new European Court of Justice in Luxembourg, a French challenge to measures taken by the High Authority, was symbolically propitious and the outcome politically welcome. France was successful, the ECJ finding that elements of the contested decision infringed the EEC Treaty and should be annulled. The fact that a Member State successfully brought a case in order to challenge a measure under the new EEC Treaty was an encouraging start. However, from the creation of the Court and its first appeal, the European judges affected the political landscape of what was to become the European Union. Were they being activist? Yes, I think so. The Court was faced with a vacuum. Before its judges lay a new Treaty which needed to be clarified and applied intelligently to find solutions.

B. Textual voids

Like most constitutional documents, the Treaty of Rome was drafted by diplomats who did not always agree on what they had agreed—and maybe even in some instances agreed not to agree, well aware that real agreement was impossible: the words camouflage the gaps. Open questions were evident. In its early years, the European Court of Justice created two fundamental doctrines without which EC law would not have developed as it has done.

The first new doctrine was direct effect, giving rights to individuals flowing directly from a treaty between states, in NV Algemeene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (Van Gend & Loos).\(^4\) and second was the primacy of Community law over national law, in Costa v ENEL.\(^5\) Although the EEC Treaty provided for judicial review of the legality of Community acts, it did not decide on the question of primacy: would Community law prevail over inconsistent national law? Could private citizens invoke the rights established by the treaties before their national courts? How would it work in practice? Would private citizens be heard on the same footing as Member States when asserting interests under the Treaty of Rome?

Let us look at the matter from the side of the drafters and from the side of the judges. The diplomats drafting the EEC Treaty had agreed that all Member States would progressively reduce to zero their customs duties on each other’s produce.\(^6\) They did not agree on what to do if a Member State failed in its duty. More precisely, they did not agree on what a citizen could do if a Member State failed in its duty. The Netherlands, usually one of the most diligent Member States, neglected to ensure that its tariff matched its

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4 For a magisterial account of many features of the practices of the European Courts compared with other international courts, see Richard Fleider, Procedure in the European Courts: Compositions and Proposals, in 267 Académie de droit international, Recueil des cours: Collected Courses of the Hague Academy of International Law 9, 9-344 (1998). This valuable and richly detailed work deserves wider circulation.

5 Case 266/62, NV Algemeene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Admin., [1963] ECR 3

6 Case 6/64, Costa v ENEL, [1964] ECR 1141


8 See EEC Treaty, supra, art 13
EEC Treaty commitments? Should the trader be entitled to rely upon the EEC Treaty itself? Should the duty rate be eight percent (the Dutch rate) or three percent (the Treaty rate)? There was plainly a discrepancy. The ECJ said it gracefully:

"The Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

Perhaps the Dutch negotiators who helped draft the Treaty of Rome favoured putting direct effect in the Treaty. In any event, the Dutch officials opposed the notion in Court, but lost. Perhaps there was an abrupt end to the initial enthusiasm in the six capitals about judicial review even if it were intended to ensure that the newly-created supranational institutions did not go too far and to ensure that States obeyed the rules equally. However, inside a few years, this principle of direct effect was no longer controversial.

Then the ECJ was faced with Mr Costa's celebrated refusal to pay his electricity bill of 1,925 Italian Lira (about $3.00), on the grounds that it had been contrary to the EEC Treaty to nationalise ENEL. The Court had to decide whether an Italian statute adopted after the entry into force of the Treaty of Rome prevailed. It produced another rich statement:

"The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity."

The obligations undertaken under the Treaty establishing the Community would not be unconditional if they could be called in question by subsequent legislative acts of the signatories.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

It is legitimate to compare these early cases with the celebrated American case Marbury v Madison, the fons et origo of judicial activism in the US. Chief Justice Marshall achieved a considerable coup; the decision confirmed that the Court could declare acts of the Congress unconstitutional if they exceeded the powers conferred by the Constitution. This established judicial review as one of the pillars of the United States Constitution. Chief Justice Marshall stated that the "government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a rested legal right."

These early pillars of EC constitutional law laid the foundation of a different Europe than the pragmatic peace-preserving intergovernmental Treaty some drafters doubtless desired. So there we see the judges, faced with a choice between an effective Treaty and a less effective Treaty, choosing effectiveness.

C. Textual Obscurity

Even where the texts purported to be complete, it was often impossible to determine exactly what the words meant, as can be observed from the debate over drafting just one part of the EEC Treaty, dealing with competition. The finished versions of Articles 85, 86, 87 and 88 of the EEC Treaty (now Articles 81, 82, 83, and 84) may have satisfied the drafters from Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. The dip-

9 See Van Gend & Loos, supra, at 22
10 Id. at 23
11 See Costa v ENEL, supra, page 1141
12 Id. at 1146, 1159
13 Costa, [1964] ECR at 1146
14 5 U.S. (Cranch) 137 (1803)
15 See id. at 180
16 See id. at 163
lomats were to a degree “babies in the woods” as to the problem, the topic and the remedy.

During the six months from September 1956 to February 1957, the negotiators working at the Château of Val Duchesse, in a leafy suburb of Brussels, had the task of reaching consensus on the competition law portion of the Treaty. There were broadly three models. The German approach contemplated preventive control: an anti-competitive arrangement should be void unless approved. The French approach left more authority to the enterprise, so that the arrangement could be implemented without prior approval, but could be rendered retroactively void by the authorities. The Dutch (there was also a Belgo-Dutch variant) provided for compulsory notification and provisional validity; if the competition authority showed that it was abusive, the invalidity would take effect only prospectively. There was concern about price discrimination and refusals to supply based on grounds of nationality and even race or religion. There was thus a lot of debate about what would now seem extraneous issues, and there were also real divergences both as to what were the enforcement targets and how enforcement should be structured. I refer those who enjoy legal archaeology to the articles cited above, from which one can glean how difficult it was to reach conclusions on many fundamental questions about the goals and function of the competition rules. They left many questions unanswered.

British officials always favour concrete obligations and distrust vague declarations and principles. The United Kingdom had elected not to join the new Community, a historic choice which left the shaping of the new entities to the continental administrative traditions. Now, UK lawyers were understandably mystified by some of the now familiar words of the young EEC Treaty with which they would have to deal, albeit as outsiders. So it was decided by the UK government to pose some difficult questions to the signatory Member States. On April 10, 1958, the British Embassy in Paris addressed to the French Government an aide-mémoire recording that there was “uncertainty in commercial and legal circles in the United Kingdom about the effect of Articles 85, 86 and 88 . . . on current and future commercial contracts between parties in the United Kingdom on the one hand and parties in the countries of the [EEC] on the other.” The United Kingdom presented a number of pertinent questions, such as:

> In order that this uncertainty may be resolved, Her Majesty’s Embassy would be grateful if the Ministry of Foreign Affairs would provide answers to the following questions:

1. Article 88 of the Treaty of Rome provides that until the entry into force of the provisions adopted in application of Article 87, the authorities of Member States shall, in accordance with their respective municipal law and with the provisions of Articles 85 and 86, decide upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the Common Market. To what extent, and in what ways, does the ratification of the Treaty of Rome affect or modify existing municipal law in this field in France? 19

   ( )

   Is a party to a pre-existing contract entitled to repudiate it if it falls within the prohibited class of contracts indicated in Article 85(1) and (2) is not saved by Article 85(3)?

   Would the ordinary commercial courts apply Article 85 if the dispute were brought before them by another party to the contract? 20

   (b) What would be the position in the event of any conflict between the substantive rules of existing municipal law in France and Articles 85 and 86 of the Treaty of Rome? 21

3. Is it possible to say what further legislative steps, if any, in connection with private restrictive practices, are required or contemplated by the Government of France as a consequence of the ratification of the Treaty of Rome? 22

4. In the event that the answers to these questions indicate that there is doubt whether or how far Articles 85 and 86 are of direct, immediate and independent application in France during the interim period, what steps if any are contemplated by the Government of France to resolve this doubt? 22

These were good questions which European judges would take years to resolve. How to reply in 1958? On June 12, 1958, the French Permanent Representation in Brussels proposed that the aide-mémoire should be examined by a working group of the six Member States in order to achieve a common line, or, if this were not possible, parallel lines. 23 The Commission’s reaction was uneven. In a memorandum dated June 19, 1958, the Competition Directorate General, trying to nurture the infant enforcement regime, expressed

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19 That is, the doctrine of primacy
20 That is, direct effects whether Community law confers rights directly upon individuals in national courts
21 Primacy again!
22 Aide-Mémoire, supra note 18
23 Note from the French Permanent Representation in Brussels, Belgium (June 12, 1958) (on file with the Council of the European Union, Archives, No: CM1/1958(748))
its fears that "the Commission fully understands the French desire to avoid any increase in existing levels of uncertainty about the interpretation of these articles, which could arise if six countries were to give different replies to the questions from the British government." 24

The Commission (disingenuously or optimistically) expressed its desire to put an end as quickly as possible to this uncertainty. It asked the Member States to give it some more time to find a practical solution and at the fourteenth meeting of COREPER in Strasbourg on June 20 and 21, 1958, they discussed the subject. 25 The archives reveal timidity, perplexity, and diversity of opinion. The Commission offered to propose an answer even before the summer holidays. The Italian delegation favoured a precise and comprehensive answer. The French feared to offer a very complete and thorough reply and proposed instead to send not a provisional answer (which would in its turn call for an exhaustive follow up) but a simple answer. Belgium was troubled by the fact that there was no competition law in Belgium (that has only recently changed!) and felt the need to offer reassurance to the British. The Netherlands favoured six different replies from each Member State. Predictably, the outcome was the constitution of a working group which – rapidly – produced a common reply stating:

The co-existence, foreseen by Article 88 of the Treaty, of national laws with the provisions of Articles 85 and 86 of the Treaty – a co-existence which national courts will eventually have to recognize – poses a problem of interpretation which can only be resolved definitively by the case-law of the Court of Justice in the context of the competence which is granted to it by the Treaty.

Further, according to Article 89 of the Treaty, the Commission of the Community is charged – when it takes up its duties – with ensuring that the principles laid down in Articles 85 and 86 are applied, which could lead the Commission to adopt a position on this subject.

The attention of the Commission has therefore been drawn to the questions raised. The Commission has informed the Government of that it intends, in the shortest possible time, to decide on its position on the most urgent practical

24 Memorandum from the Competition Directorate General, Commission of the European Economic Community, COM/58/132 (June 19, 1958) (on file with the Council of the European Union, Archives, No. CM/1958/748), ("La Commission comprend pleinement le désir français d'éviter l'incertitude actuelle sur l'interprétation de ces articles, qui pourrait se produire en cas où les six pays donneraient des réponses différentes aux questions du Gouvernement britannique.")


questions regarding the application of these Articles. These questions include the problem of what procedure should be followed in order to put an end as soon as possible to the present uncertainties emphasised in the memorandum from the United Kingdom. 26

This was agreed on July 11, 1958 27 As far as the archives could reveal, the Commission never did produce its definitive reassurance about the effects of the Treaty of Rome.

Consider what would happen if Turkey today asked a question about the interpretation of the EC Treaty like the UK did fifty years ago. It is indeed hard to imagine that the Commission would not have an opinion. The Commission's response would surely contain a reference to the Court's role as final umpire on the wording of the Treaty, but a question like the one from the UK in 1958 would not be unanswered. The problem posed would inevitably end up before the judges. The question of direct effect of the Treaty provisions on competition came to the Court of Justice in 1974 with Belgische Radio en Televisie v SV SABAM (SABAM), following which the rights of action under competition law became available to private individuals. 28

26 La coexistence, prévue par l'article 88 du Traité, des législations nationales et des dispositions des articles 85 et 86 du Traité – coexistence dans les juridictions nationales aurait éventuellement à connaître – pose un problème d'interprétation qui ne pourra être définitivement tranché que par la jurisprudence de la Cour de Justice dans le cadre de la compétence qui lui est attribuée par le Traité.

Par ailleurs, selon l'article 89 du Traité, c'est à la Commission de la Communauté qui incorpore la tâche de veiller – dès son entrée en fonctions – à l'application des principes fixés par les articles 85 et 86, ce qui pourrait amener la Commission à prendre position à ce sujet.

C'est pour cette raison que l'attention de la Commission a été attirée sur les questions posées. La Commission a fait part au Gouvernement de son intention de faire, dans le plus court délai, sa position éventuelle sur les questions pratiques les plus urgents concernant l'application des articles mentionnés. Parmi ces questions figure le problème de la procédure à suivre afin de mettre fin, le plus tôt possible, aux incertitudes actuelles soulevées dans l'aide-mémoire du Royaume-Uni.

Draft Reply by the Six Governments to the Memorandum from the United Kingdom (on file with the Council of the European Union, Archives, No. CM/1958/748, Doc. 678/58).

27 Id.

Unlike the officials of the young Commission, judges had to give answers to questions. The privilege enjoyed by the drafters of the Treaty not to decide on sensitive questions did not extend to the judges. The British government, even if it regretted never getting a straightforward reply to its 1958 inquiry, embarked on the process of accession. The answer about the direct effect of the competition rules came in 1974, by which time Britain had already joined the Community, warts and all.

D. Judicial energy during political flaccidity

So there were plainly voids in the Treaty. Many could have been filled legislatively by the institutions in Brussels, but there was a lack of political leadership in Brussels. Many of the decisions giving effect to the Treaty's provisions should have been taken in Brussels and not in Luxembourg. If the texts had been made politically clearer, the judges in Luxembourg might have remained merely "la bouche qui prononce les paroles de la loi". Instead, the Court was often asked to rule on questions when the texts had not been elaborated by the political class.

One classic example relates to sex discrimination. Article 119 (now article 141) of the EEC Treaty provided: "Each Member State shall ensure and maintain the application of the principle that men and women should receive equal pay for equal work." Gabrielle Defrenne worked as an air hostess for SA-BENA. She wanted to be treated equally to her male co-workers. Female hostesses were economically less generously treated than their male colleagues, among other things having to retire much earlier. Male cabin stewards could perform their duties even when grey-haired and paunchy. She turned to Luxembourg to demand the rights she could expect to have under the Treaty. The first time around, the Belgian government argued that the aim of Article 119 was "to avoid discrepancies in cost prices due to the employment of female labour less well paid for the same work than male labour." The goal of the drafters had not been to help women get equal pay, but to help those Member States which had legislation on sex discrimination to insist that other Member States adopt legislation which imposed an equally burdensome obligation on their industries.

When Mme Defrenne returned a second time to complain about the fact that female stewards had to stop working at forty, whereas no such age limit was placed on male stewards, the Court rejected purely economic reasoning and stated that Article 119 forms part of the social objectives of the Community. The Member States still argued – accurately – that Article 119 was not actually meant to give women a right to equal pay. They also pointed out that equal pay as between men and women did not necessarily address how long someone could work. Nevertheless, Mme Defrenne prevailed. The ECJ stated:

"This provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty."

It is indeed not surprising that people wanted to claim the right to equal pay before the Member States wanted them to have it. The lack of consensus between the Member States and the Brussels institutions did not stop the judges from pursuing goals within the spirit of the Treaty.

Instead of being the mouth pronouncing the laws, the Court became the foot giving the Member States a gentle push in the right direction.

E. How to change the law through Luxembourg

Judges do not always have bright ideas ex proprio motu. Many bright ideas are thought up by advocates. Henry Schermers put it well when stating that:

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Much of the credit for the Community legal order rightly goes to the Court of Justice of the European Communities, but the Court will be the first to recognize that they do not deserve all the credit. Without the loyal support of the national judiciaries, preliminary questions would not have been asked nor preliminary rulings followed. And the national judiciaries themselves would not have entered into Community law had not national advocates plotted it before them. For the establishment and growth of the Community legal order it was essential for the whole legal profession to become acquainted with the new system and its requirements. Company lawyers, solicitors and advocates had to be made aware of the opportunities offered to them by the Community legal system. 39

A series of cases in the area of free movement of persons is a good example of this. François Gravier, a French student, went to Belgium in 1983 to pursue a course in cartoon art in the city of Liège. 40 She was charged an enrolment fee for the course, which her Belgian colleagues were not required to pay. 41 The Treaty of Rome did not deal with education. She brought her case before the Belgian courts, arguing that although educational organisation and policy were not provided for within Community competence, these issues were nevertheless “not unconnected” with Community law. The EEC Treaty provided for general principles to be laid down in relation to a vocational training policy and in order for this training policy to be gradually established and extended, freedom to choose the place of training is important. In considering the reference, the ECJ conceded that conditions of access to vocational training fell within the scope of the EEC Treaty. Article 7 of the EEC Treaty prohibited discrimination on grounds of nationality. The ECJ held that the imposition of an enrolment fee only on non-national students, as a condition of access to such training, was contrary to Article 7.

The Belgian government modified its national law so that only those students who had already brought an action for repayment of the enrolment fee before the ECJ’s ruling in Gravier v City of Liège would be repaid the enrolment fee. 42 Two years later, Bruno Barra and sixteen other French nationals were pursuing technical and vocational secondary studies in the gunsmithing section of the municipal technical institute of Liège. 43 The students had paid the enrolment fee, and none of them had contested it until after the Gravier judgement. The Liège court referred to the ECJ the question of whether or not the ruling in Gravier could have retroactive effect. The ECJ held that a “right to repayment of amounts charged by a Member State in breach of [Community rules] is the consequence and complement of the rights conferred on individuals.” A national court must not apply a provision which makes the exercise of a right conferred by the EEC Treaty impossible.

Up until this point, only students whose education came under the category of vocational training could benefit from Gravier. Then came Mr Blazot, a French student of veterinary medicine, and sixteen other French students attending Belgian universities who also wanted to benefit from repayment of the enrolment fees which (as they were not Belgians) they had had to pay. 44 Could a university course in veterinary medicine come within the scope of vocational training for the purposes of the EEC Treaty? 45 The universities argued that such a course was academic, not vocational. The ECJ held that any form of education which prepares for a qualification for a profession, trade, or employment will fall within its definition of vocational training. In a later case, Belgian State v Humbel, about school fees, the ECJ held that “a year of study which is part of a programme forming an indivisible body of instruction preparing for a qualification for a particular profession, trade or employment constitutes vocational training for the purposes of the EEC Treaty.” 46

In 1983, education was “not unconnected” with European law. Two separate EEC Treaty articles, dealing with non-discrimination and vocational training, provided the link to Community competence. 47 These cases ultimately contributed to the introduction of express reference to education in the Maastricht Treaty in 1992 48 and the promulgation of a directive specifically concerning students in 1993. 49

So there, under pressure from counsel, we have the judicial branch making a cautious breach in the wall. The law takes a step. Then comes a more difficult case, and a further extension, and another. And finally the Member States agree that the matter needs to be settled legislatively.

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40 See Case 293/83, Gravier v City of Liège, [1985] ECR 393, 607-08
41 Id
42 See Case 309/85, Barra v Belgian State, [1988] ECR 355, 357
43 See id at 371-373
44 See Case 24/86, Blazot v Univ of Liège, [1988] ECR 379
45 Id at 381
46 Case 263/86, [1988] ECR 5365, para 13
47 Articles 7 and 128 EEC respectively
48 Maastricht Treaty, supra, art 149
F. The zeal for free movement

In some areas, the Court was unabashedly zealous. I have called the Community's zeal for market integration in the 1970s a civil religion. There was a theme of market integration in the context of judgments on free movement of goods and there were many, many answers; nearly all of which in the direction of greater cross-border access for goods.

In Dassonville, we learned that

"[A]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions." 50

Instead of the EEC Treaty's rules on free movement of goods being available to combat discriminatory national measures which deliberately hindered imports, they were held available to combat any measures which intentionally or accidentally hindered cross-border trade. Because national regulations in a multi-country market are very likely to affect cross-border flows of goods, the implications were startling. Cassis de Dijon went further. 51 It was a very potent judgment and provoked a rush of attacks on a miscellany of measures that were "indistinctly applicable" to domestic and imported products and which arguably fell within the Cassis de Dijon proscription. 52 Its effect was described in a subsequent judgment, Keck & Mithouard, as follows:

"Obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods." 53

So, if it could be sold lawfully in France, there was a Community law reason to say it was unlawful to block its sale in Germany. Pressing on that slightly open door, lawyers in the Sunday Trading cases 54 argued that any sort of rule which constrained the flow of trade between Member States was challengeable. 55 Sunday market traders claimed that local trading regulations constrained their handling of goods imported from other Member States. A flood of cases arrived, mainly from England (litigation funded, I suppose, by large retailers chafing at the law), but also cases challenging Dutch, German, and Italian rules on various marketing questions. The ECI's position in Torfaen Borough Council v. B & Q plc 56 is noticeably different from its position in Rochdale Borough Council v. Anders, 57 Reading Borough Council v. Payless DIY Ltd, 58 and Council of Stoke-on-Trent v. B & Q plc. 59 The music stopped with Keck & Mithouard, which essentially held that further creative attacks on essentially domestic trading regulations would not be welcome.

56 See id.
57 Case C-145/88, [1989] ECR 3851. The ECJ held that "[b]oth rules [regarding national opening hours] reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States. Furthermore, such rules are not designed to govern the patterns of trade between Member States." Id. at 3889.
58 Case C-305/88, [1992] ECR 1-6457, 1-6486
59 Case C-304/90, [1992] ECR 1-6493, 1-6497
60 Case C-169/91, [1992] ECR 1-6635, 1-6680. Note the difference from the reasoning in Torfaen:
"Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods. In that regard, in order to verify that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products." 59

It was on the basis of those considerations that in its judgments in the Comformam and Merchandise cases the Court ruled that the restrictive effects on trade of national rules prohibiting the employment of workers on Sundays in certain retailing activities were not excessive in relation to the aim pursued. For the same reasons, the Court must make the same finding with regard to national rules prohibiting shops from opening on Sundays. Id. at 1-6658 to 59.
judicially. The ECJ rather grudgingly acknowledged that its prior attempts to handle the progeny of Cassis de Dijon had been unsuccessful.

For the internal market, new momentum was given to the political institutions under the guidance of Commission President Jacques Delors and Commissioner Cockfield. The latter identified 280 legislative acts necessary to achieve an area free of internal economic boundaries. An important step forward for the internal market had already been taken by the ECJ in Cassis de Dijon, which in turn built upon what had been achieved in Dassonneville. The Commission embraced and developed a number of guidelines on the basis of this judgment through an "interpretative communication." This helped to develop Cassis de Dijon into the principle of mutual recognition. Voids were starting to be filled. The soft-law tool of interpretative communications has been used frequently by the Commission. The Commission as "Guardian of the Treaty" also has ample room to make its interpretation of EC law known through letters of formal notice and reasoned opinions. It was also in the late 1970s that the Commission started to develop the infringement procedure now found in Article 226 (formerly Article 169) from a political tool to a legal one, thereby rendering it less contentious and more useful. There was less political agonizing over whether to use the mechanism to condemn Member State lapses. The greater appetite of the Commission to propose its interpretations of the voids in the Treaty - as well as to propose secondary legislation - together with the increased number of legal acts giving effect to the Treaty arguably reduced the need for judicial activism.

G. U-Turns; bold and conservative case-law

Would the Court have been as robust if the political leadership of Europe during those early years had been energetic and active? We do not know. There is no question that the European Court often had to choose. Sometimes there was a bold reading, and sometimes there was a cautious one. The Court did not consistently follow one line or the other. Occasionally the Court was over-enthusiastic and occasionally, to remedy that, made its own U-turn. Generally, the famous early judgments, which were startling when pronounced, are today broadly accepted as being consistent with the European law we know.

In accepting that a previous ruling has not led to the best outcome or is illogical when applied generally, the Court has - I suggest - helped the acceptance of its rulings. Mrs van Duyun, a Dutch citizen, was an active member of the Church of Scientology, a lawful institution regarded by the UK authorities as a socially undesirable cult. As a result, she was denied permission to live in the United Kingdom to work for the Church. Mrs van Duyun challenged the immigration officer's decision as being an unjustified restriction on the free movement of workers. The UK government invoked public policy for the restriction. The ECJ found that Mrs van Duyun's personal conduct did not in itself need to be unlawful. The United Kingdom was allowed to exclude her from entering the country.

The van Duyun v Home Office approach was departed from in Adoua v Belgian State. Two French nationals, delicately referred to in the European Court Reports as "waitresses", who attracted customers by sitting in the windows of establishments in the red-light area of the city of Lille, were threatened with deportation on morals charges. Prostitution was not illegal in Belgium. The ladies prevailed on the grounds that French citizens could be deported only if Belgian citizens, who could not be deported, were equally liable to repressive penalties intended to combat the same conduct.

In connection with whether an action for damages against the Community for unlawful action based on Article 215 (now Article 288) of the EEC Treaty could be brought independently or could merely follow a prior annulment of the administrative act in question, the ECJ's original view in Plattmann & Co v Commission was modified in 1971 in Alfons Kittel vs.

61 See Keck & Mithowd, supra.
62 See id. at 1-6131
64 Only a very small percentage of Article 226 proceedings ends up in the ECJ and there is an incentive for a Member State to accept the interpretation made by the Commission instead of being named and blamed as a laggard in implementing Community law on minor issues.
GmbH v Commission,26 readopted in R&V Hageman v Commission,27 and finally abandoned in Merkur Außenhandel-GmbH v Commission.28 In the two famous Café Hag cases – which concerned the Community law consequences of the existence of a single trademark in different Member States being used on different goods due to the wartime assignment of the mark – the ECJ reversed itself between the first case in 1974 and the second in 1990.29 To quote the celebrated opinion of Advocate General Jacobs, which was followed by the Court:

*It is true that the essential function of a trade mark is ‘to guarantee to consumers that the product has the same origin’. But the word ‘origin’ in this context does not refer to the historical origin of the trade mark; it refers to the commercial origin of the goods. The consumer is not, I think, interested in the genealogy of trademarks; he is interested in knowing who made the goods that he purchases.*

The Court thus indeed recognised that it had made an error, and explicitly remedied matters.

### H. The Masters of the Treaties protect their interests

There are various means by which the Member States could hope to check an activist Court. Member States of course nominate the judges they want. But this is a quite uncertain method of controlling rulings in conflicts which have not yet arisen at the time of the appointment. Judges notoriously are independent spirits. Second, the Member States can unilaterally refrain from applying the judgment. However, Article 228 EC has made this a potentially costly option for the Member States (post-Francovich), to say nothing of lost political credibility. Third, the Member States may overrule the decision through changing the secondary legislation, or if necessary the Treaty.

The Member States have on exceptional occasions used some of these methods to deal with unwelcome rulings. In Barber v Guardian Royal Exchange Assurance Group,30 the ECJ took a decision which caused dismay in several capitals. The ruling related to private pension schemes and apparently challenged the lawfulness of pension arrangements based on the actuarial reality that men work longer than women and die earlier and, accordingly, receive pensions calculated on a different basis. The ruling was based directly on the Treaty, since the Member States had not regulated the area. The Court’s ruling could have called for a revision of the Treaty to re-establish the status quo ante. The Member States did not go that far. It would have been politically incorrect in some Member States explicitly to limit the principle of equal pay. Instead the Member States agreed to introduce the “Barber-protocol” to the Treaty of Maastricht:31

*The high contracting parties, have agreed upon the following provision, which shall be annexed to the Treaty establishing the European Community: For the purposes of Article 141 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.*

The protocol sets down that Article 119 can only be applied to pensions "attributed to periods of employment prior to 17 May 1990." While not explicitly overruling the ECJ’s decision in the Barber case the protocol did send a strong signal of the need for care when taking costly decisions in the future. Between the signing of the protocol and the entry into force of the Maastricht Treaty, the ECJ accepted the Member States’ opinion on the temporal effect of Barber in Ten Oever.32

Another more recent case, of which the echoes are still reverberating, related to professional team sports – Bosman.33 Mr. Bosman was a professional footballer. His transfer from Liège to Dunkerque fell through because of the failure by the Belgian FA to issue an international certificate of transfer, on the grounds that the Liège and Dunkerque clubs had not settled the payment of his training indemnity. Mr. Bosman thus lost his job with Dunkerque, and did not want to return to Liège (for the good reason that Liège was willing to pay him barely a third of his previous salary). There then ensued a period of unemployment, followed by some episodes – after he found a new

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26 Case 469/71, [1971] ECR 325
27 Case 96/71, [1972] ECR 1035
28 Case 43/72, [1973] ECR 1035
30 HAG II, 1990 ECR I-3735
32 Protocol 17 concerning Article 119 (now 141) of the Treaty establishing the European Community (1992)
34 Case C-415/93, URBSFA, RCL and UEFA v J M Bosman, [1995] ECR I-4921 The author acted for UEFA alongside Edward Jakhsan and Atshair Bell
job – of alleged harassment by his former employers. These circumstances were deplorable and would not have arisen if the Belgian football authorities had respected the rules of UEFA.

Mr. Bosman’s lawyers claimed that without Belgian and international rules on transfer fees, Mr. Bosman would have been free to take up employment without risk of being blocked by his club’s hostility, uncooperativeness and demands for money. It was argued that only by eliminating transfer fees entirely (more precisely, fees payable in respect of the training of a player who is no longer under contract) could such abuses be eliminated.

The football authorities argued that the failure of the transfer of one footballer because of a failure to respect the applicable rules should not lead to the dismantling of the entire transfer system. Mr. Bosman said football transfer fees were a sham, concealing the wish of football associations and clubs to discourage freedom of movement of players, whereas UEFA said that transfer fees were an indispensable and effective means of assuring redistribution of income within the world of football, giving incentives to train young players, and respecting Europe’s obligations within the worldwide organisation of football.

The Belgian court hearing the Bosman case referred questions to the European Court based essentially on two Articles of the EC Treaty – what were then Articles 48 and 85. Article 48 had always been applied to governmental discrimination against foreigners. It had never been applied to private arrangements which regulated the structure of an employment market. The exceptions provided in Article 48 address public policy, public security and public health. It was difficult to see how these might be relevant to the problems of private employment, because Article 48 was ill-adapted to deal with the details of employment relationships. It was assumed that Article 85(1) would be more relevant in that football associations agreed between each other upon rules to govern the transfer of out-of-contract players. However, it was unclear what would be the consequences if collective bargaining agreements were to fall within the scope of Article 85(1): should conciliation between employers, or between unions, or between the two, concerning terms of employment be regarded as vulnerable under the competition rules? At a time when employment negotiations may increasingly affect cross-border matters, such a conclusion would have enormous implications.

Mr. Bosman had evidently been badly treated. Was new law necessary to grant him relief? The Advocate General and the Court rejected the factual analysis offered by the football authorities. The Court could have invited the Belgian court to consider, in light of the detailed evidence, which side

was right. It could have indicated the basic legal principles, and left the application of these principles to the Belgian court. Instead, the judgment is a remarkable mixture of fact and of law. The Court says about the application of Article 48:

76 nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity.

Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.

The football authorities contended that the transfer fee system applies to every professional player; if the formality of a transfer certificate (domestic or international, as the case may be) applies to all transfers, the obstacle to freedom would not be obvious (Mr. Bosman claimed that international transfers were more difficult than domestic transfers; UEFA denied this).

those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.

Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

The consequence of the judgment was that Article 48 applies to a private sector measure which imposes financial obstacles to taking up a profession or job whether the job is taken in one’s own country or another country. This was a quite radical position, a surprise for most observers.

although the rules apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national associa-

86 Case C-514/93, Bosman, paragraph 95
86 Id. at paragraph 96
87 Id., paragraphs 99-100
tion, they still directly affect players’ access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers.

Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. 88

Thus Article 48 could apply to the transfer rules. Does this mean they were absolutely prohibited? Or could they be justified, and if so by reference to what concepts? The Court said an exception to Article 48 could be available:

if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to [respect the principles of proportionality by not being too burdensome]. 89

If the Court had stopped there, transfer rules could have been legal if they were economically justifiable, in the public interest, and proportionate. It would have been for national courts to decide in particular circumstances whether given rules or given applications of the rules were legitimate. But the Court did not stop there. It went on to discuss the detailed factual justifications offered for transfer fees, and condemned those justifications.

In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate. 90

This must have been welcome reassurance. But:

the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs. 91

Assuming this to be true, the virtue of transfer fees is not that they remove the benefits of wealth from wealthy clubs, but that smaller clubs are given financial benefits. Thus transfer payments from wealthy clubs to smaller clubs were, according to the football authorities, a valuable mechanism for redistribution of income within the sport.

It must be accepted that the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players. 92

This was a recognition of what could be a pressing reason of public interest. But:

However, because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs. 93

This paragraph seems unconvincing. Why should uncertainty of outcome be a bad thing for an economic organisation, especially in the field of sport? However, if training young players may be a lawful justification for the transfer rules, why should it be unlawful because of the difficulty of matching the fee generated by one player’s transfer with the costs of training that player? Of course a club’s earnings in this manner are contingent and uncertain. Many clubs earn vital income in this manner. Could the Court be sure that transfer fees are not an “adequate” means of financing the nursery efforts of clubs, or that they are not “decisive” in encouraging youth training? Some evidence in the Court’s file contradicted this factual conclusion, while other evidence supported it. The Court, while giving legal advice to the Belgian court, converted its factual assessment into legal doctrine.

The Court thus concluded:

Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed.

88 Id., paragraphs 103-4
89 Id., paragraph 104
90 Id., paragraph 106
91 Id., paragraph 107
92 Id., paragraph 108
93 Id., paragraph 109
by a club of another Member State unless the latter club has paid the former club a transfer, training or development fee 94

The Court said that there was no need to consider the legality of the system under the competition rules for as long as the transfer system was illegal under a different part of the Treaty. Since football lies beyond passion and in some cases enters obsession, the judgment attracted intense scrutiny. The Member States voiced their concern. Calls for a specific Treaty basis for sports policy intensified and the question became an issue for the Heads of State and government meeting in Amsterdam in June 1997. The outcome of this discussion was the Declaration on Sports attached to the Amsterdam Treaty 95

The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.

The Member States’ implicit criticism of the judgment has continued through the Helsinki Report’s “new approach” to applying EC law to sport, a new Declaration adopted in Nice66 and, finally, a basic law in the yet unratified Constitution. The Constitution states that “The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function” (Article III-282). This post-Bosman development again showed the willingness of the Member States to try to “put things right” following activist rulings of the Court.

Thus the Masters of the Treaties are not reluctant to put individual decisions by the ECJ on the agenda of an intergovernmental conference. Concerning concern about the implications of a judgment to text which reverses it is not an easy process (we can see this in recent attempts to address the SIMAP97 and Jaeger68 rulings concerning “on-call” time under the contentious Working Time Directive). The overruling of a decision by the Court must be hard to achieve even where most Member States are in agreement;

and the words of whatever text emerges by consensus will always be rather imprecise, less precise than the judgment being remedied.

I. All national courts as Community courts

As many scholars have noted, in the early days the ECJ also proposed an alliance with lower national courts.

In Simmenthal,99 which concerned whether an Italian court had the power itself to annul a domestic measure or whether it needed higher Italian judicial authority to do so:

[Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.]

The ECJ thus encouraged the lowest judicial rung in the EC hierarchy to be activist. It boosted the confidence of lower courts by giving them a right to judicial review of which they were often deprived under the national system.101 One of Austria’s greatest thinkers, Kelsen, would probably not have agreed. Given the number of important rulings in all fields of Community law that have been the result of a referral from a lower national court it is no wonder that the ECJ wanted to reinforce its relationship with these courts.

Separately, the Court, considered as activist for determining for Member States the textual consequences of what they had agreed to, created a new means of ensuring compliance. The lack of implementation and Member State failures to obey their EEC Treaty commitments had been a big problem for a long time. Things changed with Francovich v Italian Republic.102 Mr. Francovich was the employee of an Italian company which went bankrupt.103 His employer had not provided enough social security contributions for his employees; indeed, Italy had not implemented the Community direc-

94 Id, paragraph 114
95 Treaty of Amsterdam – Declaration on sport, 1997 OJ (C 340) 136
96 The European Council’s Declaration (December 2000) on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, is known as the “Nice Declaration”
97 Case C-303/98, Simap, [2000] ECR I-7963
98 Case C-151/02, Jaeger, [2003] ECR I-3389
100 Id at 644
102 Joined Cases C-6 & C-990, [1991] ECR I-5357
103 Id at 1-5406
tive on protection of employees in the event of employer insolvency. As a result, Francovich and his co-workers did not get the benefit of its provisions and had no financial cushion. They sued the Italian state for damages before the Pretura di Vicenza and Pretura di Bassano del Grappa, which referred the matter to the ECJ. The case was of evidently huge importance. Could a Member State escape domestic consequences for those damaged by its failure to implement Community law? Should national failure to comply with EEC Treaty obligations be sanctioned by a duty, a potentially massive duty in some cases, to pay compensation? The timing for a constitutional explosion was propitious. There was massive neglect by Member States of their duty to implement their own promises. The ECJ found for Mr. Francovich.

The ECJ recalled the unique legal system created by the EEC Treaty which the Member State courts are bound to apply:

*Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony.*

*Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law must ensure that those rules take full effect and must protect the rights which they confer on individuals.*

*The possibility of obtaining redress from the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.*

*It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.*

J. Has the evolution of Community law slowed?

I have suggested above that the judges of the ECJ were faced in the early years with a map showing "terra incognita" in a number of areas. The Treaty provisions were not clear, either deliberately or accidentally. As the Member States continue to play with the Treaty of Rome as repeatedly modified, they create fresh, uncertainly-churched areas where judicial intervention is necessary. Some hotly discussed cases deal with such areas of law as criminal penalties in the field of environmental law and judicial cooperation in criminal matters.

Innovation contributes to the development of EC law through the creation of new principles of law when filling the judicial vacancies left by the Treaties. We may fancifully argue that the law is capable of being explained in terms of evolution: genetic drift (the tendency of the descendants not perfectly to match the ancestors) and natural selection (the tendency of some to thrive in their environment better than others). From the genetic soup of the Treaties, EC law has drifted, sometimes taking big steps, sometimes small ones. The drift was more jerky in the early years when the number of cases before the Court was low. Each evolutionary step was quite large. The steps today are smaller and smoother. Natural selection has worked to ensure that the "fittest" judicial decisions survive. Mistakes are remedied or pruned so as to be less troublesome.

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104 Id at 1-5361; Council Directive 80/987/EEC, 1980 O.J. (L 283) 23 ("If the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer")
105 See Francovich, [1991] ECR at 1-5406
106 See id at 1-5405
107 Id at 1-5416 to 17
108 Id at 1-5413 to 14
110 One of the counsel involved in the Factormate cases was Nicholls Forwood QC, now a judge in the CFI, who had earlier served in Case 60/81, IBM Corp v Comm h, [1981] ECR 2369
111 Case C-17/03, Commision v Council, [2005] ECR I-7879
112 Case C-303/05, Advocaat voor de Wereld v Leden van de Ministerraad, [2007] ECR I-3633
Sometimes the new legal theory is a bit of a shock, and a pause is necessary to see whether there will be lineal descendants. One example relates to the question of privately-set rules or practices which have public consequences. In the 1990s the Court produced a cautious trio of judgments: Meng, Reiff and Orla. These judgments might make one think the Court was reluctant to look closely at the numerous instances where private regulations in the public interest have restrictive, or otherwise uncertain, consequences.

Things became more interesting with Wouters, concerning the legality of Bar prohibitions on partnerships between accountants and lawyers. Messrs Wouters and Savelbergh, members of the Dutch Bar, separately applied to the Nederlandse Orde van Advocaten (NOVA) for authorisation to enter into partnership with the Dutch practices of the then Price Waterhouse and Arthur Andersen. Both applications were refused by NOVA on the basis of its 1993 Regulation on Joint Professional Activity concerning partnerships with other professions, which gave overriding importance to the independence of members of the Bar and the confidential relationship which must exist between lawyer and client. Both cases ultimately came before the Raad van State (Dutch Council of State) which referred the case to the ECJ for a preliminary ruling under Article 234 of the EC Treaty.

The first question was whether the rules of NOVA were caught by Article 81. The Court found that NOVA must be regarded as an association of undertakings within the meaning of Article 81(1). The ECJ then examined the possible anti- and pro-competitive effects of the ban, and concluded that the Regulation was liable to have an adverse effect on competition and was likely to affect trade between EC Member States. The anxious reader of the judgment would by now have concluded that NOVA was going to lose. However, the Court went on to consider whether, despite the restrictions of competition, the Regulation might indeed fall outside the prohibition in Article 81(1) altogether. Account had to be taken of the overall aims of NOVA's rules, and whether the consequential restrictive effects of competition were inherent in the pursuit of those objectives. The Court held at paragraph 97:

"[n]ot every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties necessarily falls within the prohibition laid down in Article 81(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience."

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116 The Multi-Disciplinary Partnerships regulation was notified by the Dutch Bar to the Commission under Article 81(3) EC after the disciplinary proceedings against Messrs Wouters and Savelbergh had been commenced.
The ECJ echoed its observation in Klopff (and a number of subsequent judgments) that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of professional activity in its territory. The rules applicable to each profession may differ from one Member State to another; this is especially so in the case of the legal profession, whose members play different roles in the machinery of justice, in the administration of estates, the conducting of the purchase and sale of land, in fiscal and criminal matters.

The Court agreed that NOVA was entitled to consider that its members might no longer be in a position to represent their clients independently and in the observance of strict professional secrecy. The ECJ attributed particular weight to the freedom of the Bar to regulate its own affairs, and, in so doing, to restrict the freedom of its members to engage in certain activities.

The ECJ concluded that the Dutch Bar was entitled to consider that the objectives pursued by the 1993 Regulation could not be attained by less restrictive means than a ban on Multi-Disciplinary Partnerships and that the 1993 Regulation did not go beyond what was necessary to ensure the proper practice of the legal profession. Accordingly, EC competition rules did not prohibit NOVA from taking a carefully considered measure to ban Multi-Disciplinary Partnerships between lawyers and accountants.

This was something new – but would it last? Was Wouters an EC law platypus without any evolutionary descendants? The CFI was called upon to interpret Wouters in the Meca-Medina case. Two professional long-distance swimmers, Mr Meca-Medina and Mr Majeen, had complained to the Commission that the anti-doping rules issued by the International Olympic Committee (IOC) they had to comply with were not compatible with EC competition law or the free movement of services. The Commission decided not to act on the complaint on the basis that the IOC's anti-doping rules did not intend to restrict competition and that the rules in question did not go beyond what was necessary to attain the objective of a proper conduct of sport. Upon appeal to the CFI, the complainants argued that the Commission had wrongly applied the criteria in Wouters. The CFI took the opportunity to air its opinion on the development in Wouters. It distinguished the IOC's anti-doping rules from the rules at issue in Wouters. It said that, contrary to the provisions under scrutiny in Wouters, the anti-doping rules did not concern economic activity but the conduct of sport. Therefore, the CFI found that the Commission was right to conclude that the IOC anti-doping rules fell outside the scope of Articles 81 and 82. The decision was appealed to the ECJ, which affirmed the rejection of the appeal, but on very different grounds.

The ECJ rejected the view that since the sporting rules have nothing to do with economic activity and do not fall under the provisions on free movement (Articles 39 and 49 EC), they have nothing to do with the economic relationships of competition (Articles 81-82 EC). The CFI had committed an error of law.

Having set aside the CFI's judgment, the ECJ embarked on its own analysis: compatibility with the Community rules on competition cannot be assessed in the abstract:

For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters, paragraph 97) and are proportionate to them.

The ECJ found that the Commission had correctly considered the general context of the rules as being the fight against doping. Limiting athletes' freedom is inherent in the nature of anti-doping rules. Therefore, they do not necessarily constitute a restriction of competition incompatible with the common market. The measures can fall outside the prohibition of Article

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118 Case 107/83, Ordre des avocats au Barreau de Paris v Otto Klopff, [1984] ECR 2971, para 17. A German lawyer had been refused access to the Paris Bar on the sole ground that he kept an office in another Member State. The Court held that although Member States may regulate the exercise of the legal profession in their territory, they could not require a lawyer to have only one place of establishment within the then EEC.

119 In Case C-36/85, Commission v France, [1986] ECR 1475, the Court stated that nationals of a Member State who pursue their occupation in another Member State are obliged to comply with the rules that govern the pursuit of the occupation in question in that Member State. In Case C-53/94, Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, [1995] ECR I-4165, the Court held that the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organisation, qualifications, professional ethics, supervision and liability.

120 Wouters, para 102-103


K. Cautious judgment on a sensitive matter

We may contrast the novelty of Wouters and Meca-Medina with the cautious, slightly apologetic, judgment given by the Court in Krister Hanner. Hanner ran a health goods shop in Stockholm in which he wished to sell a range of products contributing to a healthy lifestyle, among them patches and chewing gum for those endeavouring to give up smoking. These products are freely sold in a variety of retail outlets in a number of countries, including Denmark, a neighbouring democracy whose experience ought to be of some relevance to Sweden. However, thirty-five years ago, Sweden decided to bring pharmaceuticals and pharmacies within the then fashionable policy of nationalisation. All pharmacists would in future work for a State-owned enterprise, the Apoteket, and only the Apoteket could lawfully supply any medicines, including over-the-counter (OTC) medicines. Mr Hanner argued that only two other countries beside Sweden (North Korea and Cuba), made it a crime for someone not employed by the State to sell OTC medicines such as anti-smoking products and aspirin.

Once prosecuted, Mr Hanner argued that the organisation of Apoteket led to less choice, less inter-brand competition and poorer service to customers. He also argued that it is difficult for new products to enter the market, as the Apoteket must agree to stock them in the shops which it owns. The Stockholm district court agreed that this indeed was a question of Community law and sent five questions to the EC. The matter was sensitive as the Court had recently considered critically Sweden's State monopoly for alcoholic beverages (Systembolaget) in Franzzén.

The EC responded that it is clear from settled case-law that the Treaty does not require a total abolition of State monopolies of a commercial character. However, the EC Treaty requires that such monopolies ensure no discrimination regarding the conditions under which goods are procured and marketed. Referring to its ruling in Franzzén, the Court reminded the national court that monopolies are not allowed if they are arranged in such a way as to put at a disadvantage, in law or in fact, trade in goods from other Member States as compared with trade in domestic goods. The Court next turned to determining whether Apoteket’s sales regime excluded such discrimination or not. Starting by looking at the way Apoteket was organised, the Court judged the monopoly in light of the criteria used in Franzzén (where the monopoly was defended as being in the public interest by limiting consumption, not the best reason for justifying a ban on selling health products).

The Court found that the agreement between the government and Apoteket did not rule out all discrimination due to the absence of any review system. Producers whose products are not selected should be entitled to know the reasons for the selection decision and should be able to contest such decisions before an independent supervisory authority. On the contrary, “Apoteket appears, in principle, to be entirely free to select a product range of its choice.” Having established a breach of Article 31(1) EC, the Court finally assessed the claim by the Swedish government that Article 86(2) may be relied upon to justify such derogations from Article 31(1) EC. It found that there could be discrimination against medicinal preparations from other Member States. It was thus clear that the Apoteket was in breach of EC law. The Court refrained from responding to most of the Swedish court’s questions. The ruling led the national court to find that Mr Hanner could not be.

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126 Case 40/70, Sivina Srl v Eda Srl, [1971] ECR 89.
127 Case C-438/02, Äldgatan v Krister Hanner, [2005] ECR 1-4551
sentenced for breaching an illegal monopoly. The prosecutor appealed but later dropped the case.

The Swedish government nevertheless celebrated the ruling as a victory, since the Court had condemned only one aspect of the Swedish monopoly. By contrast, Advocate General Léger had pointed to a number of other breaches of Community law, and the District Court stated in its judgment that this indeed indicated that there were other breaches of Community law. So a new Hanner might again be prosecuted by the Swedish State and a new national court could send similar questions to Luxembourg. I regret the ECJ was not more robust. Probably it wanted to help Mr. Hanner while not overturning its own recent judgment on the alcohol monopoly. By contrast, the Court did not shirk its duty to respond clearly in another sensitive case from Sweden, Laval,\(^{129}\) about the limits of trade union power.

L. The sensitive duty to refer

The European Court can make errors and can change its mind. The same is true of national courts. The Court has recently developed its constitutional case-law in Köbler,\(^{130}\) where the Court, after much speculation, finally pronounced its opinion on liability for breaches by the judiciary. The case began before the Austrian Verwaltungsgerichtshof (Supreme Administrative Court), where Mr. Köbler, a University professor, had claimed that it was inconsistent with Community law that the time he had worked as a professor in another Member State was not taken into account when he applied for a bonus intended for persons who had been working as university professors in Austria for more than fifteen years. The Verwaltungsgerichtshof made a preliminary reference on whether this infringed the right of free movement for workers. After being asked by the European Court if the answer could not be found in a judgment given after the question had been referred, the request for a preliminary ruling was withdrawn. This looked to be favourable for Mr. Köbler. However, the Verwaltungsgerichtshof distinguished his situation from that decided by the ECJ, and dismissed his application on the ground that a bonus for loyalty could justify a derogation from Community law. Mr. Köbler then brought a new action before a lower court, this time claiming damages on the ground that the judgment of the Verwaltungsgerichtshof ran counter to directly-applicable provisions of Community law, through a misinterpretation of the case-law. In this new proceeding, the lower court made a preliminary reference, asking inter alia whether a State can be liable also for the conduct of its supreme court.

The Court repeated the line taken in the Factortame saga\(^{11}\) that in public international law a State is to be seen as a unity. The State is thus responsible also for the conduct of its judiciary. The role of the judiciary is especially important in order to ensure the effectiveness of rights derived by individuals from Community law. From this it follows that individuals must be able to obtain redress for prejudice caused by national courts.

Regarding the conditions governing State liability for the actions of courts of last instance, the ECJ first stated that they are the same as those applicable to other State bodies. As to the gravity of the breach, it stated that State liability in the context of a court of last instance "can be incurred only in the exceptional case where the court manifestly infringed the applicable law." The factors to take into account were the same as outlined in earlier cases about other State entities: the degree of clarity and precision of the rule infringed, whether the infringement was intentional and excusable, and the position taken by a Community institution. The ECJ, however, added that it would be important if there were "non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC". This is also highlighted in Advocate General Léger's opinion, which noted three examples of liability: a ruling against the clear meaning and scope of an act; a decision contrary to the case-law of the Court; and a manifest disregard of the obligation to refer.

After discussing the conditions for liability, the Court turned to the specific circumstances in Köbler, concluding that it had indeed not decided in previous cases whether loyalty bonuses were compatible with Community law. It then found the national provision to be incompatible with Community law. The Austrian court was therefore in breach of Article 234(3) EC when deciding without referring the question to the Court. However, since the question was neither clear nor decided by the Court and the fault was owing to the incorrect reading of the Court's judgment, the breach could not be regarded as manifest and therefore did not fulfill the second criteria of being sufficiently serious.

From Köbler one could draw the conclusion that in contrast to acts by other State bodies, breaches by the judiciary have to be manifest, and liability is only possible in exceptional cases. This might imply that national courts are safe from liability claims whenever they only make an "incorrect reading" of the ECJ's case-law. But the intention of the Court is clear from its subse-

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129 Case C-341/05, Laval v Partners Ltd v Svenska Byggnyssarbetareförbundet, Svenska Byggnyssarbetareförbundets avdelning Byggteknik, Svenska Elektrikerförbundet, judgment of 18 December 2007, not yet reported

130 Case C-224/01, Gerhard Köbler, [2003] ECR I-10239

11 See the Factortame cases, supra
sequent ruling in Traghetti del Mediterraneo\textsuperscript{132} where it clarified the ruling in Köbler and stated that

\begin{quote}
\textit{to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle laid down by the Court in the Köbler judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for ensuring that rules of law are given a uniform interpretation.}
\end{quote}

In Traghetti del Mediterraneo the ECJ also commented on how national courts handle evidence:

\begin{quote}
\textit{To exclude any possibility that State liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which is made of facts or evidence would also amount to depriving the principle set out in the Köbler judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.}
\end{quote}

For the acceptance of the EC legal system, the ECJ would need to be cautious in not creating a hierarchy by which it is superior to national courts. In other words, for the acceptance of the Court's rulings, national courts have been a crucial ally. The acceptance of the Court's activist rulings has depended on the national courts' acceptance of them. When the breach of Community law is committed by a national court, the ECJ sets the threshold for liability higher than in the case of a breach by another State entity.

I confess that I once made a complaint to the European Commission about the UK following a judgment of the House of Lords in the London Lorry Ban\textsuperscript{133},\textsuperscript{133} where the House of Lords reversed the court below yet refused to refer.

The case related to whether a local regulation on heavy vehicle air brakes was inconsistent with Community law. The Court of Appeal had found against the regulation. The House of Lords was evidently sceptical about the merits of the respondents' claims, but was confronted by the CILFIT\textsuperscript{134} judgment and the duty to refer. It was argued that the respondents could not lose without a reference to Luxembourg. The five Lords of Appeal, in robust mood, rejected such craven processes.

Lord Templeman said:

\begin{quote}
Since the Court of Appeal did not appreciate the fundamental distinction between the control of vehicles and the regulation of local traffic I do not attach significance to its decision on Community law. In my opinion it is clear that the 1985 order and condition 11 are concerned solely with the regulation of local traffic. No plausible grounds have been advanced for a reference to the European Court.\textsuperscript{135}
\end{quote}

Subsequently, at a legal dinner, the noble and learned Lord Goff of Chieveley (one of the five Lords of Appeal hearing the case), courteous in manner but rigorous in logic, discussed the case with me and asked what had transpired. Somewhat nervously, I confessed that I had made a complaint to the European Commission asserting that it was a breach of the Treaty obligations of the United Kingdom for the House of Lords not to have referred to Luxembourg I stretched my head forward in case he wished to remove it with a judicial axe. But Lord Goff cheerfully and kindly said (as I recollect it) that this was excellent, as it was thought the CILFIT rule needed re-examination by the ECJ. Predictably the European Commission, faced with a complaint about the House of Lords, was too nervous to act, and nothing more was heard.

M. Conclusion

I believe that a great deal of the alleged passion about this topic is exaggerated, is synthetic. Judges, I think, are quite accustomed to being challenged. They are quite accustomed to being told they are wrong. They regard such reproaches as part of the job. Practising lawyers certainly are accustomed to being told they are wrong and I do not think judges are any different. I believe that the public reads the newspapers with the same scepticism, whether the newspapers talk about bishops or about generals or about judges. Indeed, judges are perhaps less troubled about being criticised than one might think. Lord Goff seemed not in the slightest perturbed.

\begin{footnotes}
\footnote{Case C-173/03, Traghetti del Mediterraneo SpA v Repubblica italiana, [2006] ECR I-5177.}
\footnote{London Boroughs Transport Committee v Freight Transport Association Ltd and Others (1991) 3 ALL ER 915.}
\footnote{Case 253/81, CILFIT, [1982] ECR 3415.}
\footnote{See London Boroughs Transport, supra, at 928.}
\end{footnotes}
So, if politicians claim to be shocked by the outcomes of judicial processes, I submit that they are naïve or disingenuous. I doubt whether our political leaders feel as strongly as they claim to feel on this topic. They opted for the uncertainty of judicial review, they opted to appoint intelligent judges and they took the calculated risk of agreeing to judicial review. I feel that we do not regard any government at any level as necessarily infallible, honest, wise or just. And I think that without judicial review our democracy would be much the weaker.

My last point is to commend the public face of justice partly because of my national tradition and partly because I believe in a world where commonly the administrative process is un-transparent to the citizen. The oral hearing is a successful, vital, vibrant, useful way of contributing to the citizen's sense of justice. And I submit to the judges here that just in the same way as generals and bishops have to go through public ceremonies from time to time, so should judges willingly approach the public discharge of their function on the bench. Testing tiresome lawyers with difficult questions is part of their public duty and they should not worry about it. So, employ good advocates, distrust expressions of outrage, be aware that courts get it wrong, and realise that courts reverse themselves from time to time. Changes of doctrine and theory and practice occur, in the law of war, in theology and in European law.

That is as it should be.