

The Judicial Function in European Law and Pleading in the European Courts

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The Gauthier lectures, delivered at Tulane University School of Law, examine the role of the advocate in court. This Article describes the contribution made by the law and practising lawyers to the development of European Community law by the European Court of Justice and the European Court of First Instance. It describes the courts' traditions and procedures and summarises the formative cases they decided. Finally, the Article proposes some procedural improvements in the practice of the courts.

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I. INTRODUCTION

In the 1969 Spring Term at Tulane University Law School, ten master’s degree candidates, from different countries—India, Colombia, Argentina, the United States, Japan, Germany, England, France, Scotland, and the Netherlands—listened to the eleventh—from Belgium—make a presentation on something then wholly unknown to most of them, a judgment of the European Court of Justice (ECJ or Court of Justice) in Luxembourg, *Etablissements Consten S.A R.L. v. Commission (Consten & Grundig)*.¹ The problem addressed by the ECJ sounded to several obscure, improbable, but it was to become seminal and is now venerable, perhaps a trifle outdated.² Fate has quaintly decreed that thirty-seven years later, the

1. Joined Cases 56 & 58/64, 1966 E.C.R. 429.

2. Indeed, I respectfully wonder whether it should remain venerable, since it launched European competition law too resolutely down the path of favouring parallel trade, to which too much antitrust-enforcement energy has been devoted. In this regard, see Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, para. 120 (CFI Sept. 27, 2006), <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (annulling a Commission

Scottish student has the pleasure of describing advocacy before the ECJ to a comfortably presomnolent gathering, endowed with the same mixture of good will and readiness to pass an hour hearing something arcane as the master's candidates deployed in another lecture room in 1969.

In order to understand the role of the lawyer before the European courts (there are now three) in Luxembourg, we need to consider the role of the courts and the nature of European law. That requires us to begin with history.

II. EUROPE'S BLOODY HISTORY

Today's European Union (EU) of twenty-seven Member States³ is the descendant of the first successful attempt at European union, the European Coal and Steel Community (ECSC), whose founding treaty was signed in 1951.⁴ The first purpose of the original entity was to prevent war.⁵

The ECSC was the conception of Robert Schuman, born on June 29, 1886, in Luxembourg, a land perpetually fought over, of a Luxembourger mother and a French father.⁶ His family was from Alsace-Lorraine, on the eastern border of France, where my family spent summer holidays when our children were young and where in old cemeteries the language engraved on tombstones changed every few decades reflecting whether the cemetery was under French or German rule.⁷ Schuman went to university in Germany, passed the bar there, and then in 1912 set up a practice in Metz, a town that was at

decision condemning GlaxoSmithKline for having implemented a dual-pricing system which limited the potential for free-riding and in which the court commended a lightly refurbished approach to the examination of evidence).

3. Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands, and the United Kingdom.

4. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]. The ECSC Treaty entered into force on 23 July 1952 and expired fifty years later on 24 July 2002. See ECSC Treaty, *supra*, art. 97.

5. See PHILIP THODY, AN HISTORICAL INTRODUCTION TO THE EUROPEAN UNION 1 (1997).

6. *Id.*

7. *See id.*

that time German, but later passed back to France again.⁸ He served in the German army in the first World War and then when the Treaty of Versailles gave Alsace-Lorraine back to France in 1919, he entered the French Parliament as Deputy for the Moselle region.⁹ In March 1940, he was named Under-Secretary of State for Refugees.¹⁰ Arrested by the Gestapo in Lorraine, he was secretly imprisoned—the first French parliamentarian to suffer that fate.¹¹ He was later Minister of Foreign Affairs, from 1948 to 1952, of the French Republic.¹² We remember him not as a national politician, but as the author of the Schuman Declaration, and the father of a brave experiment.¹³ For European officials who do not share a common national day (many of which commemorate military victories over neighbours who are now partners in European unity), May 9, the date of that declaration, is celebrated as their holiday.¹⁴

Schuman's idea was to make war in Europe fuelled by economic rivalry impossible: the coal- and steel-making capacities of France and Germany, the two historic combatants, were placed under the control of a High Authority.¹⁵ There were six signatory states to the ECSC.¹⁶ These six countries then went further. The Treaty Establishing the European Economic Community (known as the Treaty of Rome or EEC Treaty), signed by them in 1957, established the European Economic Community (EEC).¹⁷ A third community, the European Atomic Energy Community (Euratom), was established by another treaty signed on that same day.¹⁸ The EEC Treaty established

8. See Michel-Pierre Chelini, *Robert Schuman et l'idée européenne (1886-1963)*, <http://www.robert-schuman.org/robert-schuman/chelini2.htm> (last visited Feb. 25, 2007).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; Press Conference, Robert Schuman, French Foreign Minister (May 9, 1950) (transcript available at <http://www.robert-schuman.org/robert-schuman/declaration2.htm>) [hereinafter Schuman Declaration].

14. See Europa, Europe Day, 9 May, http://europa.eu/abc/symbols/9-may/index_en.htm (last visited Mar. 9, 2007).

15. THODY, *supra* note 5, at 1.

16. The six countries were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. ECSC Treaty, *supra* note 4.

17. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; see THODY, *supra* note 5, at 10.

18. Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, 298 U.N.T.S. 169 [hereinafter Euratom Treaty]; see THODY, *supra* note 5, at 10.

a number of new substantive legal features that corresponded to the needs of the time. It moved integration from industry to the market, from goods to people, and it created the Four Freedoms: for goods, for workers, for services, and for capital.¹⁹ It also included a painstakingly and elaborately drafted set of competition (or antitrust) rules which have been echoed or copied in at least forty countries.²⁰ As technology and politics evolved in the 1960s and 1970s, the EEC became the most important of the three communities.²¹ When we talk of European law or Community law these days, it is the law established pursuant to the EEC Treaty signed in Rome in 1957 (and much amended thereafter) to which we refer.

The number of Member States has grown: from six to nine in 1973, adding Denmark, Ireland, and the United Kingdom; from nine to ten in 1981, adding Greece; from ten to twelve in 1986, adding Spain and Portugal; to fifteen in 1995, adding Austria, Sweden, and Finland; to twenty-five in 2004 when two island nations, Malta and Cyprus, and eight parts of the late Communist empire joined; to twenty-seven in 2007, adding Romania and Bulgaria.²²

19. EEC Treaty, *supra* note 17, art. 2; see THODY, *supra* note 5, at 44-45.

20. EEC Treaty, *supra* note 17, art. 2; see THODY, *supra* note 5, at 45, 52-53.

21. See THODY, *supra* note 5, at 12-23.

22. Denmark, Ireland, and the United Kingdom joined on 1 January 1973. Council Decision of 1 January 1973, Adjusting the Instruments Concerning the Accession of New Member States to the European Communities, 1973 O.J. (L 2) 1. Greece joined on 1 January 1981. Treaty Concerning the Accession of the Hellenic Republic to the European Communities, May 28, 1979, 1979 O.J. (L 291) 1, 9. Spain and Portugal joined on 1 January 1986. Treaty Concerning the Accession of the Kingdom of Spain and the Portuguese Republic, June 12, 1985, 1985 O.J. (L 302) 1, 9. Austria, Finland, and Sweden joined on 1 January 1995. Treaty Concerning the Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, June 24, 1994, 1994 O.J. (C 241) 1, 9. Cyprus, excluding Northern Cyprus (also known as the Turkish Republic of Northern Cyprus), which remains in diplomatic and political limbo, being a part of Community territory where Community law is not applied, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia joined on 1 May 2004. Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union, Apr. 16, 2003, 2003 O.J. (L 236) 3, 16, 17. Bulgaria and Romania joined on January 1, 2007. Protocol Concerning the Conditions and Arrangements for Admission of the Republic of Bulgaria and Romania to the European Union, 2005 O.J. (L 157) 11, 29.

III. THE EUROPEAN INSTITUTIONS

The new communities each had a decision-making body, reflecting Member State spheres of influence, and an initiative-taking body, reflecting the public-interest principles pursued by the treaty.²³ In 1965, the council and the commission of the EEC and Euratom merged with the parallel institutions of the ECSC.²⁴ These institutions became a single framework for the constitutional governance of what would become the EU.

A “Parliamentary Assembly,” later renamed the European Parliament, was common to the three communities.²⁵ As its powers were very limited, its significance was democratically decorative without the tiresome drawbacks of democracy. Its members were appointed by national governments.²⁶ 1976 witnessed the changeover to direct election (as opposed to nomination) of European parliamentarians, and in 1979, the first directly elected members of the European Parliament (Parliament) took office.²⁷ The Parliament’s powers grew, partly due to the fundamental legitimacy conferred by direct election, partly because of parliamentary control of the budget, and partly because of the fact that there was felt to be a need for more popular control over the European Commission (Commission).²⁸ Today the Parliament has 732 members consisting of seven political groups, the largest of which are the European People’s Party, the Socialists, and the Liberals.²⁹ It holds plenary sessions in Brussels and Strasbourg.³⁰

Constitutional power is thus dispersed in a permanently shifting triangle of forces between the Member States in the European Council (Council), i.e., the twenty-seven cooperating sovereign nations anxious about their own policies; democratic authority, as represented by the Parliament; and the fundamental principles defended by the

23. See EEC Treaty, *supra* note 17, art. 4; Euratom Treaty, *supra* note 18, art. 3; ECSC Treaty, *supra* note 4, art. 7.

24. THODY, *supra* note 5, at xv.

25. See EEC Treaty, *supra* note 17, art. 4; Euratom Treaty, *supra* note 18, art. 3; ECSC Treaty, *supra* note 4, art. 7.

26. See THODY, *supra* note 5, at 36.

27. *Id.*

28. See *id.* at 35-36.

29. European Parliament, Welcome to the European Parliament, <http://www.europarl.europa.eu/parliament.do> (last visited Mar. 9, 2007).

30. *Id.* at 4.

Commission, which upholds the treaties.³¹ The ECJ is frequently asked to rule on tussles over constitutional competence.³²

As we shall see, the treaties' drafters in many respects left open the constitutional powers and privileges of the various institutions; and the implications and consequences of substantive European Community (Community or EC) law were even more uncertain. It was not clear whether the treaties had internal domestic effect or whether they conferred rights upon private parties of which national courts could take cognisance. In terms of U.S. constitutional history, Europe stood where the United States stood just after the adoption of the Bill of Rights in 1789.

IV. THE CONSTITUTIONAL ARCHITECTURE OF THE EUROPEAN UNION

Adaptions to the constitutional instruments governing the Community have occurred frequently but imperfectly over the past twenty years.³³ Few normal people are familiar with the details of these instruments, which were the fruit of painful and arduous constitutional deal-brokering in function of the political spirit of the times.³⁴ The period from U.K. accession in 1973 to the mid-1980s saw modest progress in European integration.³⁵ There was more stagnation than excitement for Europhiles. Then came a revival of

31. See THODY, *supra* note 5, at 24-36.

32. See *id.* at 36-37.

33. See, e.g., Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1 [hereinafter Treaty of Nice]; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]; Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht Treaty]; Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1; Treaty Amending Certain Financial Provisions of the Treaties Establishing the European Economic Communities and of the Treaty Establishing a Single Council and a Single Commission of the European Communities, July 22, 1975, 1977 O.J. (L 359) 1 [hereinafter Treaty Amending Certain Financial Provisions]; Treaty Amending Certain Budgetary Provisions of the Treaties Establishing the European Economic Communities and of the Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 22, 1970, 1971 J.O. (L 2) 1 [hereinafter Treaty Amending Certain Budgetary Provisions]; EEC Treaty, *supra* note 17; Euratom Treaty, *supra* note 18; Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 1967 J.O. (152) 1 [hereinafter Merger Treaty].

34. PAUL TAYLOR, THE EUROPEAN UNION IN THE 1990S, at 11-31 (1996).

35. See *id.* at 30-31.

momentum and of fresh tinkering with the constitutional architecture. The Commission had the good fortune to have as members two realistic visionaries (though to personalise the developments as being the achievement of one or two individuals is of course a gross oversimplification): Jacques Delors, the Commission President, and Lord Cockfield, a Commissioner and former Thatcherite minister who, to the surprise of many, became wholly committed to the logic of European integration.³⁶ Lord Cockfield identified 300 legislative acts necessary to achieve an area free of internal economic boundaries.³⁷ This goal was embraced. The Single European Act of 1986 set the date of January 1, 1993 as the deadline for the creation of the “internal market,” an “area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.”³⁸ The Single European Act also extended the powers of the Parliament vis-à-vis the other institutions and the Community vis-à-vis the Member States.³⁹ To make decision-making easier, the Single European Act made it possible to out-vote a dissenting Member State in the Council.⁴⁰ In other words, elected parliamentarians’ views could not be escaped, and Member States could be outvoted in certain cases, so the decision-making needed less paralysing unanimity. And, last but not least, obstacles to market integration had been legislatively addressed by the Member States and the institutions.⁴¹

The next great constitutional advance, though one barely understood by most ordinary people—including myself—was the creation of the “European Union,” established by the Maastricht Treaty in 1993. The communities were now said to constitute the “first pillar” of the EU.⁴² A second pillar—the Common Foreign and Security Policy—and a third pillar—Cooperation in the Fields of Justice and Home Affairs—were also created.⁴³ The Maastricht Treaty was signed in the wake of the literal demolition of the Berlin Wall and the figurative fall of Communism and the emergence of war on the

36. *See id.* at 34-37.

37. *See* LORD COCKFIELD, *THE EUROPEAN UNION: CREATING THE SINGLE MARKET* 54-55 (1994).

38. Single European Act, *supra* note 33, art. 13.

39. *See id.* art. 7.

40. *Id.* art. 8.

41. TAYLOR, *supra* note 34, at 47-48.

42. *See* Maastricht Treaty, *supra* note 33, tit. II.

43. *See id.* tits. V-VI.

European continent in the Balkans.⁴⁴ The institutions wished to extend their competences to include more politically sensitive matters than *mere* market access.⁴⁵ However, the goal of the Member States in those fields was cooperation rather than integration.⁴⁶ Controversies under the second and third pillars were to be decided exclusively through inter-governmental channels because the Member States were nervous about exposing their inter-governmental decisions to the tiresome scrutiny of courts.⁴⁷

The Treaty of Amsterdam in 1997 changed the decision-making procedures of the European communities, introducing the co-decision legislative procedure and thereby further extending the Parliament's powers.⁴⁸ It also made certain advances towards "communitarising" elements of the second and third pillars, for example, bringing judicial cooperation in civil matters into the Community's treaty.⁴⁹ (The denseness of the ideas set forth in the last sentence is part of the problem!) What the Treaty of Amsterdam did not do was to prepare the EU for enlargement. These Amsterdam leftovers were dealt with in Nice four years later, when the EU also got its own human rights charter, called the Charter of Fundamental Rights, the status of which is still ambiguous.⁵⁰ Five months after the entry into force of the

44. See THODY, *supra* note 5, at 86.

45. See TAYLOR, *supra* note 34, at 52-57.

46. See *id.*

47. See *id.*

48. See Treaty of Amsterdam, *supra* note 33, art. 2, § 44. During the negotiations of the Treaty of Amsterdam it was decided by those who know best to renumber the Maastricht Treaty articles. As a result, article 30, the cornerstone rule on free movement of goods, became article 28. Confusingly, old article 36 on the exceptions to the prohibition of obstacles to free movement got the new number 30. Similarly, the original Maastricht Treaty articles on judicial review of obstacles, articles 173, 175, and 177, were messed around to the dismay of those who rely on familiar milestones. These provisions now numbered 230, 232, and 234, which under the old system had dealt with international cooperation and pre-existing treaty obligations. The two competition/antitrust articles, on restriction of agreements between undertakings and abuse of dominance were moved from 85 and 86 to, respectively, 81 and 82. I grumpily invite American readers to consider the confusion which would have occurred if the United States Constitution had been renumbered with each constitutional amendment, so that the Fifth Amendment (Double Jeopardy) became the Fourteenth (Equal Protection) in 1868, or the Eighteenth Amendment (Prohibition) became the First (Freedom of Religion, Press, and Expression).

49. *Id.* art. 1, § 10.

50. See Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1 [hereinafter Charter of Fundamental Rights of the European Union]. The Charter of Fundamental Rights was not included in the Treaty of Nice, but the European

Treaty of Nice, another new draft, a Treaty Establishing a Constitution for Europe, was published, only to be rejected by Dutch and French voters in referenda in 2005, a legacy which still haunts the political leadership in Europe.⁵¹

A. Constitutional Obscurity and Clear Substantive Legal Principles

So what does all this mean? The Treaty of Rome was a bold venture to create a mutual interest in life without war, in a Europe rich with colour and with difference, a Europe composed of nation-states which not only promised to cooperate at the Member State level but also promised benefits to each other's citizens, a Europe of many languages and much familiarity with different cultures, foods, poets, painters, music, climates, wines and beers, and sports, a Europe where France is as French as Japan is Japanese. To those who suggest that it would be more efficient for Europe to have fewer languages and less diversity, I reply that it would be more efficient for there to be only forty French cheeses, not 400, but it would also be more soul-less, less diverse, less rich, and less European if Wal-Mart were in charge of the cheese counter. There was an informal decision to adopt as the motto of the EU *in varietate concordia*, which was rendered in the unadopted European Constitution as "United in diversity."⁵²

Building a constitutional structure as successful as the EU Treaty was in defining the substantive principles to be pursued has so far eluded us. The constitutional architecture of the EU is neither clear nor widely understood, nor is it firmly established because adaptations are virtually certain. Community law has flourished notwithstanding. Practising lawyers can function happily in a constitutionally eccentric environment.

Parliament, the Council, and the Commission "solemnly proclaimed" the text that was later included in the unratified constitutional treaty. Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1, 41; Treaty of Nice, *supra* note 33, Solemn Proclamation; Charter of Fundamental Rights of the European Union, *supra*.

51. See *EU Constitution: Where Member States Stand*, BBC NEWS, May 30, 2006, <http://news.bbc.co.uk/1/hi/world/europe/3954327.stm>.

52. Treaty Establishing a Constitution for Europe, *supra* note 50, art. 1, § 8.

B. The Treaties and Promises To Obey Them

Let us go back to Schuman's infant entities in the 1950s. The system depended on mutual concessions by, and mutual dependency by and between, the Member States.⁵³ France could procure iron and steel in Germany and German buyers could purchase agricultural produce in France, so that the economic opportunities for mischief-making and war preparations were eliminated.⁵⁴ The ECSC Treaty and the Schuman Declaration of 9 May 1950 referred to war and peace:

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

The contribution which an organised and living Europe can bring to civilisation is indispensable to the maintenance of peaceful relations. . . .

. . . The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

.
The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.⁵⁵

These were splendid concepts, but would they survive the first controversy?

There had been peace treaties before. Promises of goodwill and eternal amity had been made often enough in European and world

53. See THODY, *supra* note 5, at 24-25.

54. *Id.* at 2-3.

55. Schuman Declaration, *supra* note 13; see ECSC Treaty, *supra* note 4, pmbl.

history.⁵⁶ What would be different this time? States had to be held to

56. Of many, see the Treaty of Westphalia (1648), of Utrecht (1713), of Vienna (1815), of Versailles and of Frankfurt (1871), and then—again—of Versailles (1919). Treaty of Westphalia, Oct. 24, 1648, 1 Consol. T.S. 198; Treaty of Utrecht, Mar. 31, 1713, Apr. 12, 1713, July 13, 1713, 28 Consol. T.S. 295; Treaty of Congress of Vienna, June 9, 1815, 63 Consol. T.S. 473 [hereinafter Congress of Vienna], Preliminaries of Peace Between France and Germany (Treaty of Versailles), Fr.-Ger., Feb. 26, 1871, 143 Consol. T.S. 37 [hereinafter Treaty of Versailles of 1871]; Treaty of Peace Between France and Germany (Treaty of Frankfurt), Fr.-Ger., May 10, 1871, 143 Consol. T.S. 163 [hereinafter Treaty of Frankfurt]; Treaty of Versailles, June 28, 1919, 42 Stat. 1939 [hereinafter Treaty of Versailles of 1919]. The Treaty of Westphalia concluded the Thirty Years' War: subtitled "A Treaty of Peace between the [Holy Roman] Empire and Sweden The King of France was comprehended in this Treaty as an Ally of Sweden." This treaty was negotiated by Ferdinand III, the Holy Roman Emperor, and French, Spanish, Dutch, Swiss, Swedish, Portuguese, and the Holy See's representatives and was signed on 24 October 1648 in Münster and in Osnabrück. The preamble starts:

In the name of the most holy and individual Trinity: Be it known to all, and every one whom it may concern, or to whom in any manner it may belong, That for many Years past, Discords and Civil Divisions being stir'd up in the *Roman* Empire, which increas'd to such a degree, that not only all *Germany*, but also the neighbouring Kingdoms, and *France* particularly, have been involv'd in the Disorders of a long and cruel War

Treaty of Westphalia, *supra*, pmbl. Article 1 states:

[T]here shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, and Adherents of his said Imperial Majesty That this Peace and Amity be observ'd and cultivated with such a Sincerity and Zeal, that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other; that thus on all sides they may see this Peace and Friendship in the *Roman* Empire, and the Kingdom of *France* flourish, by entertaining a good and faithful Neighbourhood.

Id. art. I. The Treaty of Utrecht, concluding the War of the Spanish Succession, comprised a number of treaties signed in Utrecht in March, April, and July of 1713 between a series of countries including France, Great Britain, the United Provinces (or the Dutch Republic), Savoy, Prussia, Portugal, and Spain. See Treaty of Utrecht, *supra*, pmbl. Article VI states: "Whereas the most destructive Flame of War which is to be extinguished by this Peace, arose chiefly from hence, that the Security and Libertys of *Europe* could by no means bear the Union of the Kingdoms of *France* and *Spain* under one and the same King . . ." *Id.* art. VI. As we shall see, article X of the Treaty of Utrecht was much invoked in Case C-298/89, *Government of Gibraltar v. Council*, 1993 E.C.R. I-3605; Case C-145/04, *Kingdom of Spain v. United Kingdom*, para. 82 (ECJ Sept. 12, 2006), <http://curia.europa.eu/juris/cgi-bin/formpl?lang=en>. These treaties were drafted in Latin, which served as the diplomatic language of Europe for much longer than French or English.

The Treaty of Paris, signed on 30 May 1814, ended the war between France and the Sixth Coalition of the United Kingdom, Russia, Austria, Sweden, Prussia, and a number of German States. See Definitive Treaty of Peace and Amity (First Peace of Paris), pmbl., May 30, 1814, 63 Consol. T.S. 171. The larger territorial changes in Europe following the defeat of Napoleon I in 1814 were made at the Vienna Congress between 1 September 1814 and 9 June 1815. See Congress of Vienna, *supra*, pmbl. The armistice ending the fighting in the

respect their promises. But at the same time, ordinary citizens' ordinary aspirations had to be enhanced. If war was to become unthinkable and physically impossible, the citizens would need to see benefits, not just hear aspirations and temporary bonhomie as expressed by political leaders. So law, lawyers, courts, and judges had roles to play.

V. SOURCES OF COMMUNITY LAW

The ECSC and EEC Treaties each provided a role for a "Court of Justice."⁵⁷ However, 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?⁵⁸ 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?

Community law can be found in: (1) the *language of the EC Treaty* itself; (2) legislation, through *directives*, (instructions to Member States to adopt laws domestically by a certain date) such as

Franco-Prussian War of 1870-1871 was signed in the Hall of Mirrors in the *Château de Versailles* on 26 February 1871. See Treaty of Versailles of 1871, *supra*. The war was the catalyst for the creation of the German Empire, for the drafting of the *Bürgerliches Gesetzbuch* (Civil Code) and for the completion of German unification. It was officially ended by the Treaty of Frankfurt, *supra*.

The Versailles Treaty signed on 28 June 1919, which ended World War I, provided for the creation of the League of Nations and contains the so-called "War Guilt Clause," holding Germany solely responsible for all "loss and damage" suffered by the Allies during the war. See Treaty of Versailles of 1919, *supra*, pt. I, pmbl.; see also *id.* pt. VIII, § 1, art. 231. It did, however, renounce war:

The High Contracting Parties,
In order to promote international co-operation and to achieve international peace and security
by the acceptance of obligations not to resort to war,
by the prescription of open, just and honourable relations between nations,
by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another

See Treaty of Versailles of 1919, *supra*, pt. I, pmbl.

57. See ECSC Treaty, *supra* note 4, art. 7; EEC Treaty, *supra* note 17, art. 4.

58. EEC Treaty, *supra* note 17, art. 173; Treaty of Nice, *supra* note 33, art. 230.

the Product Liability Directive⁵⁹ which needed to be tailor-made for the domestic court system of each Member State, or *regulations* (adopted in Brussels after consultation between the Commission and the Member States, which become part of national law immediately),⁶⁰ such as regulations on customs valuation which are applied simultaneously and immediately by twenty-five countries' customs officials; (3) *judgments* of the European courts; and (4) *general principles* of European law extrapolated from the laws of the Member States.⁶¹ Trying to apply these general principles (such as proportionality, duty of good administration, and non-discrimination) and observing new ones (such as the right to be a member of a trade union) is perpetually fascinating. The Court of Justice in Luxembourg, like the two other European courts established there, is a most interesting judicial creature.

VI. WHY LUXEMBOURG?

The six founding Member States chose to locate the European courts in the capital city of the Grand Duchy of Luxembourg.⁶² The judges still sit in Luxembourg: polyglot, remote from the political intrigue of Brussels, in a Grand Duchy historically marked by modern warfare.⁶³ As Eric Stein has noted, the ECJ can fashion the constitutional framework of Europe “[t]ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media.”⁶⁴ Luxembourg's share of the institutional spoils may have been thought modest, but there were

59. Council Directive 85/374/EEC, 1985 O.J. (L 210) 29, *amended by* Council Directive 1999/34/EC, 1999 O.J. (L 141) 20.

60. Regulations can also be adopted by the Council and the Parliament in the so-called co-decision procedure.

61. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 189 (3d ed. 2003). In Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, para. 4, the ECJ reasserted the primacy of Community law over national rules, but continued noting that

respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

62. THODY, *supra* note 5, at 38-40.

63. *See id.* at 1, 38.

64. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 1 (1981).

good reasons for having the courts there. The opportunities for political lobbying, arm-twisting, and other indirect casual pressures on judges and their courts were reduced by the physical distance from Brussels, Strasbourg, and major capital cities. Luxembourg was a little remote but not too remote. There was a wholesome symbolism in the siting of a court in the smallest Member State of the six founding States, a country which had suffered invasion, bombing, deportations, and the other miseries which the ECSC was established to eliminate.⁶⁵ French is the working language of the ECJ—France, Belgium, and Luxembourg used French as an official language in 1951, making it a natural choice.⁶⁶

The Luxembourg town of Schengen, associated with the agreement of certain Member States to create a passport-free zone, is located at the junction of three Member States.⁶⁷ Not far away are towns associated with dire wartime sufferings, such as the lugubrious fortress town of Verdun in France, where some 750,000 men died in a few months in 1916 and where guides revel in the gory sufferings they describe, or Bastogne, in southern Belgium, where the Battle of the Bulge, which engaged tens of thousands of soldiers and civilians, was fought in the deep winter of 1944-1945.⁶⁸ More cheerfully, Luxembourg has hot springs (in which the Romans revelled), museums, forest walks, and hearty inns.

In the early days, the ECJ was not overly busy. At my first argument, in 1980, *Distillers Co. v. Commission/A. Bulloch & Co.*,⁶⁹ the judges invited counsel (Michel Waelbroeck, Bastien Vander Esch, Mario Siragusa, Ian Murray, and me) to drinks after the hearing, and a soberly merry time was had.

65. See THODY, *supra* note 5, at 1.

66. See William Tetley, *Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)*, 78 TUL. L. REV. 175, 208 n.126 (2003).

67. Luxembourg, Germany, and France. More precisely, the Schengen Agreement was signed on a ship, the PRINCESSE MARIE—ASTRID, moored on the Moselle River. See THODY, *supra* note 5, at 57-58.

68. See *Verdun: Symbol of Suffering*, BBC NEWS, Nov. 5, 1998, available at http://news.bbc.co.uk/1/hi/special_report/1998/10/98/world_war_i/203224.stm; see also Donna Miles, *Bastogne Rolls Out Red Carpet for Battle of Bulge Vets*, AM. FORCES PRESS SERVICE, Dec. 18, 2004, available at http://www.defenselink.mil/news/Dec2004/n12182004_2004121802.html.

69. Case 30/78, 1980 E.C.R. 2229.

Most lawyers who go to Luxembourg for advocacy do not indulge in sightseeing, or at least not until they have had their day in court, and they stay in the hotel across the road from the ECJ. This was originally called the Holiday Inn, then the Pullman, and is now the Sofitel Luxembourg. There sleep (lightly and maybe fitfully) most pleaders before their arguments. But I am getting ahead of myself.

VII. JUDICIAL REVIEW

A. *Judicial Review and Primacy of Community Law*

The Treaty of Rome, drafted with that monumental brevity which is characteristic of constitutional documents, was agreed by diplomats who had very different notions of what they wanted. Exactly what the words meant was often not clear, as we can observe from the following exchanges about just one part of the EEC Treaty, dealing with competition (antitrust is the American term).⁷⁰

The finished versions of articles 85, 86, 87, and 88 of the EEC Treaty may have satisfied the drafters from Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, but 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 entity, a historic choice which left the shaping of the new Community to the continental administrative traditions.⁷¹ U.K. 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 U.K. 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

70. Those who wish to read a day-by-day account of the drafting of the Community's antitrust rules by national diplomats and experts in 1956 and 1957 may find two slightly contrasting versions: one by me: Ian S. Forrester, *The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security*, in EUROPEAN COMPETITION LAW ANNUAL: 2000: THE MODERNIZATION OF EC ANTITRUST POLICY 75, 75-122 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2001) [hereinafter EUROPEAN COMPETITION LAW ANNUAL: 2000], and one by Giuliano Marengo of the European Commission Legal Service: Giuliano Marengo, *Does a Legal Exception System Require an Amendment of the Treaty?*, in EUROPEAN COMPETITION LAW ANNUAL: 2000, *supra*, at 145, 145-96.

71. See THODY, *supra* note 5, at 10-11.

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.”⁷² 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, rule 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?⁷³

. . . .

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) and 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?⁷⁴

(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?⁷⁵

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?

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

72. *Aide-Mémoire* from the U.K. Embassy in Paris to the French Government (Apr. 10, 1958) (on file with Council of the European Union, Archives, No. CM2/1958/748) [hereinafter *Aide-Mémoire*]. Identical memoranda were submitted by embassies in four other capitals. The sixth memorandum perhaps got lost.

73. That is, the doctrine of primacy, which is discussed below.

74. That is, direct effect: whether community law confers rights directly upon individuals in national courts.

75. Primacy again!

steps if any are contemplated by the Government of France to resolve this doubt?⁷⁶

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.⁷⁷ The Commission's reaction was unease. In a memorandum dated June 19, 1958, the Competition Directorate General, trying to nurture the infant enforcement regime, expressed 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."⁷⁸

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 ("Committee of Permanent Representatives," the Ambassadors, for EC purposes, of the Member States) in Strasbourg on June 20 and 21, 1958, they discussed the subject.⁷⁹ The archives reveal timidity, perplexity, and diversity of opinion. The Commission offered to propose an answer even before the summer holidays.⁸⁰ The Italian delegation favoured a precise and comprehensive answer.⁸¹ 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

76. *Aide-Mémoire*, *supra* note 72.

77. Note from the French Permanent Representation in Brussels, Belgium (June 12, 1958) (on file with the Council of the European Union, Archives, No. CM2/1958/748).

78. 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. CM2/1958/748) ("*La Commission comprend pleinement le désir français d'éviter l'incertitude actuelle sur l'interprétation de ces articles, qui pourrait se produire au cas où les six pays donneraient des réponses différentes aux questions du Gouvernement britannique.*").

79. *Extrait du Procès-Verbal de la 14ème Réunion du Coreper* (June 20-21, 1958) (on file with the Council of the European Union, Archives, No. CM2/1958/748, Doc. 636 f/58).

80. *Id.*

81. *Id.*

simple answer.⁸² 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.⁸³ The Netherlands favoured six different replies from each Member State.⁸⁴ 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 recognise—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 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.⁸⁵

82. *Id.*

83. *Id.*

84. *Id.*

85.

La coexistence, prévue par l'article 88 du Traité, des législations nationales et des dispositions des articles 85 et 86 du Traité—coexistence dont les juridictions nationales auront 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 qu'incombe 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 appelée sur les questions posées. La Commission a fait part au Gouvernement de . . . de son intention de fixer, dans le plus court délai, sa position vis-à-vis des 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

This was agreed on July 11, 1958.⁸⁶ As far as the archives could reveal, the Commission never did produce its definitive reassurance about the effects of the Treaty of Rome. The Court of Justice gave the clarifications called for over the next fifty years.

I presume that a textual analysis of the *travaux préparatoires* of the Treaty of Rome would reveal a comparable richness of uncertainty as to the meaning and implications of scores of other articles.

B. *The Routes to Judicial Review*

The Court of Justice has several functions. It is a court of appeal. The competence most familiar to lawyers in private practice in Brussels is appeals against Council or Commission action in such fields as competition, foreign trade, and technical regulations. Microsoft's celebrated appeal against the Commission's decision of March 24, 2004, was brought to the European Court of First Instance (CFI) under Treaty of Nice article 230 (formerly article 173).⁸⁷ Judgments of the CFI can, in due course, be reviewed on a point of law by the ECJ.⁸⁸ For a recent example, the ECJ issued an order disposing of appeals on ice-cream-freezer exclusivity.⁸⁹ In the case of *Meca-Medina v. Commission*, the CFI rejected an appeal by athletes who had been punished for drug offences on competition law grounds whereas the ECJ rejected their appeal on more constitutional grounds.⁹⁰

The ECJ is also a constitutional court.⁹¹ It considers challenges by the Commission or a Member State to the constitutional propriety

tôt possible, aux incertitudes actuelles soulignées 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. CM2/1958/748, Doc. 678 f/58).

86. *Id.*

87. *See* Case T-201/04 R, *Microsoft Corp. v. Comm'n*, 2005 E.C.R. II-1491 (Order of the President Concerning Interim Measures).

88. *See* THODY, *supra* note 5, at 40.

89. Case C-552/03, *Unilever Bestfoods (Ir.) Ltd v. Comm'n*, Order of the Court, Sept. 28, 2006, 2006 O.J. (C 294) 19 (upholding the judgment of the CFI, which has not yet been reported, and electing to dismiss the appeal on the grounds the arguments raised were factual rather than true points of law).

90. Case C-519/04 P, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991; Case T-313/02, *Meca-Medina v. Comm'n*, 2004 E.C.R. II-3291.

91. On this topic, see Bo Vesterdorf, *A Constitutional Court for the EU?*, 4 INT'L J. CONST. L. 607 (2006). Vesterdorf was President of the CFI at the time of writing.

of actions by the Member States pursuant to article 226 (formerly article 169) and article 227 (formerly article 170).⁹² Some of these cases have been straightforward in the sense that the deadline for adopting a directive has passed, but others have been very controversial. For example, the Commission successfully challenged Italian taxes on the export of works of art, a topic which recurred in subsequent cases.⁹³ And in the famous *German Beer Purity* case, the Commission successfully challenged the *Reinheitsgebot* (Beer Purity Law of 1516), under which only those drinks made exclusively from barley, hops, yeast, and water could be sold under the name of *bier*.⁹⁴ The argument that this was necessary to protect German consumers, and public health arguments (as German workers supposedly regarded beer as liquid bread), both failed to persuade the court.⁹⁵ The ancient regulation was not compatible with the EEC Treaty's rules on free movement of goods.⁹⁶ French beer and German beer should each be on offer, as beer, to German drinkers.

The ECJ also issues advisory opinions. Pursuant to article 300(6) (formerly article 228), the ECJ can issue opinions upon the request of the Parliament, Council, Commission, or a Member State concerning an international agreement and its compatibility with the EEC Treaty.⁹⁷ In one celebrated opinion, the ECJ found there was no exclusive competence for the EC in the field of intellectual property; therefore, the World Trade Organization (WTO) Uruguay Round agreement had to be signed by the Member States and the EC.⁹⁸

The ECJ decides questions of Community law referred by national courts. For lawyers in practice in the Member States, the most available route to Luxembourg is a reference from a national judge to the ECJ under article 234 (formerly article 177), which can give answers to questions presented to it by national judges who consider that in order to decide a pending case they require

92. See EEC Treaty, *supra* note 17, arts. 169-170; Treaty of Nice, *supra* note 33, arts. 226-227.

93. Case 7/68, *Comm'n v. République Italienne*, 1968 E.C.R. 617; Case 48/71, *Comm'n v. République Italienne*, 1972 E.C.R. 529.

94. Case 178/84, *Comm'n v. Federal Republic of Germany*, 1987 E.C.R. 1227, 1231.

95. See *id.* at 1266.

96. See *id.* at 1236-37.

97. See EEC Treaty, *supra* note 17, art. 177; Treaty of Nice, *supra* note 33, art. 234.

98. See Opinion 1/94, 1994 E.C.R. I-5276, I-5282.

clarification on the principles of Community law at stake.⁹⁹ It is the responses to some of these hundreds of questions which have most shaped popular perception of the Court of Justice and European law.

C. *Early Judicial Tasks*

The first case for the new Court of Justice, a French challenge to measures taken by the High Authority, was symbolically propitious and the outcome politically welcome.¹⁰⁰ France was successful; the ECJ finding that elements of the contested decision infringed the EEC Treaty and should be annulled.¹⁰¹ 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.

The ECJ issued two judgments in 1954 and ten in 1957.¹⁰² It is said that the first preliminary ruling sent by a national court to Luxembourg was celebrated with champagne.¹⁰³ There were few judgments, but some were very important.

In its early years, the young European court took some bold steps,¹⁰⁴ creating two fundamental doctrines: (1) direct effect, giving rights to individuals flowing directly from a treaty between states, in *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration (Van Gend & Loos)*;¹⁰⁵ and (2) primacy of Community law over national law, in *Costa v. E.N.E.L.*¹⁰⁶

99. See EEC Treaty, *supra* note 17, art. 177; Treaty of Nice, *supra* note 33, art. 234.

100. See Case 1/54, French Republic v. High Auth. of the European Coal & Steel Cmty., 1954 E.C.R. 7.

101. See *id.* at 15.

102. CURIA, Numerical Access to the Case-Law, <http://curia.europa.eu/en/content/juris/index.htm> (last visited Feb. 25, 2007).

103. Catherine Barnard & Eleanor Sharpston, *The Changing Face of Article 177 References*, 34 COMMON MKT. L. REV. 1113, 1117 (1997).

104. For a magisterial account of many features of the practices of the European courts compared with other international courts, see Richard Plender, *Procedure in the European Courts: Comparisons and Proposals*, in 267 ACADEMIE 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.

105. Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 3.

106. Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 1141.

VIII. DIRECT EFFECT

The EEC Treaty provided that Member States would progressively reduce to zero their customs duties on each other's produce.¹⁰⁷ The Netherlands, usually one of the most diligent Member States, neglected to ensure that its tariff matched its EEC Treaty commitments.¹⁰⁸ It was clear that the country should answer to its cosignatories for its breach of duty; it was less clear that the trader should be entitled to rely upon the EEC Treaty itself. In *Van Gend & Loos*, the imported product was urea-formaldehyde.¹⁰⁹ Should the duty rate be eight percent (the Dutch rate) or three percent (the Treaty rate)? The ECJ said it gracefully:

[T]he 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.¹¹⁰

Inside a few years, this principle of direct effect was no longer controversial. Should a trader who imports some turkey tails have standing to argue that he is entitled to pay a lower duty rate? The ECJ settled the vexed question of whether the rumps of turkeys (the parson's nose when on British tables) should be classed as part of the turkey's back or as edible offal.¹¹¹ By confirming that such produce is to be classified as edible offal, the ECJ ensured that the importer was able to prevail over the Member State customs authorities, which wished to levy a different rate of duty.¹¹² The cases confirmed the principle of direct effect and the propriety of verifying whether national law complies with Community law.¹¹³ National judges could

107. See EEC Treaty, *supra* note 17, art. 13.

108. See *Van Gend & Loos*, 1963 E.C.R. at 22.

109. *Id.* at 8.

110. *Id.* at 23.

111. See Case 40/69, *Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollmann*, 1970 E.C.R. 69, 82.

112. See *id.* at 77.

113. The ECJ stated that the form of the wording assured its admissibility, as even if it concerned the applicable national provisions, the object was to confirm if they were compatible with Community law. *Id.* at 80-81.

thus ask if their domestic legal rules were consistent with Community law.

Note that not all parts of the EC Treaty, even today, are directly effective. For example, the rules on competition were recognised 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.¹¹⁴ Thus, the British government received, the year after U.K. accession, a clear answer to the question raised in 1958.

IX. WHAT ABOUT PRIMACY?

Mr. Costa refused to pay his electricity bill of 1,925 Italian Lira (about \$3.00), claiming that it had been contrary to the EEC Treaty to nationalise E.N.E.L., the electricity company.¹¹⁵ He used the claim to elaborate his constitutional theory that membership in the Community limited the sovereignty of the Member States.¹¹⁶ The ECJ was faced with the proposition (not a foolish one, but not a felicitous one) that an Italian statute adopted after the entry into force of the Treaty of Rome prevailed over this treaty.¹¹⁷ The ECJ 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.¹¹⁸

The ECJ went a bit further in *Administration des finances de l'État v. Société Simmenthal anonyme (Simmenthal)*,¹¹⁹ which concerned whether an Italian court had the power itself to annul a

114. See Case 127/73, *Belgische Radio en Televisie v. SV SABAM*, 1974 E.C.R. 313, 313; Ian S. Forrester, *Complement or Overlap? Jurisdiction of National and Community Bodies in Competition Matters After SABAM*, 11 COMMON MKT. L. REV. 171, 171, 176 (1974).

115. See Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 1141.

116. *Id.* at 1152.

117. See *id.* at 1151.

118. *Id.* at 1146, 1159.

119. Case 106/77, 1978 E.C.R. 629, 643.

domestic measure or whether it needed higher judicial (Italian) authority to do so:

[E]very 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.¹²⁰

And again, from *Costa*:

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.¹²¹

It is legitimate to compare these early cases with the celebrated American case *Marbury v. Madison*.¹²² 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.¹²³ I suggest that this established judicial competence as one of the pillars of the United States Constitution.

In the twenty-seven years between the first European Court judgment in *French Republic v. High Authority of the European Coal & Steel Community*¹²⁴ and my first argument in 1980 in *Distillers Co.*,¹²⁵ the ECJ gave over 1000 judgments.¹²⁶ Famous cases during this period include *Van Gend & Loos* (direct effect),¹²⁷ *Costa* (primacy),¹²⁸ *Consten & Grundig* (competition and trademarks),¹²⁹ the *Lütticke* trilogy (direct appeals against Commission measures),¹³⁰

120. *Id.* at 644.

121. *Costa*, 1964 E.C.R. at 1146.

122. 5 U.S. (1 Cranch) 137 (1803).

123. *See id.* at 180.

124. Case 1/54, 1954 E.C.R. 7.

125. Case 30/78, 1980 E.C.R. 2229.

126. CURIA, *supra* note 102.

127. Case 26/62, 1963 E.C.R. 3.

128. Case 6/64, 1964 E.C.R. 1141, 1141.

129. Joined Cases 56 & 58/64, 1966 E.C.R. 429.

130. Case 48/65, Alfons Lütticke GmbH v. Comm'n (*Lütticke I*), 1966 E.C.R. 27; *see also* Case 57/65, Firma Alfons Lütticke GmbH v. Hauptzollamt de Sarrelouis (*Lütticke II*), 1966 E.C.R. 293; Case 4/69, Alfons Lütticke GmbH v. Comm'n (*Lütticke III*), 1971 E.C.R. 325.

Wilhelm v. Bundeskartellamt (*non bis in idem* in competition penalties),¹³¹ *SA Brasserie de Haecht v. Wilkin-Janssen (Haecht II)* (competition procedures and whether filing a doubtful contract with the Commission made that contract provisionally valid under the competition rules),¹³² *Europemballage Corp. v. Commission (Continental Can)* (whether a merger of two non-dominant companies could be challenged under the rules on abuse of a dominant position),¹³³ *Procureur du Roi v. Benoît (Dassonville)* (free movement of goods lacking an official certificate),¹³⁴ *In re Watson (Watson & Belmann)* (whether deportation is a proportionate remedy to sanction a foreign *au pair* who tardily registers at her local town hall),¹³⁵ *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* (sex discrimination as to retirement age),¹³⁶ *Simmenthal* (national courts' duty to apply the EEC law),¹³⁷ and *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (importation of blackcurrant liquor lawful in the Member State of production, but prohibited (yes, true!) in the Member State of importation).¹³⁸

The next ten years were also judicially rich. The caseload of the European court grew as the deep implications of the EEC Treaty's constitutional principles became clearer. 1780 judgments filled out details, set precedents, and remedied earlier uncertainties.¹³⁹ *Parti écologiste 'Les Verts' v. Parliament* made it clear that acts of the Parliament could also be challenged before the ECJ and that no institutional act is immune from judicial review—though the route to review may be bumpy—because the EEC Treaty offered “a complete system of legal remedies.”¹⁴⁰ The relationship between the EU and its

131. Case 14/68, 1969 E.C.R. 1.

132. Case 48/72, 1973 E.C.R. 77.

133. Case 6/72, 1973 E.C.R. 215.

134. Case 8/74, 1974 E.C.R. 837.

135. Case 118/75, 1976 E.C.R. 1185 (preliminary ruling).

136. Case 43/75, 1976 E.C.R. 455.

137. Case 106/77, 1978 E.C.R. 629.

138. Case 120/78, 1979 E.C.R. 649.

139. CURIA, *supra* note 126.

140. Case 294/83, 1986 E.C.R. 1339, 1365. The Court of Justice put it elegantly:

It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter,

Member States continued to be clarified in cases such as *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* (national remedies for breach of Community law)¹⁴¹ and *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* (repayment of charges levied contrary to Community law).¹⁴²

In *IBM Corp. v. Commission*, the court held that a Statement of Objections, the formal accusation by which a competition case is launched by the Commission, could not as such be appealed to the ECJ since its issuance did not change the legal status of the accused company.¹⁴³ Two future judges were counsel in that case, Messrs. Forwood and Edward.¹⁴⁴

In a very different field, the Court of Justice took a constitutionally important step in *Johnston v. Chief Constable of the Royal Ulster Constabulary*.¹⁴⁵ Female reserve police officers could no longer get full-time employment opportunities in light of the security needs of the time and the practice of not arming female officers.¹⁴⁶ The attempt to challenge this rule was blocked by the issuance of a ministerial certificate which conclusively established that the decision had been based on considerations of national security.¹⁴⁷ Ms. Johnston prevailed in Luxembourg, the ECJ holding that excluding judicial review is inconsistent with the right of persons who feel they have been the subject of discrimination on the grounds of sex to obtain effective judicial control.¹⁴⁸

As we shall see, while these institutional and constitutional principles were being elaborated, the ECJ seemed less successful in

the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty.

Id.

- 141. Case 158/80, 1981 E.C.R. 1805.
- 142. Case 199/82, 1983 E.C.R. 3595.
- 143. See Case 60/81, 1981 E.C.R. 2639, 2653-55.
- 144. *Id.* at 2640.
- 145. Case 222/84, 1986 E.C.R. 1651.
- 146. See *id.* at 1665.
- 147. *Id.* at 1667.
- 148. *Id.* at 1679.

handling its appellate jurisdiction in factually complex trade and competition appeals against Commission decisions.

X. DRAFTING INTENTIONS AND *EFFET UTILE*

The intention of the drafters who produced the text of the Treaty of Rome in 1957 was not necessarily dispositive for the interpretation of that text. It was up to lawyers and judges to expand the law in individual cases.

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.”¹⁴⁹ 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.¹⁵⁰ Gabrielle Defrenne worked as an air hostess for the now-sadly-defunct Belgian airline, SABENA.¹⁵¹ Female stewards had to stop working at forty, whereas no such age limit was placed on male stewards.¹⁵² Was there an infringement of article 119?¹⁵³ The Member States argued—accurately—that article 119 was not actually meant to give women a right to equal pay.¹⁵⁴ 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.¹⁵⁵ The ECJ stated:

[T]his provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time

149. EEC Treaty, *supra* note 17, art. 119; Treaty of Nice, *supra* note 33, art. 141.

150. Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455, 472; see Elizabeth F. Defeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT’L & COMP. L.J. 351, 377 (2005) (“[T]his provision . . . was included for economic rather than human rights reasons”).

151. See *Defrenne*, 1976 E.C.R. at 471. For a discussion of this case, see L. Neville Brown, *Air Hostesses and Discriminating Employers*, 47 MOD. L. REV. 692 (1984).

152. As provided for in article 5 of the standard employment contract for female SABENA staff. *Defrenne*, 1976 E.C.R. at 457.

153. There were in all three *Defrenne* cases. See Case 80/70, *Defrenne v. Belgian State*, 1971 E.C.R. 445; *Defrenne*, 1976 E.C.R. at 455; Case 149/77, *Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 1978 E.C.R. 1365.

154. *Defrenne*, 1976 E.C.R. at 459-60.

155. *Id.* at 481-82.

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.¹⁵⁶

Likewise, when Italian law on the labelling of dangerous chemicals said one thing and a European directive said another, Mr. Tullio Ratti was prosecuted for breaching the former and defended himself by invoking the latter—successfully.¹⁵⁷ The limits of direct effect are regularly tested. In *Marshall v. Southampton & South-West Hampshire Area Health Authority*, the ECJ confirmed that Member State entities, when employers, are obliged to respect directives which have not been implemented and must therefore give employees the rights conferred under the directive.¹⁵⁸ Nevertheless, although the ECJ has confirmed that directives can be invoked by an individual against a Member State, it has not gone so far as to recognise “horizontal direct effect,” whereby one private individual can invoke against another private individual rights created by an unimplemented directive. So the employee of a public sector employer would be better placed in this respect at least than the employee of a private employer. Moreover, in *von Colson v. Land Nordrhein-Westfalen*, the ECJ found that national judges were obliged to interpret national law in the light of directives’ aims, even though these might not be directly effective.¹⁵⁹ This duty flowed from article 10 of the EEC Treaty, which obliges Member States to take all appropriate measures to ensure fulfilment of their Community obligations.¹⁶⁰

The ECJ has been willing to look sympathetically at claims which have the effect of making Community law more efficient and remedies more effective—*effet utile* is an untranslatable phrase connoting teleological efficacy. One big problem involved Member State failures to obey their EEC Treaty commitments. In a number of cases, the ECJ was invited by the Commission to condemn, pursuant to article 169 (now article 226), Member State failures to obey EEC Treaty obligations in the form of adopted legislation or respect for such legislation. Italy, which had a creaky and unsatisfactory legislative system, was judicially chastised on dozens of occasions,

156. *Id.* at 472.

157. Case 148/78, *Ministère public v. Ratti*, 1979 E.C.R. 1629.

158. Case 152/84, 1986 E.C.R. 723, 751.

159. Case 14/83, 1984 E.C.R. 1891, 1906.

160. EEC Treaty, *supra* note 17, art. 10.

unsuccessfully pleading that its parliamentary system was overloaded, that it was doing its best, that everything was very difficult, and that in due course it would get round to addressing the problem.¹⁶¹ These cases seemed endless.

Then things changed with *Francovich v. Italian Republic*.¹⁶² Mr. Francovich was the employee of an Italian company which went bankrupt.¹⁶³ His employer had not provided enough social security contributions for its employees; indeed, Italy had not implemented the Community directive on protection of employees in the event of employer insolvency.¹⁶⁴ As a result, Francovich and his co-workers did not get the benefit of its provisions and had no financial cushion.¹⁶⁵ Their creative counsel sued the Italian state for damages before the *Pretura di Vicenza* and *Pretura di Bassano del Grappa*, which referred the matter to the ECJ.¹⁶⁶ 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. Italy (and not only Italy) was what might be called a recidivist scofflaw. The ECJ took a bold step. It found for Mr. Francovich and his claim for damages against the Italian state.¹⁶⁷

161. See, e.g., Case 48/71, *Comm'n v. Italian Republic*, 1972 E.C.R. 529, 532. In this case, the Italian Government based its defence on difficulties encountered in the parliamentary procedure outside its control. In C-43/97, *Commission v. Italian Republic*, 1997 E.C.R. I-4671, I-4677, the ECJ rejected the argument that the Italian breach was just of "minor importance." In Case 52/75, *Commission v. Italian Republic*, 1976 E.C.R. 277, 283, Italy argued that it should not be found in breach of its obligation because the other Member States had also failed to implement the directive in question on time—an argument rejected by the Court of Justice.

162. Joined Cases C-6 & C-9/90, 1991 E.C.R. I-5357.

163. *Id.* at I-5406.

164. *Id.* at I-5361; Council Directive 80/987/EEC, 1980 O.J. (L 283) 23, 23 ("[O]n the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.").

165. See *Francovich*, 1991 E.C.R. at I-5406.

166. See *id.* at I-5405.

167. *Id.* at I-5416 to 17.

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.¹⁶⁸

Francovich (dealing with damages) and the *Factortame* cases (dealing with the need for adequate national *remedies* for breach of Community law in the case of Spanish fishermen who were denied licenses to fish in U.K. waters)¹⁶⁹ have transformed Member State patterns of behaviour with respect to Community obligations.

XI. OPTIONAL OR COMPULSORY JUDICIAL REFERENCES

Any national court or tribunal may refer a matter to Luxembourg for clarification on a point of Community law necessary for the national judge to rule.¹⁷⁰ Courts from whose ruling there is no appeal

168. *Id.* at I-5413 to 14.

169. Case C-213/89, *The Queen v. Sec'y of State for Transp., ex parte Factortame Ltd (Factortame I)*, 1990 E.C.R. I-2433; Case C-221/89, *The Queen v. Sec'y of State for Transp., ex parte Factortame LTD (Factortame II)*, 1991 E.C.R. I-3905; Joined Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany & The Queen v. Sec'y of State for Transp., ex parte Factortame Ltd (Factortame III)*, 1996 E.C.R. I-1029. One of the counsel involved in the *Factortame* cases was Nicholas Forwood QC, now a judge in the CFI, who had earlier served in Case 60/81, *IBM Corp. v. Comm'n*, 1981 E.C.R. 2369.

170. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 371-77 (2d ed. 2002).

must refer.¹⁷¹ What happens if one party says there is a point of Community law at stake and the other party says the point is clear? Should the national court refer even if it feels the reference may be a waste of time? *Srl CILFIT v. Ministry of Health*¹⁷² dealt with the duty of a Member State court in these circumstances.¹⁷³

The ECJ is not free to choose its own cases and the number of references was growing—although some courts were still reluctant to make references, so the question was a sensitive one. Should it encourage courts to make references when in slight doubt, or should it encourage them to reach their own conclusions? The Court of Justice left national courts some discretion, but not so much discretion; there is no need for a reference if the correct application of Community law is “so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved,” but the national court must first “be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.”¹⁷⁴

Although there is generally a willingness to help the national courts, it has happened that the Court of Justice refuses to answer a question, mainly when it considers its ruling is unnecessary to decide a controversy or when the question seems hypothetical.

Foglia v. Novello (Foglia I) was an attempt to challenge French law by an ingenious litigation.¹⁷⁵ Foglia, an Italian, had concluded a

171. *See id.*

172. Case 283/81, 1982 E.C.R. 3415. In *CILFIT*, a company challenged an Italian law on the ground that it was contrary to EC law. *Id.* at 3426-27. This, rather obviously, was not the case. The company still argued that the national court was obliged to refer a question to the Court of Justice. *Id.* at 3427. The Italian Government argued in the national court that this was unnecessary since the answer was evident. *Id.* The Italian *Corte di cassazione* asked the Court of Justice if it was obliged to ask questions even if there was no reasonable interpretive doubt about the answer. *Id.*

173. On the ECJ, the ECJ system, procedure, and efficiency, see the following resources: L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (5th ed. 2000); HENRY G. SCHERMERS & DENIS F. WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* (5th ed. 1992); Francis G. Jacobs, *Analysis and Reflections, Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice*, 29 EUR. L. REV. 823, 823-30 (2004); Bo Vesterdorf, *The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities*, 28 EUR. L. REV. 303, 303-23 (2003); Daniel Wincott, *A Community of Law? 'European' Law and Judicial Politics: The Court of Justice and Beyond*, 35 GOV'T & OPPOSITION 3 *passim* (2000).

174. *CILFIT*, 1982 E.C.R. at 3430.

175. Case 104/79, 1980 E.C.R. 745.

contract to sell wine to Novello in France.¹⁷⁶ Both wanted to challenge before the Italian courts the practices of the French excise authorities.¹⁷⁷ Included in the contract was the provision that the buyer would not be liable for any taxes levied by the French or Italian authorities which were contrary to EC law.¹⁷⁸ Foglia then paid the French taxes and subsequently claimed them back from Novello before the Italian courts.¹⁷⁹ Novello's defence was the contract, arguing that the tax was contrary to article 95 (now article 90) of the EEC Treaty.¹⁸⁰ To draw an analogy, this was a test case brought before the courts of Arizona with the intention of persuading those courts to condemn a New Mexico Statute. Despite this procedural creativity, the ECJ refused to rule on the legality of the French tax, stating it was outside its jurisdiction to do so.¹⁸¹ It persisted in its refusal in *Foglia v. Novello (Foglia II)*.¹⁸²

The ECJ generally refuses to rule on hypothetical questions, but its practice is inconsistent as test cases are not necessarily artificial. In *Union Royale Belge des Sociétés de Football Ass'n ASBL/Union des Ass'ns Européennes de Football (UEFA) v. Bosman*, a Belgian court put a question which was of only theoretical interest to Mr. Bosman, a professional footballer playing in the lower professional leagues: Were national football association rules placing limits on the number of foreign players in the first division lawful?¹⁸³ The goal of Mr. Bosman was to challenge how professional team sports were organised rather than to redress an actual problem affecting him personally. The ECJ accepted the question, noting that the Liège court had explained why it wanted an answer.¹⁸⁴ To be fair, the referring judge in *Foglia* also had explained why an answer was desired.¹⁸⁵

176. *Id.* at 758.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Case 244/80, 1981 E.C.R. 3045, 3067-68.

183. See Case C-415/93, 1995 E.C.R. I-4921, I-5060.

184. *Id.* at I-5061. For other examples of a hypothetical reference, see Case C-18/93, *Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova*, 1994 E.C.R. I-1783; Case C-83/91, *Meilicke v. ADV/ORGAAAG*, 1992 E.C.R. I-4871.

185. *Foglia I*, 1980 E.C.R. at 759.

XII. DIFFICULT QUESTIONS AND CHANGES OF COURSE

Some of the questions put to the ECJ by national judges have been difficult, some rather easy, and in a number of celebrated cases the ECJ has had to change its mind. Advocacy, of course, helped it do so. Here are a couple of examples.

Mrs. van Duyn, a Dutch citizen, was an active member of the Church of Scientology, a lawful institution regarded by the U.K. authorities as a socially undesirable cult.¹⁸⁶ As a result, she was denied permission to live in the United Kingdom to work for the Church.¹⁸⁷ Mrs. van Duyn challenged the immigration officer's decision as being an unjustified restriction on the free movement of workers.¹⁸⁸ The U.K. government invoked public policy for the restriction.¹⁸⁹ The ECJ found that Mrs. van Duyn's personal conduct did not in itself need to be unlawful.¹⁹⁰ The United Kingdom was allowed to exclude her from entering the country.¹⁹¹

The *van Duyn v. Home Office* approach was departed from in *Adoui v. Belgian State*, the first of a number of interesting cases on free movement of persons from Belgium in which the Liège *avocat*, Luc Misson, was involved.¹⁹² 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 Liège, were threatened with deportation on morals charges.¹⁹³ Prostitution was not illegal in Belgium.¹⁹⁴ The clients of Maître Misson 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.¹⁹⁵

186. See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1339-40.

187. *Id.* at 1340.

188. *Id.* at 1344.

189. *Id.*

190. *Id.* at 1350-51.

191. *Id.* at 1351-52.

192. Joined Cases 115 & 116/81, *Adoui v. Belgian State*, 1982 E.C.R. 1665; see Case C-268/99, *Jany v. Staatssecretaris van Justitie*, 2001 E.C.R. I-8615, I-8620 to 21 (holding that conduct by migrants which a Member State accepts on the part of its own nationals (prostitution) cannot be regarded as constituting a genuine threat to public order).

193. *Adoui*, 1982 E.C.R. at 1668-69.

194. *Id.* at 1707.

195. *Id.* at 1712-13.

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 *Plaumann & Co. v. Commission*¹⁹⁶ was modified in 1971 in *Alfons Lütticke GmbH v. Commission*,¹⁹⁷ readopted in *R&V Hageman v. Commission*,¹⁹⁸ and finally abandoned in *Merkur Außenhandel-GmbH v. Commission*.¹⁹⁹ 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 1990.²⁰⁰ To quote the celebrated opinion of Advocate General (AG) 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 trade marks; he is interested in knowing who made the goods that he purchases.²⁰¹

Less satisfactorily, in *Laboratoires pharmaceutiques Bergaderm SA v. Commission*, the ECJ departed from a well-established line concerning liability for damages but did so without plainly acknowledging what it was doing.²⁰²

In the *Sunday Trading* cases, lawyers confronted with rules restricting the sale of certain articles on Sunday tried to change English law by invoking Community law.²⁰³ They relied on two seminal cases on free movement and their successors, the first being *Dassonville*²⁰⁴ about Scotch whisky imported into Belgium from France without a

196. Case 25/62, 1963 E.C.R. 197.

197. Case 4/69, 1971 E.C.R. 325.

198. Case 96/71, 1972 E.C.R. 1005.

199. Case 43/72, 1973 E.C.R. 1055.

200. See Case C-10/89, SA CNL-SUCAL NV v. HAG GF AG (*HAG II*), 1990 E.C.R. I-3711; Case 192/73, Van Zuylen Frères v. Hag AG (*HAG I*), 1974 E.C.R. 731.

201. *HAG II*, 1990 E.C.R. at I-3735.

202. Case C-352/98 P, 2000 E.C.R. I-5291.

203. Catherine Barnard, *Sunday Trading: A Drama in Five Acts*, 57 MOD. L. REV. 449, 451 (1994); see *infra* notes 212-216 and accompanying text.

204. Case 8/74, Procureur du Roi v. Benoît (*Dassonville*), 1974 E.C.R. 837.

certificate attesting to the whisky's origin, and the second being *Cassis de Dijon*.²⁰⁵ Those liquor cases were of great importance.

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.”²⁰⁶

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.²⁰⁷ 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.²⁰⁸ Its effect was described in a subsequent judgment, *In re Keck (Keck & Mithouard)*, as follows:

[O]bstacles 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.²⁰⁹

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 argued that any sort of rule which constrained the flow of trade between Member States was challengeable.²¹⁰ Sunday market traders claimed

205. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), 1979 E.C.R. 649.

206. *Dassonville*, 1974 E.C.R. at 852.

207. *Cassis de Dijon*, 1979 E.C.R. 649.

208. *Id.*

209. Joined Cases C-267 & C-268/91, 1993 E.C.R. I-6097, I-6131.

210. *See Barnard*, *supra* note 203, at 451.

that “blue laws” constrained their handling of goods imported from other Member States.²¹¹ 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 ECJ’s position in *Torfaen Borough Council v. B&Q plc*²¹² is noticeably different from its position in *Rochdale Borough Council v. Anders*,²¹³ *Reading Borough Council v. Payless DIY Ltd*,²¹⁴ and *Council of Stoke-on-Trent v. B&Q plc*.²¹⁵ The music stopped with *Keck & Mithouard*, which essentially held that further creative attacks on essentially domestic trading regulations would not be welcome judicially.²¹⁶ The ECJ rather grudgingly acknowledged that its prior attempts to handle the progeny of *Cassis de Dijon* had been unsuccessful.²¹⁷

211. *See id.*

212. Case C-145/88, 1989 E.C.R. 3851. The ECJ held that

[s]uch 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.

213. Case C-306/88, 1992 E.C.R. I-6457, I-6486.

214. Case C-304/90, 1992 E.C.R. I-6493, I-6457.

215. Case C-169/91, 1992 E.C.R. I-6635, I-6660. 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.

It was on the basis of those considerations that in its judgments in the *Conforama* and *Marchandise* 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 I-6658 to 59.

216. *See* Joined Cases C-267 & C-268/91, *In re Keck (Keck & Mithouard)*, 1993 E.C.R. I-6097, I-6131 to 32.

217. *See id.* at I-6131.

Among the range of colourful cases put to the ECJ was whether the importation for sale in the United Kingdom of lewdly inflatable “Rubber Ladies” lawfully put on the market in another Member State could be prohibited on the ground that they are indecent or obscene in the eyes of the U.K. authorities.²¹⁸ The manufacture of such products in the United Kingdom was not unlawful, but their importation was.²¹⁹ The United Kingdom either had to make domestic production illegal or lift the import ban.²²⁰

Could Mr. Bouchereau, a French trainee mechanic enjoying the diverse pleasures of London (among them the smoking of marijuana) be deported by the order of the outraged magistrates, or was he protected by the free movement of workers provision in the Treaty of Rome?²²¹ In *Her Majesty's Customs & Excise v. Schindler*, the ECJ considered the always sensitive area of “soft” or long odds gambling where protection of the public, morals, and regulation overlap.²²² Was the importer into the United Kingdom of tickets and publicity material issued by a respectable, licensed German lottery to be regarded as legitimately dealing in imported goods, or was he offering a service which the host country did not regard as lawful?²²³ The ECJ took a cautious line applying the rules on the free movement of services, which contemplate more national supervision as opposed to the more absolutist rules on the free movement of goods.²²⁴ However, in the case of *Läärä v. Kihlakunnansyyttäjä (Jyväskylä)*, the ECJ held that gambling slot machines as such were to be regarded as goods covered by the EEC Treaty’s rules on free movement rather than under the rules on service.²²⁵

Could a tourist (not a migrant, not a worker, merely a solvent tourist), who had been attacked and robbed outside a Paris underground station, be denied criminal-injuries compensation, which

218. See Case 121/85, *Conegate Ltd v. HM Customs & Excise*, 1986 E.C.R. 1007, 1018-19.

219. *Id.*

220. *Id.* at 1019.

221. Case 30/77, *Regina v. Bouchereau*, 1977 E.C.R. 1999, 2008-09.

222. See Case C-275/92, 1994 E.C.R. I-1039, I-1082 to 88.

223. See *id.* at I-1091.

224. See *id.*

225. Case C-124/97, 1999 E.C.R. I-6067, I-6114.

was available to French nationals and others living in France?²²⁶ The ECJ, extending its rules on free movement, said that when Community law allows a person to move freely in another Member State, the corollary right is that the individual be protected on the same basis as nationals of that Member State.²²⁷

Many references came from national prosecutions under obscure laws. Could a product be labelled with the denomination “*montagne*” although the mountain from which it originates is not acknowledged as such by the public authorities?²²⁸ Mr. Pistre sold his cured meats with a “*montagne*” label and was criminally prosecuted in France.²²⁹ The French Government said that “*montagne*” is a quality description and an indication of provenance and that Community law did not apply as the case was confined to France.²³⁰ Mr. Pistre said that the legislation was a discriminatory barrier to trade among Member States.²³¹ The ECJ sided with Mr. Pistre.²³² The measure facilitated the marketing of domestic goods, hindering, at least potentially, intra-Community trade.²³³ The case, apart from demonstrating the passion of the French on all matters of the table, showed how far the ECJ is prepared to go in listening to a well-argued case about barriers to intra-Community trade.

XIII. SPOTTING THE POINT: EXTENDING THE TREATY—THE EXAMPLE OF COLLEGE FEES

In the United States today, counsel arguing an antitrust, criminal, or personal injury case usually does so within the framework of rather familiar constitutional principles. In this Part of my Article, I will note, with respect, the creative use by legal practitioners of unexpected provisions of the EEC Treaty to advance their clients’ interests.

226. Case 186/87, *Cowan v. Trésor public*, 1989 E.C.R. 195, 217. Mr. Cowan was represented before the French agency by an English Solicitor. *Id.* at 216.

227. *Id.* at 222-23.

228. Joined Cases C-321, C-322, C-323, & C-324/94, *In re Pistre*, 1997 E.C.R. I-2343, I-2562 to 63.

229. *See id.*

230. *Id.* at I-2363.

231. *Id.* at I-2368, I-2372.

232. *Id.*

233. *See id.* at I-2378.

In 1983, a French student, Françoise Gravier, went to Belgium to pursue a course in cartoon art in the city of Liège.²³⁴ She was charged an enrolment fee for the course, which her Belgian colleagues were not required to pay.²³⁵ The Treaty of Rome does not deal with education. Maître Luc Misson 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.²³⁶ 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.²³⁷ He noted that freedom of movement of workers is a cornerstone of Community law.²³⁸ The ECJ, to which a preliminary reference was made, conceded that conditions of access to vocational training fell within the scope of the EEC Treaty.²³⁹ Article 7 of the EEC Treaty prohibited discrimination on grounds of nationality.²⁴⁰ 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 7.²⁴¹

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.²⁴² Two years later, Maître Misson represented Mr. Barra and sixteen other French nationals pursuing technical and vocational secondary studies in the gunsmithing section of the municipal technical institute of Liège.²⁴³ The students had paid the enrolment fee, and none of them had contested it until after the *Gravier* judgement.²⁴⁴ The Liège court referred to the ECJ the question of whether or not the ruling in *Gravier* could have retroactive

234. See Case 293/83, *Gravier v. City of Liège*, 1985 E.C.R. 593, 607-08.

235. *Id.*

236. *Id.* at 612.

237. *Id.* at 612-13.

238. *Id.*

239. *Id.* at 613.

240. *Id.*

241. *Id.* at 615.

242. See Case 309/85, *Barra v. Belgian State*, 1988 E.C.R. 355, 357.

243. See *id.* at 371-73.

244. *Id.* at 372.

effect.²⁴⁵ 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.”²⁴⁶ A national court must not apply a provision which makes the exercise of a right conferred by the EEC Treaty impossible.²⁴⁷

Up until this point, only students whose education came under the category of vocational training could benefit from *Gravier*. Then came Mr. Blaizot, 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.²⁴⁸ Could a university course in veterinary medicine come within the scope of vocational training for the purposes of the EEC Treaty?²⁴⁹ The universities argued that such a course was academic, not vocational.²⁵⁰ 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.²⁵¹ 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.”²⁵² In each case, Maître Misson was the counsel.²⁵³

So in 1983, education was “not unconnected” with European law.²⁵⁴ Two separate EEC Treaty articles, dealing with non-discrimination and vocational training, provided the link to Community competence.²⁵⁵ These cases ultimately contributed to the introduction of express reference to education in the Maastricht Treaty

245. *Id.* at 373-74.

246. *Id.* at 376.

247. *See id.* at 376-77.

248. *See* Case 24/86, *Blaizot v. Univ. of Liège*, 1988 E.C.R. 379.

249. *Id.* at 381.

250. *Id.*

251. *Id.* at 408.

252. Case 263/86, 1988 E.C.R. 5365, para. 13.

253. *See id.*; *Blaizot*, 1988 E.C.R. 379.

254. *See Humbel*, 1988 E.C.R. para. 13.

255. *Blaizot*, 1988 E.C.R. at 408.

in 1992²⁵⁶ and the promulgation of a directive specifically concerning students in 1993.²⁵⁷

A. *Expanding the Law Step by Step: The Equal Pay Cases*

A series of references from English courts concern equal pay. Anthony Lester QC, now Lord Lester of Herne Hill QC, was involved in a number of them (as well as acting for Ms. Johnston, the Northern Ireland policewoman). The first was *Macarthy's Ltd. v. Smith*.²⁵⁸ Mrs. Smith said that she was paid comparatively less than her male predecessor for doing the same work.²⁵⁹ The employer argued that the equal pay provisions of domestic legislation only covered situations where Mrs. Smith could compare herself to a male colleague who was being paid more *at the same time in the same workplace*.²⁶⁰ The English Court of Appeal referred a question to the ECJ to find out if the principle of equal pay contained in the EEC Treaty was confined to situations where men and women worked contemporaneously.²⁶¹ The ECJ held that the work undertaken need not be contemporaneous, but did not go as far as to confine admissible comparisons to “parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment.”²⁶²

A second reference, *Worringham v. Lloyds Bank Ltd*, was a test case brought on behalf of the 14,000 female employees of Lloyds Bank.²⁶³ The case concerned whether pension schemes could come under the remit of “pay” for the purposes of article 119 of the EEC Treaty.²⁶⁴ The ECJ reformulated the question submitted to it, possibly aware of the political sensitivities and vast amounts of money at stake, so that the question which it answered differed from that posed by the

256. Maastricht Treaty, *supra* note 33, art. 149.

257. Council Directive 93/96/EEC, 1993 O.J. (L 317) 59.

258. Case 129/79, 1980 E.C.R. 1275.

259. *Id.* at 1286.

260. *Id.* at 1286-87.

261. *Id.* at 1287.

262. *Id.* at 1289. For an analysis of issues raised in the case, see A. Lester, *The Uncertain Trumpet: References to the Court of Justice from the United Kingdom: Equal Pay and Equal Treatment Without Sex Discrimination*, in *ARTICLE 117 EEC: EXPERIENCES & PROBLEMS* 164, 164-94 (Henry G. Schermers et al. eds., 1987).

263. Case 69/80, 1981 E.C.R. 767, 787.

264. *See id.* at 789.

English court. Did monies paid by the employer to a retirement benefit scheme, by way of addition to a gross salary, come within the concept of pay under article 119?²⁶⁵ Mrs. Worringham and Miss Humphreys won their case, but the question of the status of pension schemes, as formulated by the English court, had not been fully answered. The ECJ was invited to take a huge step, but it took a smaller one. It later took a judgment as to private pensions, *Barber v. Guardian Royal Exchange Assurance Group*, which caused consternation by apparently challenging 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.²⁶⁶

In another example, Mrs. Jenkins worked part-time and was paid proportionately less money than a male counterpart doing the same job on a full-time basis.²⁶⁷ She argued that the principle of equal pay requires that hourly pay be the same regardless of how many hours were worked per week.²⁶⁸ She also argued that if it were shown that more males than females were able to work a full working week, there would be a breach of the principle of equal pay, unless her employers could prove that they were justified in paying a higher rate to those who worked the full quota of hours each week.²⁶⁹ Again, the ECJ went part of the way with her. It rejected the first part of Mrs. Jenkins' argument and, as to the second part, stated that the fact that the existence of different rates of pay, based on hours worked, is not contrary to article 119 in so far as there may be objectively justifiable criteria.²⁷⁰ It was for the national court to decide, by looking to the facts of the individual case and the employer's intention, whether or not the policy amounts to discrimination on the basis of sex.²⁷¹

If the series of cases had started with Mrs. Jenkins, she would probably have been more unsuccessful. Timing is important in the Luxembourg courts, just as it is in other courts.

265. *See id.* at 790-91.

266. Case C-262/88, 1990 E.C.R. I-1889.

267. Case 96/80, *Jenkins v. Kingsgate (Clothing Prods.) Ltd.*, 1981 E.C.R. 911, 922-23.

268. *Id.* at 923.

269. *Id.* at 925-26.

270. *Id.* at 926.

271. *Id.* at 928.

B. *Free Movement of Goods: The Centrafarm Cases: Sensible Steps to a Strange Conclusion*

My last example of the expansion of the law via creative lawyering concerns free movement of goods, the Dutch lawyer, Mr. de Savornin Lohman, a practitioner of the old school, and his client Centrafarm, a pharmaceutical wholesaler whose reputation was more modest. Trademark disputes before national courts usually involve such issues as allegations of confusing similarity between marks affixed to competing goods or assertions that marks have lapsed.²⁷² Trademark issues before the ECJ often concern whether a trademark holder may prevent the sale of genuine merchandise bearing a trademark affixed by a commercial rival without the holder's consent.²⁷³ The ECJ has since the 1970s adopted an approach that tolerates more interference with trademark rights than would be permitted under classical trademark doctrine.²⁷⁴

Generally, the ECJ has declined to interfere with a Member State's definition of trademark law concepts, such as "confusing similarity."²⁷⁵ Indeed, prior to the revolution in European trademark law due to *Centrafarm BV v. Winthrop BV*²⁷⁶ in the 1970s, a trademark holder was permitted to challenge the sale of goods bearing its mark, even if the holder or an affiliate of the holder had legitimately affixed the mark in another country.²⁷⁷ Thus, cross-border commerce of genuine trademarked goods could be difficult if challenged by the local trademark holder. As a result, a trademark holder was sometimes

272. See Joined Cases 56 & 58/64, *Établissements Consten, S.A R.L. v. Comm'n*, 1966 E.C.R. 429.

273. See, e.g., Case C-2/00, *Hölterhoff v. Freiesleben*, 2002 E.C.R. I-4187, para. 17 (holding that a third party may use a trade mark as an indication of the origin of the goods).

274. See S.M. Maniatis, *Whither European Trade Mark Law? Arsenal and Davidoff: The Creative Disorder Stage*, 7 MARQ. INTELL. PROP. L. REV. 99, 145-46 (2003).

275. See, e.g., Case C-317/91, *Deutsche Renault AG v. AUDI AG*, 1993 E.C.R. I-6227 (concerning the similarity between Quattro and Quadra); Case 119/75, *Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapferer & Co.*, 1976 E.C.R. 1039 (concerning the similarity between Terrapin and Terranova); see also Case C-10/89, *SA CNL-SUCAL NV v. HAG GF AG (HAG II)*, 1990 E.C.R. I-3711 (commenting on lack of confusing similarity which existed between some marks). According to the AG in *HAG II*, "the Bundespatentgericht held that the mark 'LUCKY WHIP' was liable to be confused with the mark 'Schöller-Nucki', a decision that seems to postulate a body of consumers afflicted with an acute form of dyslexia." *HAG II*, 1990 E.C.R. at I-3740 (opinion of AG Jacobs).

276. Case 16/74, 1974 E.C.R. 1183.

277. See Maniatis, *supra* note 274, at 100.

able to prevent unwelcome imports of genuine goods from another country. But, for most products, it was virtually impossible for the trademark holder to take effective action against every trader who might sell or import his goods. In practice, market forces would gradually lead to some similarity of pricing for most products subject to cross-border trading. Tennis balls, Scotch whisky, jeans, and electronic consumer goods were sold through too many channels for trademark infringement actions to block their importation.

By contrast, pharmaceuticals were (and still are) sold at prices effectively set by the health care authorities, which also pay for them via the public health systems.²⁷⁸ Those prices vary greatly even between contiguous Member States. Today, they are inexpensive in Greece, Italy, and Spain, which favour low budgets, and more costly in the United Kingdom, the Netherlands, and Germany, which favour rewarding the pharmaceutical industry for the utility of its medicines.²⁷⁹ Because pharmaceuticals were distributed within a legally closed system by a few licensed wholesalers, the use of intellectual property rights could be an effective mechanism to prevent such trade. Correspondingly, cross-border trade would not change the pricing preferences of Member States.

In its revolutionary series of judgments in the 1970s involving Centrafarm, the ECJ changed the law. In each case, a corporate group wished to use national trademarks and patents to block the unwelcome importation and sale of genuine goods from one Member State to another.²⁸⁰ It would have seemed absurd if, for example, perfectly genuine Valium sold in the United Kingdom by “Roche United Kingdom” could be seized if offered for sale to pharmacists in the Netherlands because “Roche Netherlands” held the right to the Roche or Valium trademarks in the Netherlands.²⁸¹ So the earliest judgments were widely applauded as their results made good sense.

278. See, e.g., John A. Vernon, Joseph H. Golec & W. Keener Hughen, *The Economics of Pharmaceutical Price Regulation and Importation: Refocusing the Debate*, 32 AM. J.L. & MED. 175, 176-78 (2006) (discussing ways in which European countries control drug prices).

279. See *id.* at 178 & tbl. 1.

280. See Case 16/74, *Centrafarm BV v. Winthrop BV*, 1974 E.C.R. 1183; Case 15/74, *Centrafarm BV v. Sterling Drug Inc.*, 1974 E.C.R. 1147.

281. See Case 102/77, *Hoffmann-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, 1978 E.C.R. 1139, 1141-42.

To favour the free movement of goods between Member States at the expense of intellectual property rights, the ECJ recognised that some core rights could not be taken away from the intellectual property holder.²⁸² These core rights, called the specific subject matter or the essential function of the rights, included the right to prevent piracy and unauthorised copying.²⁸³ Protection of these rights survived the scrutiny of articles 30 and 36 of the EEC Treaty (now articles 27 and 30). However, the Court of Justice held that not every exercise of these core rights was immune from the rules on free movement.²⁸⁴ These rules precluded the right to prevent cross-border trade of genuine trademarked products that had been marketed elsewhere in the common market by a member of the local rightholder's group.²⁸⁵ This distinction was a good example of adroit judge-made law that provided theoretical underpinnings for a result deemed desirable by economic and political concerns. In a common market committed to the elimination of national economic frontiers, a manufacturer could not be allowed to use trademarks to prevent free trade in genuine goods among Member States by licensed wholesalers such as Centrafarm.²⁸⁶ Mr. de Savornin Lohman's client became a legal celebrity.

The challenge to trademark rights then proceeded further. Centrafarm wanted to do more than merely re-sell in the Netherlands the drugs in their original packaging (large bottles containing hundreds of pills suitable for a hospital pharmacy).²⁸⁷ Centrafarm wished to repackage the drugs in new boxes and to apply a label stating the contents, or to relabel them, or to change the number of pills in the box, so as to adapt the goods to the market in which the medicines were to be sold.²⁸⁸ According to the ECJ, such repackaging and relabeling was permissible, subject to specific conditions.²⁸⁹

282. Joined Cases C-427, C-429 & C-436/93, *Bristol-Myers Squibb v. Paranova A/S*, 1996 E.C.R. I-3457.

283. See Case C-10/89, *SA CNL-SUCAL NV v. HAG GF AG (HAG II)*, 1990 E.C.R. I-3711, I-3733; *Sterling Drug*, 1974 E.C.R. at 1162.

284. See *Winthrop BV*, 1974 E.C.R. at 1194.

285. *Id.*

286. *Id.* at 1195.

287. See *Hoffmann-La Roche*, 1978 E.C.R. at 1167-68.

288. *Id.* at 1162.

289. See *id.* at 1167-68.

Then the litigations fell quiet for a few years while the industry adapted to the new regime. It became common enough for a pharmaceutical trader to buy 10,000 twenty-dose packages of a drug in Greece, rearrange and sometimes even cut up the blister packs to change the number of pills per package and print new packaging which stated the manufacturer's name, the trade name of the drug, and the parallel trader's name, in order to resell 12,500 sixteen-dose packages in Germany.²⁹⁰

While honouring the carefully timed series of successful litigations by Centrafarm effected in the 1970s and 1980s, I question the wisdom of allowing wholesalers of pharmaceuticals to affix trademarks to new boxes in which they have chosen to package the medicines they bought. Wholesalers trading in other consumer products do not enjoy the right to apply trademarks to repackaged products without the owner's consent, and I see no special reason why pharmaceutical wholesalers should enjoy the exceptional privilege of removing the manufacturer's packaging on a box of tablets then repackaging the tablets in a new presentation showing the wholesaler's trade dress, the manufacturer's name, and the trademark of the tablets. Perhaps that issue of principle may one day be argued in Luxembourg.

XIV. TRANSATLANTIC PARALLELS: LAWYERS AND MARGARINE

I will now mention briefly a topic of which I have personal knowledge as a litigant: obstacles to membership of a bar on the ground of nationality. Let us begin in the United States, where Fre Le Poole Griffiths, a citizen of the Netherlands, holder of a green card and married to a U.S. lawyer, passed the Connecticut bar examination but was denied admission to the bar on the basis of her alien status.²⁹¹ Having lost before the Connecticut Supreme Court, she prevailed before the United States Supreme Court in the days of Chief Justice Burger.²⁹² The case syllabus states:

Classifications based on alienage, being inherently suspect, are subject to close judicial scrutiny, and here the State through appellee bar

290. See Ian S. Forrester, *The EFTA Court Confronts Re-labelling* (Paranova AS v. Merck & Co., Inc. and Others, *Judgment of the EFTA Court of 8 July 2003, Case E-3/02*), 2003 EUR. L. REP. 278.

291. *In re Griffiths*, 413 U.S. 717, 718 (1973).

292. *Id.* at 729.

committee has not met its burden of showing the classification to have been necessary to vindicate the State's undoubted interest in maintaining high professional standards.²⁹³

In the opinion, the Court noted:

Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

We hold that the Committee, acting on behalf of the State, has not carried its burden.²⁹⁴

The judgment speaks of foreigners' "*contributions to the social and economic life of the country*."²⁹⁵ The Court held that a regulatory body naturally has an interest to assure that the relevant qualifications are met before licensing individuals to practise law, but that when the sole status for disqualification is nationality, the ban is not constitutionally sustainable.²⁹⁶

Griffiths was interpreted in 1976 by the New York State Board of Bar Examiners to cover aliens who did not hold green cards in the matter of *Forrester*. Following the clarification of the relevant law by the Court of Appeals judge who supervised bar admission, I was asked by the Character Committee of the New York Bar whether I might encounter some mental reservation in swearing to support the Constitution of the United States. I was able to reply with perfect truth that since my candidacy for the bar was based upon the Fourteenth Amendment, I could not be a more enthusiastic supporter of that Constitution.

In the European Community, article 43 of the EEC Treaty (formerly article 52) prohibits restrictions on an individual's right of establishment in the territory of another Member State.²⁹⁷ The article also covers situations where an individual wishes to retain his or her business in his or her home Member State and also take up activities elsewhere in the EU.²⁹⁸

293. *Id.* at 717.

294. *Id.* at 722.

295. *Id.* at 719 (emphasis added).

296. *See id.* at 722, 729.

297. EEC Treaty, *supra* note 17, art. 52; Treaty of Nice, *supra* note 33, art. 43.

298. EEC Treaty, *supra* note 17, art. 52; Treaty of Nice, *supra* note 33, art. 43.

Jean Reyners obtained his legal education in Belgium but was refused admission to the bar in Belgium because he lacked Belgian nationality.²⁹⁹ Inevitably, the matter was referred by the Belgian courts to the ECJ, which said that the principle of equal treatment was a fundamental EEC Treaty provision.³⁰⁰ The ECJ also responded to an argument made by the Belgian bar which was very similar to that made by the Connecticut bar, saying that lawyers had to be citizens almost by definition.³⁰¹ The ECJ came to the same conclusion as the United States Supreme Court, distinguishing between the private activities of a lawyer and those activities which have a specific connection with the exercise of official authority.³⁰² Both courts concluded that lawyerly activity does not normally involve the latter.³⁰³ The ECJ also concluded that Mr. Reyners could rely directly on the EEC Treaty to invoke his right to freedom of establishment.³⁰⁴

More cases came to the ECJ concerning freedom to set up as a lawyer in different Member States. In *Thieffry v. Conseil de l'ordre des avocats à la cour de Paris*, a Belgian *avocat* moved to France and received French university recognition of his qualifications, but was refused permission to train as an *avocat* at the Paris Bar, as he did not have a French law degree.³⁰⁵ The ECJ ruled that if Mr. Thieffry had obtained what was recognised as an equivalent qualification and had satisfied the necessary training requirements, then he could not be denied admission to the bar solely because his qualification was not a French one.³⁰⁶

Equivalency of qualification itself raised many interesting questions for advocates and their clients.³⁰⁷ Finally, a harmonising

299. Case 2/74, *Reyners v. Belgian State*, 1974 E.C.R. 631.

300. *Id.* at 650.

301. *Id.* at 653.

302. Compare *id.* at 654-55 with *In re Griffiths*, 413 U.S. 717, 728-29 (1973).

303. *Griffiths*, 413 U.S. at 728-29; *Reyners*, 1974 E.C.R. at 655.

304. *Reyners*, 1974 E.C.R. at 650.

305. Case 71/76, 1977 E.C.R. 765.

306. *Id.* at 779-80.

307. See, e.g., Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663 (concerning whether an Edinburgh LL.M. graduate needed public approval in Germany to show his title); Case 107/83, *Ordre des Avocats au Barreau de Paris v. Klopp*, 1984 E.C.R. 2971; Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 1991 E.C.R. I-2357; see also Case C-168/91, *In re Konstantinidis*, 1993 E.C.R. I-1191 (concerning a Greek's battle with German bureaucracy that wished to misspell his name).

directive applying to provision of services came into force.³⁰⁸ Mutual recognition has been adopted regarding diplomas.³⁰⁹ This was broadened in a directive which applied to Member State nationals wishing to pursue a regulated professional activity in another Member State.³¹⁰

Lawyers are one source of controversy. Margarine, hated by the makers of butter, is another vexed problem; customers should be put on their guard lest they buy the wrong product innocently. In *Collins v. New Hampshire*, in the midst of a “margarine war,” the United States Supreme Court was confronted with the conviction of a person who had violated a state statute permitting the sale of margarine and other dairy substitutes only on condition that these were coloured pink.³¹¹ The Supreme Court held that “the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition.”³¹² As late as 2005, the Supreme Court of Canada, by contrast, upheld as reasonable provincial legislation forbidding the colouring of margarine to make it more attractive to consumers.³¹³ A similar European case concerned whether a Member State could prohibit the retail of margarine unless sold in a cube-shaped package.³¹⁴ This was not a prohibition, more of an inconvenience.³¹⁵ The court held that Belgian legislation requiring margarine to be packaged in a strange shape (in order to avoid being confused with butter) indirectly affected free movement of goods since imported goods had to be repackaged before sale in Belgium.³¹⁶ So just this once, artificial food seems to be more tolerantly treated in Europe than in North America.

308. Council Directive 77/249/EEC, 1977 O.J.(L 78) 17.

309. Council Directive 89/48/EEC, 1989 O.J. (L 19) 16.

310. *See id.*

311. *See* 171 U.S. 30, 31 (1898).

312. *Id.* at 34.

313. *See* UL Can. Inc. v. Québec, [2005] 1 S.C.R. 143.

314. Case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, 1982 E.C.R. 3961, 3963. The litigation looks to have been a test case intended to establish that a cone-shaped block of margarine could lawfully be marketed in Belgium despite the local law.

315. *Id.* at 3974.

316. *Id.* at 3975.

XV. CASE LOADS AND DELAYS

By the 1980s, drinks in judges' chambers had disappeared from the agenda for counsel. Indeed, by the mid- and late-1980s, there was concern that the ECJ was not giving adequate time (and maybe attention and sympathy) to questions of fact in competition and anti-dumping appeals from Commission decisions. To improve the quality of the judicial review came the creation of the CFI in 1989 by a decision of the Council pursuant to an amendment made in the Single European Act.³¹⁷ The CFI's original mandate was to relieve the case-load burden of the Court of Justice.³¹⁸ It rendered its first judgment in 1991.³¹⁹ Its competences were extended to cover all actions brought by non-privileged parties, i.e., those other than EU institutions and Member States, and over appeals from decisions concerning Community trademarks.³²⁰ Its decisions may be appealed to the ECJ on points of law.³²¹ As Community law has become more important and institutional activity more prevalent, so the judicial challenges have become more frequent. The CFI has heard about 5200 cases in its first fifteen years,³²² lessening the case-load of the ECJ, but encountering its own problems of delay—good judicial review of fact-heavy cases takes time and resources even to identify the legal points in dispute. There is no doubt that lawyers and clients have been pleased to observe the rigour with which the CFI examines factual evidence, looks at original documents, and reaches conclusions without according excessive deference to the Commission's findings.

317. Council Decision 88/591/ECSC, 1988 O.J. (L 319) 1; *see* Single European Act, *supra* note 33, art. 11.

318. *Id.* at 1. For example, staff cases, of which there were many, did not usually concern issues of great legal importance to the Community even though the matters at stake were of personal importance to those involved.

319. Case T-1/89, Rhône Poulenc S.A. v. Comm'n, 1991 E.C.R. II-867.

320. Treaty of Nice articles 230, 232, 235, 236, and 238 (formerly EEC Treaty articles 173, 175, 178, 179, and 181, respectively) deal with review of legality, failure to act, compensation for damages, disputes between Community and its staff, and jurisdiction over arbitration. Article 225 of the Treaty of Nice also gives the CFI some competence to hear preliminary references under article 234 (formerly EEC Treaty article 177).

321. *See* Treaty of Nice, *supra* note 33, art. 1, § 31, *amending* EEC Treaty, *supra* note 17, art. 225.

322. CURIA, The Court of First Instance, <http://curia.europa.eu/en/instit/presentation/fr/tpi.htm>. (last visited Mar. 9, 2007).

A. *Enlargement to Twenty-Five Member States*

Ten new judges joined the ECJ and nine joined the CFI on 1 May 2004.³²³ Their arrival was accompanied by a considerable increase in the number of staff and, as a result, the courts' capacity for coping with their workload. But as the number of official languages grew, the problems of translation and interpretation multiplied. The courts now have twenty-three official languages; Irish was granted the status of an official language of the EU in June 2005, a change which applies to the Community institutions as of 1 January 2007.³²⁴ In theory, Irish may also be used before the courts, although hitherto it has been reserved for ceremonial occasions.³²⁵

B. *The European Union Civil Service Tribunal*

The ECJ originally had jurisdiction over disputes between EC officials and their hierarchy.³²⁶ Such disputes can concern pensions, promotion, access to examinations, privileges, misconduct and sanctions flowing from it, and other personnel disputes. A number of these disputes would have been avoided if the hierarchy had managed matters more efficiently: as a result, some litigations were a vehicle for purging personal grievances while others presented truly difficult points of law. None of these cases was trivial, but they presented different sorts of judicial question to the "typical" state aid or dumping case in the CFI or free-movement case in the ECJ. More than one judge has observed that a number of the matters upon which the ECJ

323. Press Release No. 37/04, CURIA, Ten New Members of the Court of Justice of the European Communities (May 11, 2004), available at <http://curia.europa.eu/en/actu/communiqués/cp04/info/cp040037en.pdf>; Press Release No. 38/04, CURIA, Nine New Members of the Court of First Instance of the European Communities (May 12, 2004), available at <http://curia.europa.eu/en/actu/communiqués/cp04/info/cp040038en.pdf>.

324. See CURIA, The Court of Justice of the European Communities, The Procedure, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (follow "The Procedure" hyperlink) (last visited Mar. 2, 2007) (noting that proceedings can take place in any of "the 23 official languages of the European Union"). The language of a case before the European courts can be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, or Swedish.

325. See Rules of Procedure of the Court of Justice of the European Communities, art. 29, 1991 O.J. (L 176) 7, 13-14.

326. L. NEVILLE BROWN & TOM KENNEDY, BROWN & JACOBS: THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 193 n.1 (5th ed. 2000); see JOXERRAMON BENGOTXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 15 (1993).

had to pronounce essentially presented matters of management and human problems: the very hearing was a means of addressing grievances deeply felt by staff.

The Treaty of Nice provided for the creation of judicial panels in certain specific areas.³²⁷ On that basis, the Council adopted a decision establishing the European Union Civil Service Tribunal (Civil Service Tribunal) on 2 November 2004.³²⁸ The new Civil Service Tribunal has seven judges—from England, Germany, Poland, Finland, Greece, Belgium, and France.³²⁹ It should have a significant effect on the volume and overall profile of cases before the CFI: “It will enable the length of cases to be reduced and their conduct to be improved not only for cases concerning the European Civil Service, but for all the proceedings with which the Court of First Instance has to deal.”³³⁰

The ECJ has managed to reduce both the number of pending cases and the average length of proceedings. The number of cases pending on 31 December 2004 was lower than it had been for five years and had decreased further by the end of 2005.³³¹ The Treaty of Nice also made a series of changes to the way in which the ECJ works, especially in cases which are not evidently difficult but which the ECJ has no capacity to decline.³³² This improvement in its judicial statistics reflects the ECJ’s use of instruments to accelerate the treatment of certain cases (priority treatment, accelerated or expedited procedure, readiness to decide cases without a hearing as manifestly ill-founded, use of small chambers, and the possibility of giving judgment without the opinion of an AG).

327. See Treaty of Nice, *supra* note 33, art. 1, §§ 26, 32, amending EEC Treaty, *supra* note 17, §§ 220, 225; Euratom Treaty, *supra* note 18, arts. 136, 140B.

328. See Council Decision 2004/752/EC, Establishing the European Union Civil Service Tribunal, 2004 O.J. (L 333) 7.

329. See CURIA, The Civil Service Tribunal, The Members, <http://www.curia.europa.eu/en/instit/presentationfr/composition/membertribunalfonction.htm> (last visited Feb. 12, 2007).

330. Press Release No. 88/04, CURIA, The Council of the European Union Has Adopted the Decision Establishing the European Union Civil Service Tribunal (Nov. 2, 2004), available at <http://curia.europa.eu/en/actu/communiqués/cp04/info/CP040088en.pdf>.

331. See generally CURIA, *supra* note 126 (listing cases lodged before the ECJ).

332. See Volker Röben, *Constitutionalism of the European Union After the Draft Constitutional Treaty: How Much Hierarchy?*, 10 COLUM. J. EUR. L. 339, 349 (2004).

C. Delay

There is anxiety about delay. Cases before the CFI can take much too long, just as cases before the ECJ used to take too long. Judges of the European courts have expressed forcefully to the Member States, who are in charge both of allocating financial resources and of the treaty texts by which the courts are governed, their concerns about delays. For example:

[T]he fundamental problem, which lies at the root of the debate on institutional reform is quantitative: the constant increase in the number of cases. In this respect, the problems of the Court are not exceptional; they are the same as those faced by national courts only on a Community scale.

.....

However, the setting up of the Court has not been sufficient to deal with the problems of quantity in the long term. A few key figures give an idea of how the case load has developed: in 1975, 130 cases were lodged at the Court; in 1980, 279; in 1988 [(when it was decided to set up a Court of First Instance) 385 with 605 cases pending. However in 1999, 543 cases were lodged before the Court and 384 before the Court of First Instance and on 1 January 2000 896 cases were pending before the Court and 732 before the Court of First Instance.

Obviously the volume of cases pending has an effect on the length of time taken to deal with each of them. So, whilst the average time taken to deal with a preliminary reference (which [one] should not forget has to be added on to the time taken for the case to go through the national courts) was just over 6 months in 1975, 17 months in 1988 and in 1999 23.1 months. Clearly, this period of time must be reduced because the effectiveness of the preliminary reference procedure depends on the time the Court takes to give a ruling. If the Court takes too long national courts will be put off from asking preliminary questions.

.....

What worries us most is the risk that the situation could seriously deteriorate to the detriment of the effectiveness of justice and the confidence of those who seek it. It is therefore extremely important that the Court is allocated the necessary budgetary resources in order to perform its functions. In particular, the lack of resources in the translation service has reached a critical point and gives rise to considerable delays in the procedure. For example, for reasons of translation, our judgments cannot be delivered until several weeks after they have been finalised and where the judgment is especially long, the

delay can be up to a few months. This problem recurs throughout the procedure as the pleadings lodged in each case have to be translated. The situation is such that it risks jeopardising one of the achievements in Community justice to which the Court attaches great importance, namely the availability of the judgments in all of the languages on the day of the judgment.³³³

Indeed, so serious were the delays in handling one celebrated cartel matter that a legal plea was taken on that specific ground. In *Baustahlgewebe GmbH v. Commission*, the Commission decision was taken on 2 August 1989, the appeal filed on 20 October 1989, argument heard between 14 and 18 June 1993, and judgment pronounced by the CFI on 6 April 1995, nearly six years after the decision.³³⁴ On appeal to the ECJ, AG Léger, when giving his opinion on 3 February 1998, observed that the appeal had not been handled “within a reasonable time” as called for in article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.³³⁵ The Commission had imposed a fine of European Currency Unit (ECU) 4.5 million on the applicant, reduced to ECU 3 million by the CFI.³³⁶ Nearly nine years had elapsed. As noted in a perceptive article, such a lapse of time was not unheard of.³³⁷ In its judgment of 17 December 1998, the ECJ decided that a sum of ECU 50,000 would constitute “reasonable satisfaction” and decided to reduce the fine imposed by ECU 50,000, to ECU 2,950,000 in respect of the delay.³³⁸

As the courts are one of the most successful European institutions, I fear that delay will continue to be a concern in future years, especially for the CFI, which has large, fact-heavy, complex matters to deal with. Further, references from national courts to the ECJ are generally disposed of more briskly than appeals to the CFI, especially in major competition cases.

333. THE EC COURT OF JUSTICE AND THE INSTITUTIONAL REFORM OF THE EUROPEAN UNION 1-3 (2000), available at <http://curia.europa.eu/en/instit/txtdocfr/autrestxts/rod.pdf>.

334. Case T-145/89, *Baustahlgewebe GmbH v. Comm'n*, 1995 E.C.R. II-987, paras. 1, 10, 15.

335. Case C-185/95 P, *Baustahlgewebe GmbH v. Comm'n*, 1998 E.C.R. I-8417, para. 15 (opinion of AG Léger).

336. *Baustahlgewebe GmbH*, 1995 E.C.R. para. 162.

337. See Helen Toner, *Case C-185/95 P, Baustahlgewebe GmbH v. Commission, Judgment of 17 December 1998, Not Yet Reported. Full Court.*, 36 COMMON MKT. L. REV. 1345, 1345 (1999).

338. *Baustahlgewebe*, 1998 E.C.R. I-8417, para. 141 (court opinion).

XVI. THE COURTS AND THEIR MEMBERS

It is worth noting at the outset the fundamentally different notions of the roles, functions, and habits of the civil law (let us say French) judge and the common law (let us say English) judge. In the French constitutional model, judges are merely the mouthpiece that utters the legal principles, already in existence, determining the outcome of a case. Far from being anecdotal, colourful, or even gossipy, a French appellate judgment might consist of one short, barely comprehensible sentence. By contrast, the senior English (or Irish or Scottish) judge is almost always a former advocate, well-paid, gorgeously robed, enjoying immense independence. The style of the judgments, often dictated orally at the end of the hearing, will reflect a confident, personal approach. This robustness and independence have deep roots in national history. The following morsel from the English Court of Appeal, furnished to me as an illustration of what would not happen in Luxembourg (by a member of one of the courts), is not likely to be matched in the sober pages of the European Court Reports:

LORD JUSTICE WARD: The appellant is a lap dancer. I would not, of course, begin to know exactly what that involves. One can guess at it, but could not faithfully describe it. The Judge tantalisingly tells us, at paragraph 21 of his judgment, that the purpose is “to tease but not to satisfy”.

By about the end of 2002, or early in 2003, the appellant seems to have begun to tease the respondent. He, being a rich businessman, sought, no doubt, to enliven his lonely evenings in London by seeking entertainment at the Spearmint Rhino club in Tottenham Court Road where the appellant was then employed. Having been tempted, he managed to obtain her telephone number and invited her to dinner. It was not exactly the traditional boy meets girl, “Let’s have dinner, darling” kind of invitation. It was an invitation which she accepted, but entirely on the basis that she would be there as his escort and, as his escort, she would provide the services of companionship and amusement, but for a consideration. That consideration would amount, according to the judgment, to perhaps about £700 or £800 a night for the pleasure of her company at dinner. But the arrangement was made on a number of occasions and, as they went on, the relationship changed and at some time early in 2003 it is common ground that the services included sexual services, for which even more money was paid as a consideration. Whether or not rule 2 of the Spearmint Rhino club

had been breached, requiring that you could get no satisfaction, we do not know and fortunately do not have to decide.³³⁹

A separate manifestation of the phenomenon is the relative personal prominence of senior judges. Certain English and American judges have achieved celebrity status over the years, their names being well-recognised by members of the public: Chief Justices Warren, Burger, and Rehnquist (or, for that matter, Chief Justice Marshall), and Lord Denning, Master of the Rolls, are well-known figures, celebrated and revered (or reviled by those who dislike their judgments). In continental Europe, however, the identities of individual judges will be less well-known. Of course, lawyers will know the names of the judges and their qualities, but the wider public will not. The European courts fall into the continental tradition. Press reports rarely mention individual judges and certainly would not detect different strands of intellectual opinion between them. The ECJ may have celebrity status (at times, in the British press, demonised status), but its status is corporate and collegiate. The civilian judge in Luxembourg, typically a former civil servant, professor, or national judge, will be accustomed to a cautious legal tradition of seeking identifiable errors of law.

As a result, sadly or otherwise, European court judgments are in style rather grey, not very colourful. The individualism of judges is diluted in collegiality. The key language is stated, not trumpeted. Although the judgments today are more reader-friendly than in the early years when the ECJ followed the French tradition of drafting the judgment as, grammatically, a single sentence, they read more like government reports than stirring prose. Sir David Edward, Q.C., a former judge, describes an episode when his draft judgment needed to be made less lively:

“When I produced my first draft judgment, one of my colleagues said, ‘That is a very good opinion, now we must make it a judgment. We must make it aseptic.’ The scope for individuality lies, not in the public expression of one’s own opinion, but in the development of personal relationships so as to be able to persuade others of one’s point of view and to accommodate or reconcile divergent points of view.”

.....
The broad continental approach and it applies in most of the European countries—and probably in most countries of the world

339. *Sutton v. Hutchinson*, [2005] EWCA (Civ) 1773, [1]-[2] (Eng.).

actually—is that judges are not intended to be expressing personal opinions. Their function is to come together to discuss and either unanimously or, if necessary, by a majority decide how the case ought to be decided and then to set out the reasons for that decision in as objective a manner as possible. That's what my colleague meant when he said this is a good personal opinion. But it's not a judgment according to our view of what a judgment should be. Judges don't write personal opinions; they write judgments. As he said we've got to make it aseptic. In other words, we have got to make it dry, impersonal, and objective and that is the essential difference between that style of judging and the style of judging in the common law system. The judgment ideally should be objective and dry and to an extent uninteresting and unexciting.³⁴⁰

I would not claim that a judgment of the ECJ in a major case is either uninteresting or (especially to those involved) unexciting, but it is true that a browse through law reports in England, Scotland, or Ireland will yield more vividness, more colour, reflecting diverse judicial personalities.

According to article 223 of the Treaty of Nice:

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence; they shall be appointed by common accord of the governments of the Member States for a term of six years.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice.³⁴¹

In practice, each Member State appoints one judge to the ECJ and one to the CFI;³⁴² the new Civil Service Tribunal has seven

340. Interview by Don C. Smith, Professor, Univ. of Denver Sturm College of Law, with Judge David Edward, European Court of First Instance, European Court of Justice, in Edinburgh, Scotland (Nov. 21, 2005), *in* THE JUDGE DAVID EDWARD ORAL HISTORY PROJECT: SESSION IV: YEARS ON THE COURTS: PART I—1989-2004, HOW THE COURTS OPERATED (2006), *available at* http://www.law.du.edu/david_edward/transcripts/pdf/2006_05_17_session_4.pdf (footnote omitted).

341. Treaty of Nice, *supra* note 33, art. 223.

342. *See* NEVILLE MARCH HUNNINGS, THE EUROPEAN COURTS 51 (1996).

judges.³⁴³ Those honoured by being named to a position in the Luxembourg courts have occupied a variety of previous careers: many have been national judges,³⁴⁴ a few have been judges at the European Court of Human Rights;³⁴⁵ many have taught law, either full time or part time;³⁴⁶ a few were in diplomatic service;³⁴⁷ some were officials of the Commission or Council;³⁴⁸ some were national civil servants and officials;³⁴⁹ several have been politicians or were national Ministers;³⁵⁰ one was a former head of state;³⁵¹ yet another was a candidate for election as head of state;³⁵² several have been practitioners, in private

343. For a charming, vivid, and accurate account of life in the chambers of a European judge, see Diane Hansen-Ingram, *Tales from the Tartan Chambers*, in A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD I, 2 (Mark Hoskins & William Robinson eds., 2004).

344. Judges Thymen Koopmans, Jean-Claude Bonichot, Lars Bay Larsen, Pernilla Lindh, Aindrias Ó Caoimh, Peter Jann, Konrad Hermann Theodor Schiemann (Lord Schiemann), George Arestis, Alexander J. Mackenzie Stuart (Lord Mackenzie Stuart), Marko Ilešič, Jiří Malenovský, and Ján Klučka. In this and the following footnotes, the names are illustrative, not exhaustive. Also, see CURIA, The Court of Justice of the European Communities—The Members, <http://curia.europa.eu/en/instit/services/index.htm> (follow “The Court of Justice” hyperlink; then “The Members” hyperlink) (last visited Feb. 25, 2007); CURIA, The Court of Justice of the European Communities—The Former Members, <http://curia.europa.eu/en/instit/services/index.htm> (follow “The Court of Justice” hyperlink; then “The Former Members” hyperlink) (last visited Feb. 25, 2007); CURIA, The Court of First Instance—The Members, <http://curia.europa.eu/en/instit/services/index.htm> (follow “The Court of First Instance” hyperlink; then “The Members” hyperlink) (last visited Feb. 25, 2007); CURIA, The Court of First Instance—The Former Members, <http://curia.europa.eu/en/instit/services/index.htm> (follow “The Court of First Instance” hyperlink; then “The Former Members” hyperlink) (last visited Feb. 25, 2007); CURIA, *supra* note 329.

345. Judges Egils Levits, Uno Lõhmus, Jerzy Makarczyk, and Pranas Kūris. Judge Paul J. Mahoney in the Civil Service Tribunal was formerly registrar of that court. *See* sources cited *supra* note 344.

346. Judges Andreas Matthias Donner, Pierre Pescatore, Josse J. Mertens de Wilmars, Koopmans, Antonio Tizzano, René Joliet, Gil Carlos Rodríguez Iglésias, Vassilios Skouris, Thomas von Danwitz, Klučka, Malenovský, Christiaan Willem Anton Timmermans, Ilešič, Allan Rosas, Rosario Silva de Lapuerta, Koen Lenaerts, Makarczyk, and Kūris. *See* sources cited *supra* note 344.

347. Judges Endre Juhász, Levits, Kūris, Krateros Ioannou, and Hubert Legal. *See* sources cited *supra* note 344.

348. Judges Timmermans, Rosas, José Narciso da Cunha Rodrigues, Jean-Pierre Puissochet, Koopmans, and Haris Tagaras. *See* sources cited *supra* note 344.

349. Judges Karl Roemer, Jacques Rueff, Ó Caoimh, Tizzano, Legal, Josef Azizi, Jann, Pescatore, Koopmans, and Ole Due. *See* sources cited *supra* note 344.

350. Judges Louis Delvaux, Robert Lecourt, Giacinto Bosco, Fernand Schockweiler, Antonio Mario La Pergola, Melchior Wathelet, Kūris, Levits, and Mertens de Wilmars. *See* sources cited *supra* note 344.

351. Judge Cearbhall Ó Dálaigh. *See* sources cited *supra* note 344.

352. Judge Thomas Francis O’Higgins. *See* sources cited *supra* note 344.

practice in the United Kingdom and in Ireland and in government practice elsewhere.³⁵³ Further, a number have served in armed conflicts, on different sides,³⁵⁴ some of whom were seriously wounded in combat,³⁵⁵ one at least was a political prisoner,³⁵⁶ and at least one made new law as a litigant after he retired, concerning charges on the importation of books.³⁵⁷

The AG is meant to act “with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement.”³⁵⁸ The AG is a member of the ECJ, sits beside (but not among) the judges, and expresses the first judicial word on the case, some weeks after the hearing.³⁵⁹ The role can be compared to that of a judge sitting at first instance, or to the *commissaire du gouvernement* in the French *Cour de cassation*, or to a permanent amicus curiae, or to a professor of law who tells successive groups of listeners the basic principles over and over again. The CFI may name one of its number to serve as AG but has rarely done so since its early years, because of the amount of resources consumed.³⁶⁰

An AG’s opinion will set forth, in a personal manner, the key issues in the case, the principal areas of dispute, and the AG’s proposed disposition on each question.³⁶¹ AGs have a wonderful job in that they can express themselves as they choose, may recommend departures from precedent, and are dispensed from the need to pursue consensus with their colleagues.³⁶² Their opinions are a source of Community law in which flavour and individuality can be found. AG

353. Judges Mertens de Wilmars, Koopmans, Mackenzie Stuart, Nicholas James Forwood, David Alexander Ogilvy Edward, Christopher William Bellamy, Gordon Slynn, Donal Patrick Michael Barrington, Larsen, Ó Caoimh, Löhmus, Tizzano, da Cunha Rodrigues, Silva de Lapuerta, Lenaerts, Arestis, Schiemann, Anthony Borg Barthet, Ilešič, and AGs Jean-Pierre Warner, Slynn, and Eleanor Sharpston. *See* sources cited *supra* note 344.

354. Judges Hans Kutscher, Fernand Grévisse, Donner, Lecourt, MacKenzie Stuart, and AG Warner. *See* sources cited *supra* note 344.

355. Judges Kutscher and Grévisse. *See* sources cited *supra* note 344.

356. Judge Adrianus Van Kleffens. *See* sources cited *supra* note 344.

357. Judge Donner. *See* sources cited *supra* note 344.

358. Treaty of Nice, *supra* note 33, art. 222.

359. HUNNINGS, *supra* note 342, at 57.

360. CURIA, *supra* note 322.

361. *See* HUNNINGS, *supra* note 342, at 57-58.

362. *See id.* at 59.

Colomer, in *Sieckmann*, cites both Patrick Süskind's novel *Das Parfum* and Baudelaire's poem *Le Parfum*.³⁶³ AG Warner in *Serio v. Commission* expresses surprise at the requirement that candidates for a competition should have knowledge and, if possible, practical experience, of "Anglo-Saxon law," because he had always understood that system of law to have become defunct some 900 years previously.³⁶⁴

AG Lenz revealed in *Bosman* his enthusiasm for football;³⁶⁵ AG Jacobs could be lyrical about customs classification matters.³⁶⁶ AG Sharpston commented tartly in a recent case on intemperate pleadings:

In Case C-53/05 the Commission states that Portugal could not read the Directive and accuses Portugal of an act of piracy in expropriating authors and confiscating their intellectual property. In Case C-61/05 the Commission accuses Portugal of effrontery and of 'pulling a fast one' and asks whether it knows how to read. In both documents the Commission uses a sarcastic and derisive tone generally. Whatever the rights and wrongs of the infringement action, I regard such language and tone as unacceptable.³⁶⁷

XVII. UNANIMITY, DISSENT, AND DEBATE

There are no dissenting judgments from members of the European courts in Luxembourg. Only the judges know how unanimous the judgment was. In some early cases, not every judge signed every judgment, but today the practice is that the court tries to press on until the judges reach consensus (although consensus may not be reached).³⁶⁸ The minority and the majority work together in the drafting process, so the final text signed by everyone may be significantly different from the first draft prepared by one judge.

363. Case C-273/00, *In re Sieckmann*, 2002 E.C.R. I-11737, para. 29 (opinion of AG Colomer) (citing PATRICK SÜSKIND, *DAS PARFÜM: DIE GESCHICHTE EINES MÖRDERS* (1985); Charles Baudelaire, *Le Parfum*, in *LES FLEURS DU MAL* 39 (1861)).

364. Case 115/73, 1974 E.C.R. 341, 352 (opinion of AG Warren).

365. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL/Union des Ass'ns Européennes de Football (UEFA) v. Bosman*, 1995 E.C.R. I-4921, I-4950 to 51 (opinion of AG Lenz).

366. For a colourful account of the rights of the individual, see Case C-168/91, *In re Konstantinidis*, 1993 E.C.R. I-1191 (opinion of AG Jacobs).

367. C-53/05, *Comm'n v. Portuguese Republic*, 2006 E.C.R. I-6215 para. 54 (opinion of AG Sharpston).

368. See HUNNINGS, *supra* note 342, at 89.

Compromises may dilute the precision of the ruling, but there is only one ruling rather than several sentiments expressed with vigour which might leave the referring national court uncertain of what indeed was the law. In my view, the case against dissenting judgments remains solid. The risk of a dissent in a politically sensitive case is that ministers, officials, or government departments from the same Member State as the dissenting judge may feel dispensed from the need to respect the judgment of the majority. Even if the identity of the dissenter were kept secret, there would still be a risk that less weight would be attached to the majority judgment. It is interesting to note that Chief Justice Roberts has been commending single judgments to his new colleagues on the United States Supreme Court. In recent talks, in London to the American College of Trial Lawyers (in October 2006), and at Georgetown University (in May 2006), he commended “unanimity, or near unanimity,” which promotes “clarity and guidance for lawyers and for the lower courts”:

The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground. . . . If it's not necessary to decide more to dispose of a case, in my view it is necessary not to decide more. . . . [Divisions] can not and should not be artificially suppressed. . . . But the rule of law and the Court as an institution both benefit from broader agreement.³⁶⁹

Moreover, the minority opinion can readily be expressed in academic articles, with an impact rather similar to dissenting judgments. It is not improper for a member of a European court to commend a particular view of the law in an academic context. For example, there is currently a vigorous debate over whether the courts' rules on “direct and individual concern” should be made less restrictive to allow direct appeals to the CFI by persons or associations disadvantaged by rules adopted for their economic sector.³⁷⁰ Let us

369. Chief Justice John Roberts, Address at the Georgetown University Law Center's 2006 Commencement (May 21, 2006) (available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=146>); see Am. Coll. Trial Lawyers, *Fellows Will Gather in London and Dublin*, BULLETIN, Spring 2006, at 2.

370. Compare Case 25/62, *Plaumann & Co. v. Comm'n*, 1963 E.C.R. 197 (establishing the prevailing standard for individual concern), with Case C-263/02, *Comm'n v. Jégo-Quéré & Cie SA*, 2004 E.C.R. I-3425, para. 45, and Case C-50/00, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677, para. 43 (opinion of AG Jacobs) (proposing broader interpretations of the term); see also Laurence W. Gormley, *Judicial Review: Advice*

suppose a new EU regulation changes the legal mesh size of fishing nets. The rule affects all fishermen. Can one of them personally or through his association, by a direct appeal to the CFI, challenge the rule as being unlawful? Attempts to make a direct challenge have involved the size of fishing nets,³⁷¹ the importation of clementines,³⁷² the price of grain in Germany,³⁷³ importation of cheap cotton from Greece to France,³⁷⁴ and the use of, among others, the term “crémant” for sparkling wines.³⁷⁵ The difficulty of showing both direct concern and individual concern may compel the victims of a new regulation to sue nationally, find a sympathetic judge, and then argue their case in a reference to the Court of Justice. It is no secret that some judges would favour a relaxing of those criteria. At the Congress of the International Federation for European Law (FIDE Congress) in London in 2002, for example, the questions of direct and individual concern were freely debated by AG Jacobs, Judge Azizi, and others.³⁷⁶ Whereas U.S. and U.K. national judges would be likely to express themselves cautiously on hotly debated questions in speeches and law review articles, judges serving in Luxembourg are less constrained. So the absence of the dissenting voice in a judgment does not reduce the vigour of the debate about the principle. By way of footnote, the CFI elected to depart from the previous case law on the topic of direct and individual concern.³⁷⁷ While its judgment was overturned on appeal to the ECJ, no one doubted its competence to adopt a new rule.³⁷⁸ I predict that the law will, in the long-term, change.

for the Deaf?, 29 *FORDHAM INT'L L.J.* 655, 687 (2006) (discussing the controversy surrounding the definition of “direct and individual concern”).

371. *Jégo-Quéré*, 2004 E.C.R. I-3425, para. 5; *Unión de Pequeños Agricultores*, 2002 E.C.R. para. 5.

372. Case 25/62, *Plaumann & Co. v. Comm'n*, 1963 E.C.R. 197, 212.

373. Joined Cases 106 & 107/63, *Toepfer v. Comm'n*, 1965 E.C.R. 405, 411.

374. Case 11/82, *Piraiki-Patraiki v. Comm'n*, 1985 E.C.R. 207, 208.

375. Case C-309/89, *Codorniu SA v. Council*, 1994 E.C.R. I-1853, I-1882.

376. For a discussion on the controversy surrounding direct and individual concern, see Gormley, *supra* note 370, at 687; International Federation for European Law, 20th Congress, in London, U.K. (Oct. 30-Nov. 2, 2002).

377. Case T-177/01, *Jégo-Quéré & Cie SA v. Comm'n*, 2002 E.C.R. II-2365.

378. Case C-263/02, *Comm'n v. Jégo-Quéré & Cie SA*, 2004 E.C.R. I-3425, para. 50.

XVIII AN “ACTIVIST” COURT?

I have mentioned a few of the questions which the ECJ had to decide during its early years. In the 1970s, the Community went through a period of political stagnation. But the simple and potent principles set forth in the EEC Treaty continued to present problems for national judges. During this fallow period, the ECJ was the most dynamic of the institutions. It produced a string of important judgments and was, predictably, criticised for following teleological interpretations and for being over-activist, mainly by commentators from the common law and Scandinavian countries.³⁷⁹ Walter van Gerven says, interestingly:

Certainly, the Court has been “active” in its desire to improve legal protection of individual rights. But that is the essence of any supreme court’s task: in that field, every national legal system offers examples of so-called activism. However, at the same time it has been asserted, that the Court, if anything, has been more “passive” than “active” in its willingness to review Council or Commission decisions or regulations limiting the free market and free competition concepts, mainly by respecting the so-called discretionary powers of these institutions in, for example, the agricultural field, even when they are used for protectionist or over-regulatory purposes. Having said that, one should not forget, though, that judicial activism is, more often than not, the consequence of inability or unwillingness to act on the part of the legislative.³⁸⁰

A more accurate (and more court-friendly) version of the controversy would be that opinions of the ECJ do not consistently please Member States. The directives and regulations that constitute the bulk of European legislation are almost never perfectly clear in every feature. They are drafted by civil servants who are responsible to different masters (the Commission, twenty-seven Member States who are rarely unanimous, the Parliament, the parties affected, the public interest, and other vocal causes). They are often drafted so as to please, or not to displease too much, those who disagree: reconciling divergent views by linguistic obfuscation delivers consensus on tersely

379. See, e.g., HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1986); WALTER VAN GERVEN, THE EUROPEAN UNION—A POLITY OF STATES AND PEOPLES 27-28 (2005).

380. Walter van Gerven, *The Role and Structure of the European Judiciary Now and in the Future*, 21 EUR. L. REV. 211, 212 (1996) (footnote omitted).

worded principles today at the price of controversy or litigation tomorrow. The ECJ has the task of ensuring that the Member States adhere to what they promised, but not more than they promised. While some judgments provoke agitation for a number of Member States and while the press (and even ministers, who should know better) will present the matter in terms of a patriotic battle whose outcome is decided by foreign judges, my personal impression is that the ECJ's decisions do not consistently enhance Community power at the expense of the Member States. The EC Treaty establishes broad duties of pro-Community behaviour for the Member States: for example, they "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."³⁸¹ The judges have to decide, sometimes, important questions governed by imperfectly clear texts. No wonder their conclusions cause intermittent outrage. This is not new.

XIX. DIFFERENT JUDICIAL TRADITIONS

There is no single pattern of forensic and judicial conduct in Europe. Traditional advocacy depends on clarity, simplicity, focus, concentration, and an occasional whiff of passion. To what extent can these be deployed in Luxembourg?

In the early days of the ECJ, it was decided that pleadings would be partly written and partly oral, the former being more important.³⁸² This was consistent with the practice of the six founding Member States, where litigation is largely conducted via written pleadings.³⁸³ The accession of Ireland and the United Kingdom in 1973 brought to the ECJ the benefit of the common law oral traditions of these countries.³⁸⁴ And it brought to counsel in those countries the benefit of rigorously drafted written pleadings. I am old enough to remember from the early 1970s the lively contrast between the reading at droning speed of a non-oral-tradition counsel from one of the original six

381. Treaty Establishing the European Community art. 10, Nov. 10, 1997, 1997 O.J. (C 340) 3.

382. CURIA, *supra* note 322.

383. Cf. Felicity Nagorcka et al., *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 469-70 (2005).

384. Council Decision of 1 January 1973, *supra* note 22.

Member States and the lively, fluent, and colourful presentation of the early English pleaders who spoke in Luxembourg.

In England, Scotland, and Ireland, the process of judicial decision-making is in large measure public, as counsel debates the issues with the bench. In the House of Lords, counsel and the five Law Lords argue with formal politeness, but exhausting intensity, for hours or days about the relevant questions of principle.³⁸⁵ The oral argument is a vital part of the judicial determination. Judges argue with each other and with counsel.

In the civil law tradition, counsel are usually heard in silence, at least when making their principal submissions. Indeed, in France and Belgium, for example, and other Member States as well, it is somewhat improper for the judge to reveal, via questions, a personal view of the merits.

In some Member States, counsel and judge engage in a public debate, an integral part of the process of decision-making. Questioning of the advocate can be so fierce that one could characterise it as a blood sport. In my own jurisdiction of Scotland, an appeal court in the nineteenth century was renowned for the ferocity and intemperance of its judges: due to “constant interruption from and conversation upon the bench the arguments of counsel were torn to tatters.”³⁸⁶ “Then would happen a tornado which either engulfed the pleader or laid him out limp and wan . . . Several times counsel even sat down and confessed themselves unable to plead because of the attitude of the bench . . .”³⁸⁷ “One often sees,” wrote one professor,

an unfortunate counsel trying to face four questions at once, all on different points, like the early Christian exposed in the arena to fight simultaneously with an elephant, a tiger, a leopard, and a bear. . . . That the Court are entitled to every deference is conceded, but their title depends on their respecting the independence of the Bar. Nor is this a question of personal privilege; the rights of counsel are the patrimony of the Bar held in trust for the public, granted as the main guarantee for justice and security.³⁸⁸

385. See HOUSE OF LORDS, THE JUDICIAL WORK OF THE HOUSE OF LORDS (2005), available at <http://www.parliament.uk/documents/upload/HoflBpJudicial.pdf>.

386. Robert S. Shiels, *The Ordeal of Advocates in 1896*, 2006 SCOTS L. TIMES 209, 211.

387. [1905] 21 SC. L. REV. 168.

388. N.J.D.K., *Second Division's Progress*, 8 JUR. REV. 268, 273-74 (1896).

In other Member States, the pleadings are overwhelmingly written and the oral portion is formal, even non-existent. Continental lawyers are astonished to hear that in *A v. National Blood Authority* counsel gave argument to the English High Court (on whether blood transfusions containing allegedly undetectable hepatitis virus were a “defective product”) for about fourteen days.³⁸⁹

A special challenge for those who appear regularly is that they may sometimes be called upon to speak in a foreign language. This means losing the native fluency which gives a lawyer distinctiveness and resourcefulness in the face of questions. Lawyers in the legal service of the European institutions are quite regularly required to speak in their second, or even third, language. This calls for a more thoroughly pre-composed speech and an acceptance that the lawyer will—*horribile dictu*—make grammatical mistakes. It would be surprising to hear an advocate in the Louisiana or U.S. supreme courts make a grammatical error, but in a multilingual court, mistakes of language are natural. Remember that in the Middle Ages, Latin was spoken as the literate person’s second language. There would be strange pronunciations, coinage of strange new words, and mistakes of grammar. But people could understand each other. After pleading in French, I have been teasingly reproached by other counsel for mistakes of grammar. Correspondingly, the advocate speaking his native tongue has an advantage albeit small to moderate.

There are other challenges to be borne in mind. In a court of twenty-three languages and judges from twenty-seven countries, it is a statistical certainty that a majority of judges in a typical chamber of five judges will not speak the language of the case as a native language. The advocate’s remarks will therefore be interpreted by the courts’ team of simultaneous interpreters, of whom there are more than fifty—freelance interpreters not included—from the twenty-five Member States.³⁹⁰ French, for example, the courts’ working language, has seven interpreters, English and German have six each, Slovenian

389. (2001) 3 All E.R. 289. The battle is described in a chapter jointly written by counsel—M. Brooke Q.C., I. Forrester Q.C., N. Underhill Q.C.—and the judge—Mr. Justice Barton, Michael Brooke QC & Ian Forrester QC, *The Use of Comparative Law in A & Others v. National Blood Authority*, in *COMPARATIVE LAW BEFORE THE COURTS* 57, 57-83 (Guy Canivet et al. eds., 2004).

390. HUNNINGS, *supra* note 342, at 99.

has one—there has been no Slovenian case so far.³⁹¹ If the language of the case is English or French, many judges will listen to the advocate directly, if clear enough and slow enough, while listening via one ear to the interpreter speak the judge's native language. If the language of the case is Portuguese, Greek, or Polish, languages spoken by few non-natives, the entire bench may be wholly dependent on the quality of the interpretation for an understanding of the advocate's words. If the advocate speaks too quickly, the interpreter must omit some of the ideas or over-simplify. If there are several interpreters, they are likely to omit different ideas. Worse, the interpretation may have to go through two interpreters (Finnish to French to Slovak, for example). Partly because of the problem of interpretation and partly because of the tradition of courteously listening in silence, judges rarely interrupt counsel during set-piece speeches. Indeed, the commonest interruptions are requests to go more slowly and reminders of the need to respect the time limits allocated to counsel.

XX. CONTESTED FACTS

Judicial review in Luxembourg involves a review of the legality of the measure, not its desirability (*opportunité* is the French term).³⁹² It is frequently necessary, especially for the CFI, to decide on whether there were errors of factual appreciation, not a trial *de novo* of the facts.³⁹³ Civil law courts do not formally reject pieces of alleged evidence because they are not the "best evidence."³⁹⁴ Newspaper articles, assertions of opinion, tables, charts, and evidence elicited by leading questions are not formally inadmissible.³⁹⁵ The judge may not give much weight to them, but he will not refuse to consider them. There are no formal constraints upon the nature of the evidence which the European courts may consider.³⁹⁶ In the first appeal filed with the

391. Interpreters at the European courts: organisational staff, 6; German, 6; English, 6; French, 7; Danish, 3; Spanish, 3; Estonian, 2; Finnish, 3; Greek, 3; Hungarian, 2; Italian, 4; Latvian, 2; Lithuanian, 1; Dutch, 3; Slovak, 2; Slovenian, 1; Swedish, 3; Czech, 1. Cf. CURIA, Departments of the Institution—Interpretation, <http://curia.europa.eu/en/instit/services/index.htm> (last visited Mar. 7, 2007) (describing the organization of the courts' interpreter service).

392. See BERMANN ET AL., *supra* note 170, at 155-56.

393. See *id.*

394. See HUNNINGS, *supra* note 342, at 319.

395. See *id.*

396. See *id.*

CFI, the then Judge Vesterdorf was appointed to perform the role of AG for that case.³⁹⁷ His opinion covered a number of interesting points, including the “unfettered” nature of the CFI’s assessment of evidence:

Apart from the exceptions laid down in the Communities’ own legal order, it is only the reliability of the evidence before the Court which is decisive when it comes to its evaluation. . . .

. . . [T]he Court of Justice allows only an overall assessment of a document’s probative value and simple rules of evidential logic to be decisive in the evaluation of evidence.³⁹⁸

His opinion also discusses factors pertaining to the weight of written evidence: its freshness,³⁹⁹ its addressee,⁴⁰⁰ and its apparent reliability.⁴⁰¹

Naturally, the question arises of the relevant standard of proof. In an old staff case about whether an official had drowned by accident or by suicide, AG Roemer spoke of “substantial indications” giving “rise to a high degree of probability.”⁴⁰² In a case under the ECSC, AG Gand spoke of a “reasonable degree of certainty.”⁴⁰³ In a cartel case, the ECJ set forth a standard the Commission had failed to satisfy: a “firm, precise and consistent body of evidence.”⁴⁰⁴

Note that in the case of references to Luxembourg by a national court, the ECJ is merely asked to advise on the relevant legal principles and is therefore not hearing an appeal where one party must carry a certain burden of proof in order to prevail.⁴⁰⁵ This is a further

397. Case T-1/89, Rhône-Poulenc v. Comm’n, 1991 E.C.R. II-867 (opinion of AG Vesterdorf).

398. *Id.* at II-954.

399. *Id.* at II-956 (noting how far agreements were followed was not “of great significance” in determining the amount of fines).

400. *Id.* at II-957 (noting no hesitation in the notes being “a reliable source for understanding what took place”).

401. *Id.* at II-956 to 57. The document “originate[d] from employees who have to provide their colleagues and superiors with an account of what took place at meetings which they attended. . . . It [is] also, of course, . . . improbable that large industrial undertakings would send their employees to meetings . . . if those employees were not capable of reporting . . . in a sensible and reliable way.” *Id.*

402. Case 18/70, Duraffour v. Council, 1971 E.C.R. 515 (opinion of AG Roemer).

403. Case 8/65, Acciaierie e Ferriere Pugliesi SpA v. High Auth. of the ECSC, 1966 E.C.R. I (opinion of AG Gand).

404. Joined Cases C-89, C-104, C-114, C-116, C-117 & C-125 to C-129/85, Osakeyhtiö v. Comm’n, 1993 E.C.R. I-1307 para. 70.

405. *See supra* note 99 and accompanying text.

reason to sympathise with the problems of those who have to challenge the legality of a regulation by the cumbersome route of a reference from a national court.

Oral evidence is rarely received by the European courts: on the rare occasions where a case hinges on the truth of one contested factual element, there might be a formal hearing of a witness, but judges prefer documentary evidence. Indeed, there have been few formal hearings of the testimony of witnesses in the history of the European courts. In staff cases, doctors have been heard, and in competition cases, economists have been heard.⁴⁰⁶ In modern practice, the submission of oral *evidence*, in the sense of oral testimony by witnesses, is quite rare. However, the submission of advocacy by non-lawyer experts is an alternative way of making technical points effectively. Judges state that they consider the benefits of speed and informality to exceed the benefits of a more rigorous laying of a foundation for what the expert says. Indeed, judges accept the offering of expert advocacy by non-lawyers as part of what would otherwise, in the common law tradition, be part of counsel's pleading. It works quite well, in my experience, although I shall have suggested improvements to offer.

Arguments before the CFI typically involve set-piece presentations by counsel (from twenty to forty minutes each, usually) for each side, then a pause, then questions from the Reporting Judge, the President of Chamber, and the other members of the Chamber. Questions are polite and mild by Anglo-Saxon standards (though searching). Answers are sometimes given by counsel, sometimes by a client representative, or an expert: economics and the design of servers for networks of computers in *Microsoft Corp. v. Commission*,⁴⁰⁷ hospital-borne infections and the capacity of *Enterococci faecium* in the human gut to transfer resistance to antibiotics in *Pfizer Animal Health SA v. Council*,⁴⁰⁸ computer design in *Control Data Belgium NV SA v. Commission*,⁴⁰⁹ or epidemiology in

406. The CFI employed an economist for six years in the 1990s to help the judges understand economic debates in competition appeals. See Ilene Knable Gotts et al., *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. ANN. SURV. AM. L. 435, 498 (2005).

407. Case T-201/04 R, 2005 E.C.R. II-1491.

408. Case T-13/99, 2002 E.C.R. II-3305, II-3337.

409. Case 294/81, 1983 E.C.R. 911, 915.

Les Laboratoires Servier v. Commission,⁴¹⁰ for example. Experts are not sworn, nor are their identities and qualifications necessarily circulated in advance to other parties. Questions may be put mildly from the bench in response to their interventions. There is no cross-examination by counsel, but other judges may follow-up, and counsel can suggest lines of further inquiry.

In the *Microsoft* case before the CFI, the Grand Chamber of thirteen judges (from Ireland, England, Portugal, Denmark, Spain, Lithuania, Latvia, Austria, Germany, Poland, the Netherlands, Luxembourg, and Portugal) heard submissions by counsel (admitted to the bar or qualified in the law in Belgium, England, Ireland, Scotland, Italy, the Netherlands, Spain, and Sweden).⁴¹¹ Screens were installed so that each judge could follow the technical explanations, animated diagrams, charts, statistical tables, screenshots, quotations from key texts, video clips, and the like. The CFI also heard from computer consultants, several computer engineers, a parent of the Open Source software movement, and several economists. In a common law context, they could be regarded as somewhere between witnesses and advocates, but they certainly helped to clarify technical points. Judges asked questions in English, the language of the case, or in their own language, and counsel responded in the language of the case. All questions and answers were routed through the bench. After an intervention from one side, counsel on the other side would be asked to comment.

The *Microsoft* hearing lasted from 9.30 a.m. on Monday morning, April 24, 2006, to Friday evening, April 28, at 6.45 p.m. It was the most intensive session in the CFI's history. Responding to the media interest, a separate room was set aside for journalists who could follow developments on a large screen.⁴¹² A shorthand stenographer commissioned by one of the parties attended to make a transcript which was subsequently shared with other parties. The CFI's own tape recording is not revealed to the public. There were a few light moments. One counsel attended the birth of his child in Brussels and

410. Case T-147/00, 2003 E.C.R. II-85, II-98.

411. *Microsoft*, 2005 E.C.R. II-1491.

412. Information for the Press No. 26/06, CURIA, Hearing of 24-28 April 2006 in Case T-201/04 (Mar. 17, 2006), available at <http://curia.europa.eu/en/actu/communiqués/cp06/info/cp060026en.pdf>.

returned the next day to the CFI, receiving applause led by the President.

XXI. CONCLUSION

A. *Concluding Thoughts and Suggestions*

This Article is the result of a lecture delivered on the occasion of the Third Gauthier Lecture, in honour of a noted trial lawyer who made a great success out of representing ordinary people, especially in jury cases.⁴¹³ These lectures address questions of advocacy. There are no juries in Luxembourg, and many of the questions addressed by the European courts would be ill-adapted to the decision of a jury. But any advocate wishes the same things: to be given a good chance to speak out for the client's case to a well-prepared court, which will render a clear judgment impartially. In this respect, the practitioner in Louisiana and in Luxembourg have the same goals. Every advocate will have some ideas for improving the quality of the procedures which are the underpinnings of the delivery of justice. The following respectful suggestions are the fruit of conversations with several former or present members of the European courts—and with a number of fellow practitioners whose view I canvassed for this Article.

The first thing to say is how astonishingly far European law has come in fifty years. Judges have delivered judgments which were bold, prudent, cautious, obscure, clear, widely praised, or widely blamed. They have worked successfully across the barriers of language, different legal traditions, and governmental criticism, and lobbying (overt and, one must assume, covert), to build a coherent legal architecture. Many of their judgments have required them to choose between powerful opposing forces—security and safety versus freedom of choice or freedom of enterprise; residents versus immigrants; France versus Germany; consumer safety versus consumer choice; the familiar versus the foreign; protectionism versus free trade. Some of the judgments have been mocked, and some of the judges have been derided in their national press (one was pilloried for working more hours than the hours stipulated by the Working Time

413. See TULANE UNIV. LAW SCH., MORE IN 2004/2005, at 14 (2004), available at <http://www.law.tulane.edu/alumni/More/More0405.pdf>.

Directive).⁴¹⁴ The judges' tenure is not secure; in some Member States replacement of judges (appointed for a six-year term) may ensue when national general elections lead to a change of governing party.⁴¹⁵ So while we honour the advocates who have helped to develop the law by zealously defending their clients, we should also honour the judges who have built the law, not without occasional risks to their own security of tenure in their job.

There are today three European courts in Luxembourg, each with its own characteristics. The Civil Service Tribunal, the youngest, has only just opened its doors so it has no need yet of reforms, either timid or radical.

B. The Oral Hearing

While it is true that the written pleadings in the ECJ (as in the CFI) carry more weight than the oral pleading in open court, this oral phase remains important. To the litigant, the oral hearing is the visible, formal, public, and vital part of the deciding of the case. The practitioner in Cintra, Thessaloniki, Aberdeen, St. Malo, or Taormina has the privilege to argue the client's cause in public, before a multinational bench in a well-equipped courthouse. The client sees the judges. These are not trivial considerations. The relative invisibility of the proceedings before and after the hearing give the oral proceedings all the more symbolic significance.

There are significant differences in the styles of hearing. Those who leave a hearing at the CFI or the young Civil Service Tribunal usually consider they have had a fair chance to be heard, have been confronted by the opposing arguments, and believe that the court's concerns emerged from the debate. They can only guess at what points were well- or ill-received. The hearings involve a challenge to a Community act. The two sides are clearly opposed. The judges do not express themselves as forcefully as in the United Kingdom or Ireland, and they may raise a point by which they are not convinced in order to hear counsel's response: thus judicial questioning does not necessarily betoken judicial scepticism. The hearings generally take at least a couple of hours.

414. Council Directive 93/104/EC, Working Time Directive, 1993 O.J. (L 307) 18.

415. CURIA, The Court of Justice of the European Communities—The Composition, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (last visited Mar. 20, 2007).

A hearing before the ECJ is different, notably because of the frequent absence of interactivity between counsel and bench. Many lawyers, including myself, have experienced the frustration of rising, speaking, listening to the opponents, speaking in brief rebuttal, and then receiving neither comment nor question from the judges. Interruptions are difficult because of interpreters who may be at different stages of counsel's sentence when the interruption occurs. So a bench may be silent throughout. There are reasons for this: the caseload is heavy, and the efficient conduct of judicial business becomes impossible if the proceedings are prolonged unexpectedly. However, most unfortunately, silent judges can give the impression of not being familiar with the essence of the case they will hear, as opposed to the ideal situation of coming to the hearing in order to clarify a few essential points. The range of topics will be wider than before the CFI (although the CFI gets cases—often inadmissible—on company law, fisheries, and other matters) and may touch any area of Community policy. The underlying facts may not be clear. The sheer range of topics and the sheer number of cases to be handled (because the ECJ has no way of filtering the number of cases it hears) are formidable challenges.⁴¹⁶ Naturally, both judges and counsel want the hearing to proceed under the best conditions, taking account of all the circumstances.

The *advocate* wants to respond to the judges' concerns, but must guess, for lack of clarification or specification, the points upon which to focus. So the judges may give an impression of being detached, distant, even unengaged, while the counsel may be investing much emphasis on points which are not in dispute and missing the opportunity to clarify a point which is both obscure and important. This is particularly frustrating in the case of references from national courts, where the hearing will be the first and final session before Europe's judges.

What about the *judge*? It may well be the case that some judges of the ECJ on some occasions feel that their participation in an oral hearing has been a waste of time. Counsel reads a prepared script rather too fast for linguistic comfort, counsel repeats the points already

416. See Joined Cases C-320, C-321 & C-322/90, *Telemarsicabruzzo SpA v. Circostel*, 1993 E.C.R. I-393, where the ECJ was simply unable to divine the concerns of the referring court.

made in writing, counsel seems not to be addressing the points on the minds of the bench, time does not permit questioning the advocates at length after their remarks, and courtesy does not permit interrupting counsel in midflow. So the bench metaphorically sighs and listens politely. Counsel may be unaware of the missed opportunity. The judges have spent an hour unproductively.

How can these problems be addressed with a view to making the experience more rewarding for all concerned? It is of course true that oral argument is not automatic and has to be requested. However, I submit that if oral argument is going to occur, it is appropriate for the ECJ to take steps to make it more consistently fruitful.

The ECJ currently recommends, in guidance to counsel, that counsel should not read out a prepared script, but that notes of intended remarks be supplied to the interpreters in advance: these points are not inconsistent, in that interpreters will do a better job if they know what is coming, whereas lawyers who read a written text at high speed are un-interpretable. It might be appropriate for the ECJ to change the patterns of behaviour of some pleaders by taking affirmative steps. One would be to be willing to abandon the tradition of silently listening. The supreme courts of several countries put demanding questions to counsel during oral argument. In the case of the United States Supreme Court, this is done within the twenty minutes commonly allotted to counsel. Most lawyers would rather be challenged as to the bench's concerns than be left unchallenged to argue a point that was not important. I submit that questions and interruptions, far from being a discourtesy, are a welcome means of assisting counsel to do the job of being an advocate.

There is no discourtesy in voicing a doubt to, or seeking a clarification from, someone who is paid to remedy doubts and dispel uncertainties. Indeed, a more radical approach would be to request counsel to address three or four questions specified in advance. Experience of practice in other courts seems to demonstrate that the perceived quality of justice is enhanced by making the oral hearing intellectually richer and more challenging for counsel. Any oral hearing will be enhanced, not diminished, by a frank debate between bench and bar. Naturally no judge will wish to embarrass counsel, especially young counsel making their first appearance in the European courts. On the other hand, counsel have a professional duty

to defend zealously the interests of the client. So, I respectfully submit, the judge is helping counsel to do a better job by asking that the relevant points be addressed and in a manner that is technically compatible with the ECJ's constraints of language and time. That is courteous and efficient.

Many advocates regret the ECJ's tendency to listen in silence and to pose no questions either during or after the opening speech. I respectfully submit that the ECJ should devote effort to improving the quality of its hearings. At the moment, the hearing sometimes gives the impression of being a necessity required by the court's rules, whereas with some improvements, it could be made a wholesome part of the judicial process. If there is a worry that interpretation problems could mangle the dialogue, especially in the case of languages that are not widely-spoken, there may be an alternative. Apart from not being accustomed to the indispensable constraints of speaking slowly and clearly, often it happens that counsel lack specificity as to the topics which preoccupy the ECJ. If their cause seems hopeless, better to identify its weaknesses. If the details of the national legal regime are obscure, better that counsel know the problem. At the moment of the oral hearing, the court has already examined the case, and the judges will have read the report for the hearing describing the main arguments and the main legal problems. The AG has done some, maybe ninety percent, of the work of preparing conclusions to guide the ECJ, describing the legal and factual context with a view to recommending a conclusion. The AG's opinion could perhaps be delivered to the parties two weeks *before* the argument. The text could be in draft form so that it could be adapted in light of the insights gained during the oral hearing. The AG's opinion could be a most helpful asset to counsel, even in abbreviated form.

One alternative, more radical approach would be for the Reporting Judge to inform counsel for the parties of the three or four main points as to which the ECJ desires to hear argument; another approach would be for the Reporting Judge and the AG orally to convey to counsel, for example in a telephone conference call, those matters upon which oral argument should most usefully be focused. Any of these changes would ensure that counsel will do what any advocate wishes to do: identify those matters which preoccupy the

court. They would not, I submit, require a significant departure from the rules of the ECJ.

With respect to the procedures of the CFI, counsel very warmly welcome the putting of questions and the opportunity to have a discussion between the bar and bench. Those questions demonstrate that the judges are prepared, in itself reassuring, and ensure that big issues do not get neglected and that factual matters are rigorously tested. The CFI has already decided that using AG to prepare an opinion, even in a major case, consumes more time than it confers clarity and advantage upon the judges. So what margin of manoeuvre remains? I would venture to propose consideration of three innovations. First, every colleague whom I questioned in the preparation of this Article voiced concern about the delays in cases before the CFI. They note the massive files submitted in some cases on economics, medicine, costs of production, computer software, and other technical matters. It is not a light task to digest these large cases. Accelerating the handling of certain cases means devoting fewer resources to other cases.

The courts are not able to avoid the problem of language and it appears politically too sensitive to change the linguistic traditions of the courts. Although in practice a majority of its cases arrive in French, English, or German, translation accounts for a big part of the delays. If, indeed, the challenge of being a multilingual court is not solvable by favouring certain languages, we may consider other possibilities.

One amelioration could relate to the Report for the Hearing. These used to be succinct works of art, which indicated the most important and sensitive questions. My impression is that Reports for the Hearing, in the CFI and in the ECJ, sometimes merely record the exchange of all arguments as opposed to focusing the key debates. In Danish practice, judges are permitted to give to the parties, after oral argument, an indication of the judges' current sentiments. In light of that, a high proportion of litigants either abandon their claim or reach a settlement. This may be an interesting way of reducing the number of judgments in civil domestic litigation, but not one likely to be appropriate in very important cases or in cases where a public authority confronts an issue of principle.

A more promising approach would be to shorten the judgments of the CFI. The court is the best analyst of its own processes. I invite reflection as to whether the shape of judgments might be changed and as to whether that would save significant amounts of judicial time. In some cases of great importance, a most thorough review of the relevant principles gives valuable guidance. In other cases, I wonder if it is necessary to record all the arguments for the sake of completeness. In my respectful submission, the essence of the matters to be resolved in certain cases could be addressed more succinctly in judgments. Not all arguments are of equal importance and not all need to be recorded in great detail prior to being rebutted. The ECJ has made greater progress in pursuing brevity than the CFI, I submit.

On a separate matter, it is the courts' practice to hear persons other than counsel. As noted above, they may be company employees, economists, professors, technical experts, accountants, or otherwise have relevant skills or knowledge. Several judges have said they find it helpful and instructive to receive such submissions, as well as being rapid, and say such exchanges have made a significant difference to their conclusions in particular cases. I have two suggestions. First, the CFI should give consideration to inviting conflicting experts on a crucial matter to prepare a statement recording those points as to which they agree and those points as to which they disagree. In my experience, two experts who are required to cooperate can do so fruitfully: by clearing the ground of uncertainties and agreeing on the extent of that which is in dispute, they can make the judges' job easier. A court-appointed expert (they are rare but not unknown) could usefully help, not by giving a third opinion but by facilitating consensus between the parties' experts. Second, the value of such interventions by qualified experts would be enhanced by exchanging, before the argument, details of positions held, publications written, and areas of relevant expertise. Experts may express themselves orally in court very prudently or rather boldly. They are more likely to record their views in learned articles, especially those which are peer-reviewed, as accurately as they possibly can. If the sentiments expressed orally are consistent with those published in journals, so much the better. If not, then it is appropriate to explore the inconsistencies. An expert's submissions should be valued more by the expert's academic or technical weight, not by the expert's fluency

in oral submissions. Such preparations would reduce the element of surprise and better focus the debate.

I conclude by returning to where this Article began: in a classroom at Tulane Law School. These lectures, which honour advocates and their skills, should not forget the importance of the law, of the legal process, and of the political, historical, and economic context in which law resides. The advocate's role in Luxembourg and in New Orleans is similar: simplicity, clarity, energy, and focus on the essentials.