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I. EUROPEAN COMMUNITY LAW

(1) INTRODUCTION

1. European Community law. European Community law is the body of law created by or under the treaties establishing the three European Communities — the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC or Euratom) — and a number of subsequent treaties, conventions and agreements. The United Kingdom became a member state of the Communities on 1 January 1973. Part I of the European Communities Act 1972 provides, in effect, that Community law is to be applied and enforced as part of the law of the United Kingdom.

2. 'European' law. Community law and the institutions of the European Communities are quite distinct and separate from those created under the auspices of the Council of Europe, notably the European Convention on Human Rights and the European Court and Commission of Human Rights. Both bodies of law are frequently referred to as 'European law', and there is a confusing similarity in the names of the institutions. Great care should be taken to avoid confusion since Community law forms part of the law of the United Kingdom whilst the Convention on Human Rights, although binding on the United Kingdom as a state, does not.

3. Scope of this part of the title. This part of this title contains a brief account of the origins and development of the European Communities, the Community institutions and their functions, the sources of Community law and the methods of interpretation and application, and the aspects of substantive Community law which are most likely to be important to the Scottish practitioner. Other parts of the title deal in greater detail with the law of the Community institutions and the jurisdiction of Community Courts.
Para 3

1 See paras 4 ff below.
2 See paras 29 ff below.
3 See paras 74 ff below.
4 See paras 100 ff below.
5 See paras 294 ff below.
6 See paras 184 ff below.
7 See HUMAN RIGHTS.
8 See eg AGRICULTURE; FOOD, DAIRIES AND SLAUGHTERHOUSES; FISHING AND FISHERIES; and TRADE REGULATION.

(2) THE DEVELOPMENT AND NATURE OF COMMUNITY LAW

(a) The Origins and Development of the European Communities

4. Post-war co-operation; the Council of Europe. In the aftermath of the 1939-45 war a number of bodies and institutions were set up to promote European reconciliation and economic recovery and to avoid the risk of further conflicts between the nations of Europe. The United Kingdom played an active part in this process during the early years, particularly in setting up the Council of Europe in 1949. The United Kingdom was one of the first states to ratify the European Convention on Human Rights, to recognise the right of individual petition to the Commission of Human Rights and to recognise the compulsory jurisdiction of the Court of Human Rights.

5. Economic and political co-operation; differences of approach. All the organisations of which, at that time, the United Kingdom became a member were based upon traditional methods of intergovernmental negotiation and co-operation. But there were many who believed that these traditional methods were inadequate to solve the structural problems of the European economies and provide lasting political cohesion. In particular the division of Germany and the Berlin crisis underlined the need to bind the new Federal Republic of Germany more firmly into the political structure of western Europe.

6. The Schuman Declaration. On 9 May 1950, in a statement which has come to be known as the ‘Schuman Declaration’, the Foreign Minister of France, M Robert Schuman, announced that:

'the French government proposes to take action immediately on one limited but decisive point. It proposes to place Franco-German production of coal and steel as a whole under a common higher authority within the framework of an organisation open to the participation of the other countries of Europe'.

This led to the Treaty of Paris of 18 April 1951 establishing the European Coal and Steel Community (the ‘ECSC Treaty’), of which the member states were
text may be found in Selection of Texts concerning Institutional Matters of the Community from 1950 to 1982, published by the European Parliament.

2 See para I, note 1, above.

7. The European Coal and Steel Community (ECSC). The essential feature of the European Coal and Steel Community was the creation of a new entity (‘the Community’) with international legal personality and autonomous institutions in which the member states pooled their sovereignty for limited but defined purposes. The production and distribution of coal and steel were brought under the control of a High Authority with supranational powers, including the power to make legally binding ‘decisions’ and ‘recommendations’. The other institutions of the Community were a Common Assembly with supervisory powers, representing the peoples of the states brought together in the Community; a Special Council of Ministers, whose powers were partly legislative and partly consultative, representing the member states; and a Court of Justice whose function was to ‘ensure that in the interpretation and application of this Treaty . . . the law is observed’. The ECSC Treaty was concluded for a period of fifty years.

1 ECSC Treaty, art I. The provisions regarding the institutions of the ECSC are contained in arts 7-45.

2 Ibid, art 97.

8. The Messina Conference and the Treaties of Rome (EEC and Euratom). The setting up of the ECSC was followed by abortive attempts to establish a European Defence Community and a European Political Community. In 1955 an intergovernmental conference of the ‘original six’ (in which, although sending observers, the United Kingdom again declined to take part) met at Messina under the chairmanship of M Paul-Henri Spaak. This led to the two Treaties of Rome of 25 March 1957 establishing the European Economic Community (the EEC Treaty) and the European Atomic Energy Community (the Euratom Treaty).

9. The three Communities and their political aims. The immediate purpose of the EEC was to establish a ‘common market’ for all forms of economic activity, whilst that of Euratom was to create ‘the conditions necessary for the speedy establishment and growth of nuclear industries’. But it is fundamental to an understanding of the Communities and their law to appreciate that from the outset the treaties had longer-term political aims. The Schuman Declaration referred to ‘common foundations of economic development as a first step towards a European federation’; the Preamble of the ECSC Treaty refers to ‘a broader and deeper Community among peoples long divided by bloody conflicts’ and that of the EEC Treaty to the determination of its signatories ‘to lay the foundations of an ever closer union among the peoples of Europe’. The aim of the Communities was therefore to achieve political ends through economic means. Coal and steel were at the time, in the words of the Schuman Declaration, ‘the basic elements of industrial production’, and atomic energy, then in its infancy, was seen as the principal future source of energy. It was believed that the bringing of coal, steel and atomic energy, as well as economic activity generally, under common rules and common institutions would lead to economic interdependence and, eventually, to the political integration of the mem-
10. The institutions of the Communities. The EEC and Euratom Treaties, both concluded for an unlimited period, followed the same general scheme as the ECSC Treaty in establishing a Community with legal personality and four autonomous institutions to exercise the powers conferred on the Communities by the member states. As before, the institutions included an Assembly representing the peoples, a Council representing the member states and a Court of Justice. The institution equivalent to the High Authority of the ECSC was, however, called the Commission; its powers were more limited and it was ranked after the Assembly and the Council in order of precedence.

11. Majority voting in the Council. All three treaties provided for the Council to take certain legislative decisions by majority vote—in some cases by simple majority, in others by qualified majority involving a weighting of votes according to the population size of the member states.

12. The merging of the institutions. Under a convention signed at the same time as the Treaties of Rome establishing the EEC and Euratom, a single Assembly and a single Court of Justice were established for all three Communities. In 1967, by a treaty known as the ‘Merger Treaty’, a single Council was also established and the ECSC High Authority and the EEC and Euratom Commissions were merged into a single body to be known as the Commission. Nevertheless, although they have common institutions, the three Communities remain legally distinct and the powers and functions of the institutions depend on the terms of the treaty under which they act. In particular, when acting under the ECSC Treaty, the Commission enjoys the more extensive powers conferred upon the High Authority.

13. ‘The European Community’. It is now customary, particularly when discussing the institutions, to speak of ‘the Community’ as if it were a single entity. Indeed, unless he is involved in a matter concerning coal, steel or atomic energy, the practitioner is likely to be concerned only with the law of one of the Communities, the EEC. In what follows ‘the Community’ refers, according to the context, either to the Communities as a whole or to the EEC.

14. United Kingdom application for membership; the Luxembourg Compromise. In August 1961, during the premiership of Mr Harold
machinery of the Communities to a standstill. The crisis was resolved by the so-called Luxembourg Compromise\(^1\), which, although it had no legal status and was little more than agreement to disagree, had the political effect of allowing any member state to veto any legislative proposal which it conceived to affect its ‘very important interests’. It also altered the balance between the institutions which had been intended by the EEC Treaty\(^2\).

\(^1\) For the text of the Luxembourg Compromise (or Luxembourg Accords), see Bull EC 3-1966, pp 9 ff.

\(^2\) See paras 42, 43, below.

15. United Kingdom accession. In May 1967, under the premiership of Mr Harold Wilson, the United Kingdom applied, again unsuccessfully, to join the Community, but a further application under the premiership of Mr Edward Heath was successful. A Treaty of Accession was signed in Brussels on 22 January 1972\(^1\) between the (then existing) member states and the applicant States of Denmark, Ireland, Norway and the United Kingdom. Following a ‘no’ vote in a national referendum, Norway failed subsequently to deposit instruments of ratification. On 1 January 1973 the United Kingdom, along with Denmark and Ireland, became member states subject to transitional arrangements which expired at the end of 1977.

\(^1\) Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community (Brussels, 22 January 1972; TS 18 (1979); Cmnd 7463; JO L73, 27.3.72, p 5). As to accession to the Community, see para 182 below.

16. Renegotiation and referendum. The accession of the United Kingdom was followed almost immediately by the world oil crisis and the fall of Mr Heath’s government. The government of Mr Wilson sought to ‘renegotiate’ the terms of entry. Some concessions were made which involved no amendment to the treaties. Thereafter, in the first referendum in British history\(^1\), a substantial majority voted, in effect, in favour of continued membership of the Communities.

\(^1\) This excludes the 1973 referendum in Northern Ireland on whether to remain a component part of the United Kingdom. The EEC Referendum (see the Referendum Act 1975 (c 33)) took place on 5 June 1975, four years before the referenda on the Scotland Act 1978 (c 51) and the Wales Act 1978 (c 52) (both repealed).

17. Progress and setbacks. During the late 1960s and 1970s various attempts were made to make more effective progress towards economic, monetary and political union. The Community was successful in expanding its activities into new fields, such as regional, social and environmental policy. But completion of the common market through legislation, the procedures for which were hampered by the Luxembourg Compromise, made little progress. Some steps were, however, taken to improve the workings and accountability of the institutions and to promote political and monetary co-operation.

18. Budgetary reform. In 1970 the Assembly, which had come to be known
duties and a percentage of the value added tax levied by the member states. Further budgetary and financial rearrangements, which increased the powers of the Parliament vis-à-vis the Council over the budget, were introduced in 1975.  

1 The Assembly has been called ‘the Parliament’ in normal and sometimes official usage since 1962: see Assembly Resolution of 30 March 1962 (JO 1962, p 1045). By virtue of the Single European Act, art 3(1), the name of the institution was changed formally (if obliquely) to ‘the European Parliament’.  


4 There are also minor sources of Community revenue, such as tax upon the income of Community employees, income from the sale of publications, investment income, competition fines and the sale of property, but these are insignificant in relation to the budget as a whole.  


19. Political co-operation; ‘the European Council’. The early 1970s also saw the beginnings of the process of political co-operation in the field of foreign policy, and of regular meetings of the heads of state and government of the member states known as ‘Summits’ or, since 1974, as meetings of the ‘European Council’ (not to be confused with the Council of Europe or with the Council of the Communities). The European Council increasingly assumed overall policymaking authority, although it had neither legal status in the framework of the Community nor any power to take binding decisions.  

1 The ‘constitution’ of the European Council was laid down at the Paris Summit of 1974: see Bull EC 12-1974, pp 7 ff. Its existence has now been recognised by the Single European Act: see para 30 below.  

20. The European Monetary System. In 1978 a Resolution of the European Council established the European Monetary System (EMS), including a mechanism for stabilising exchange rates (the Exchange Rate Mechanism or ERM) and a new unit of monetary value (the European Currency Unit or ECU), based upon a ‘basket’ of values of national currencies. The pound sterling is part of the basket comprising the ECU, and the United Kingdom joined the Exchange Rate Mechanism in October 1990.  


2 As at November 1990 Greece and Portugal remain outwith the Exchange Rate Mechanism.  

21. Direct elections to the Parliament. 1979 also saw the first direct elections to the European Parliament which, up to that date, had consisted of nominees of the Parliaments of the member states. Although it had, since 1973 (chiefly at the instigation of its British members), begun to call the Commission more effectively to account by parliamentary questions, it remained a consultative assembly unwilling to use the two draconian powers conferred upon it by the treaties: the power to affect the budget proposed by the Commission and
impending accession of Greece. Since direct elections the Parliament has also edged closer to using its power in relation to the Commission⁵.

1 EC Council Decision 76/787 (OJ L278, 8.10.76, p 1); Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage (OJ L278, 8.10.76, p 10).
2 ECSC Treaty, art 21(1), (2) (substituted by the Convention on Certain Institutions Common to the European Communities, art 2(2)); EEC Treaty, art 138(1), (2); Euratom Treaty, art 108(3).
3 See para 33 below.
4 See para 48 below.
5 See para 48, note 2 below.

22. The Genscher-Colombo Plan; the Solemn Declaration of Stuttgart. The Parliament also began to press for radical reform of the institutional machinery of the Community with a view inter alia to its being given an equal if not a predominant part in the process of legislation. In 1983 the European Council responded with the Solemn Declaration of Stuttgart on European Union. This was a watered-down version of the 'Genscher-Colombo Plan'¹, a proposal originally put forward in 1981 by the German and Italian governments for a 'European Act' which would progressively transform the Community into a new entity to be called 'European Union'.

1 For the texts, see (1983) 20 CML Rev 685.

23. The Draft Treaty on European Union; the Fontainebleau Summit. The Parliament in the meanwhile employed experts to draft a new proposal for comprehensive reform in the form of a 'Draft Treaty establishing the European Union'¹. This was adopted by a substantial, though not an absolute, majority of the members of the Parliament in February 1984. In June 1984 a meeting of the European Council (the Fontainebleau Summit) settled the long-running dispute about the United Kingdom's financial contribution and set up an ad hoc Committee (the Dooge or Spaak II Committee) 'to make suggestions for the improvement of the operation of European co-operation in both the Community field and that of political, or any other, co-operation'².

1 For the text of the draft treaty, see OJ C77, 19.3.84, p 33.
2 For the text, see Bull EC 6-1984, p 11.

24. The Delors Commission; the Cockfield White Paper; the Milan Summit; the Luxembourg Conference. The Dooge Committee reported in March 1985 and proposed that an intergovernmental conference be convened 'to negotiate a draft European Union Treaty . . . guided by the spirit and method of the draft Treaty voted by the European Parliament'¹. In the meanwhile, a new Commission under M Jacques Delors had taken office in January 1985. Shortly thereafter Lord Cockfield, the Commissioner with responsibility for the internal Community market, produced his White Paper² identifying the remaining barriers to trade within the Community and proposing a timetable for their elimination over the lifetime of two Commissions — that is, by the end of 1992. Despite British (and Danish and Greek) opposition, the European Council at its meeting in June 1985 (the Milan Summit) resolved to convene a conference for the purpose of implementing both the Dooge recommendations and the Cockfield White Paper³. The conference met in Luxembourg and Brussels during the autumn of 1985.
25. The Single European Act. The outcome of the conference convened as a result of the Milan Summit was a new treaty known as the 'Single European Act', which, after some delay waiting upon Irish ratification, came into force on 1 July 1987.

For the text, see OJ LI 169, 29.6.87, p.1. The Single European Act was incorporated into United Kingdom law by the European Communities (Amendment) Act 1986 (c 58).

26. Treaty amendment and political co-operation. The Single European Act formally recognises the existence of the European Council, although it assigns no powers or functions to it. It provides for a number of amendments to the founding treaties, and gives institutional form to the machinery of political co-operation in the field of foreign policy. The machinery of European Political Co-operation (EPC) is parallel to, but not part of, the institutional machinery of the Communities, each of which retains its separate legal personality. The Single European Act is so called because it deals with these two separate matters in a single treaty.

Single European Act, art 2.
Ibid, Title II (arts 4-29).
Ibid, Title III (art 30).

27. Majority voting under the Single European Act. The Single European Act has created greater opportunity for legislative decisions to be taken by qualified majority vote in the Council of Ministers and has involved the Parliament in certain aspects of the legislative process through a new 'co-operation procedure'. The Single European Act contains no reference to the Luxembourg Compromise and neither recognises, nor provides any machinery for exercise of, any right of veto. The risk of any such right being invoked has in any event been reduced by allowing a measure of 'variable geometry' in the application of Community legislation: for the first time the EEC Treaty permits Community law to be applied differently, or at different times, as between the member states. The new provisions have already eased the political process of agreement, but they may have created new difficulties for the lawyer in ascertaining the law to be applied.

See especially the Single European Act, art 6 (amending the EEC Treaty), and para 378 below. As to the Luxembourg Compromise, as to which see para 14 above and para 42 below.


See paras 111, 124, 170, below. As to the Cockfield White Paper, see para 24 above.
mission and the Court of Justice. As noted above, the Single European Act formally recognises the title ‘European Parliament’ and recognises the institutional character of the European Council. The founding treaties establish a number of other ‘organs’ such as the Court of Auditors, the Economic and Social Committee and the European Investment Bank. All of the institutions are discussed in detail later in this title.

1. As to the Parliament, see paras 31 ff, 348 ff below.
2. As to the Council, see paras 35 ff, 389 ff below.
3. As to the Commission, see paras 43 ff, 309 ff below.
4. As to the Court of Justice, see paras 56 ff, 184 ff below.
5. See para 18, note 1, and para 26 above.
6. As to these organs, see paras 71-73, 429 ff below.

(A) THE EUROPEAN COUNCIL

30. The European Council. The Single European Act provides, with regard to the European Council:

‘The European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission of the European Communities. They shall be assisted by the Ministers for Foreign Affairs and by a Member of the Commission.

The European Council shall meet at least twice a year’.

No specific powers or functions are assigned to the European Council and it is not mentioned again in the text. Whilst, by its nature, it will continue to be of supreme political importance, it plays no part in the formal process of Community law-making. It has always been accepted that the European Council could, if it so chose, constitute itself as the Council of Ministers and undertake the legislative functions assigned by the founding treaties to that Council. It has never in fact done so.

2. See paras 35 ff below.

(B) THE EUROPEAN PARLIAMENT

31. Membership of the Parliament. Each of the founding treaties provides that the Parliament

‘s shall consist of representatives of the peoples of the States brought together in the Community, [and] shall exercise the advisory and supervisory powers conferred on it by this Treaty’.

The members of the Parliament (commonly called MEPs) are elected by direct universal suffrage for a fixed five-year term. There are 518 MEPs. Their numbers are broadly proportionate to the population size of the member states with a weighting in favour of the smaller states. For this reason Scotland (as a constituent part of the United Kingdom, which elects eighty-one MEPs) is represented by only eight MEPs, whereas Denmark, Ireland and Luxembourg
2 EC Council Decision 76/787 (OJ L278, 8.10.76, p 1); Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage (OJ L278, 8.10.76, p 10).

32. Powers with respect to legislation. A number of articles of the founding treaties provide that, before acting, the Council must consult the Parliament. The opinion thus obtained is not binding upon the Council; it is advisory only. The Council was originally dismissive of this duty of consultation, but the Court of Justice held that the requirement, far from being a mere formality,

'reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'.

The consultative role of the Parliament has also been augmented in two respects. First, a 'Conciliation Procedure' agreed between the Council and the Parliament in 1975 provides that where there exists a difference of opinion between them on Community acts which have 'appreciable financial implications', the two institutions which make up the budgetary authority (the Council and the Parliament) agree to meet in order to seek a compromise. Second, the 'Co-operation Procedure' added to the EEC Treaty by the Single European Act requires the Council and the Parliament to enter into a dialogue in the enactment of legislation in certain fields of Community activity. Both procedures are discussed in detail below. The Committees of the Parliament are becoming increasingly influential in the process of legislation and now work very closely with the services of the Commission and the Council.

33. Powers with respect to the budget. Apart from the right of consultation on Community legislation, the major powers of the Parliament consist, first, in its power to force the resignation of the Commission and, second, in its powers in relation to the budget. The budgetary procedure under the treaties involves an intricate process of power sharing between the Parliament, the Council and the Commission. Ultimately, the Parliament may reject the budget outright by a two-thirds vote cast by a majority of its members, and it has now done so on four occasions, in 1980, 1982 (a supplementary budget), 1986 and 1988. It may not, however, increase the total amount of the budget beyond the 'maximum rate of increase' set by the Commission in areas of non-compulsory spending unless the alteration is agreed between the Council and the Parliament. Adoption of the budget frequently leads to public disagreement between the Parliament and the Council and has not infrequently been the subject of proceedings before the European Court of Justice.

1 Case 138/79 Roquette Frères SA v EC Council [1980] ECR 3333 at 3360, ECJ.
2 Joint Declaration of the European Parliament, the Council and the Commission (Brussels, 4 March 1975) OJ C89, 22.4.75, p I. This is sometimes called the 'concertation' procedure after its French name.
3 EEC Treaty, art 149(2) (substituted by the Single European Act, art 7).
4 See paras 371 ff below.

1 See para 48 below.
3 EEC Treaty, art 203(8) (as so substituted).
4 Ibid. art 203(9) (as so substituted).
5 See para 48 below.
motion of censure on the Commission and so, effectively, dismiss it. Second, the Commission is required to reply orally or in writing to questions put to it by the Parliament or by its members. The Commission’s replies to such questions are a valuable guide to ascertaining the legislative policy of the Commission and to its thinking on points of existing Community law. The members of the Commission and the Council are entitled to be given the opportunity to be heard by the Parliament, and the speeches made on these occasions may again be a guide to the policy aspects of law-making. Extraneous sources, such as statements in the Parliament, may be invoked as a guide to the interpretation of Community legislation, and the underlying policy objective may determine the way in which Community legislation is applied. Parliamentary answers and speeches may also be helpful in assessing the prospects of Community legislation being enacted and, if so, on what time scale.

1 See para 48 below.
2 EEC Treaty, art 140, 3rd para.
3 Ibid, art 140, 4th para.

(C) THE COUNCIL

35. Function of the Council. The Council, commonly known as the Council of Ministers, is the principal legislative organ of the Community, except under the ECSC Treaty where the Commission (formerly the High Authority) can take legislative decisions, the assent of the Council being required only for certain purposes. In terms of the Merger Treaty,

‘the Council shall consist of representatives of the Member States. Each Government shall delegate to it one of its members’.

This reflects the original intention that the Council should be a ‘college of delegates’, acting as a single autonomous Community institution in which each member state would be represented by a minister specially appointed for the purpose.

1 ECSC Treaty, art 14, and art 28 (substituted by the Act of Accession (1985), art 12).
2 Merger Treaty, art 2, 1st para.

36. Composition of the Council. In practice, the Council has become more like a traditional forum for intergovernmental negotiation, and its composition depends on the subject matter under discussion. So, for a matter relating to agriculture, the Council consists of the national Ministers of Agriculture; for a matter relating to transport, of the Ministers of Transport; and so on. The ‘senior’ body is the General Affairs Council or Council of Foreign Ministers, which takes decisions on matters of general importance, such as institutional affairs, external affairs, the preparation of European Council and Western Summit meetings and residual matters not fitting clearly into other government portfolios. Nevertheless, all decisions are taken in name of the Council as such.

37. Secretariat. The Council has its own Secretariat-General consisting of six
sought through a system under which the officials of the last two, the current
and the next two Presidencies work together².

1 Merger Treaty, art 2, 2nd para (substituted by the Act of Accession (1985), art 11), under which
the order of rotation is determined by arranging the names of the member states alphabetically in
their own languages: Belgïe/Belgique, Danmark, Deutschland, Ellas, Espanâ, France, Ireland,
Itália, Luxemburgo, Nederland, Portugal, United Kingdom. After a full six-year cycle starting
in January 1986 the order will be reversed in pairs so that the Presidency will rotate thus:
Danmark, Belgïe/Belgique; Ellas, Deutschland; France, Espanâ; etc. Thereafter the original
order will be resumed, and so on.
2 This is a mechanism which works better in theory than in practice, for the officials from the last
and next Presidency — and a fortiori the last and next but one — are invariably of lower grade than
those who took part or will take part in substantive business. Continuity is in fact more
effectively assured through the day-to-day working relationship of the Council Secretariat-
General, COREPER and the Commission.

39. COREPER. The Merger Treaty recognised the existence of the body
known as COREPER¹, which consists of the permanent representatives
(ambassadors) of the member states², who are permanently based in Brussels.
COREPER is ‘responsible for preparing the work of the Council and for
carrying out the tasks assigned to it by the Council’². In practice a number of
decisions are taken by COREPER, the formality of decision by the Council
being observed through written procedure. Much of the preparatory work of
the Council is done by committees or working groups of national civil servants.
A number of decisions of the Council are, for practical purposes, taken by
COREPER³.

1 Comité des Représentants PERmanents.
2 Merger Treaty, art 4.
3 The Council agenda is divided into ‘A points’, upon which agreement has been reached in
COREPER and only the formality of a Council decision is required, and ‘B points’, which
require debate in the Council. Some matters are dealt with by written procedure without a
meeting, whereas others are taken as ‘false B points’ where in reality there is no dispute but one or
more delegations require, for domestic political reasons, to go through the motions of recording
their points of view in the minutes.

40. Powers of the Council. As noted above¹, the powers conferred upon the
High Authority by the ECSC Treaty were considerably greater than those of
the Commission under the EEC and Euratom Treaties. Consequently, the
powers and functions of the Council under the ECSC Treaty are more limited.
The subject matter of the Euratom Treaty is more akin to that of the ECSC
Treaty, but its institutional framework is closer to that of the EEC. In what
follows the powers and functions of the Council under the EEC Treaty are
described.

1 See para 12 above.

41. Legislative procedure. The EEC Treaty normally specifies, for each
case, the form of legislation and the procedure to be followed. In general, the
Council must act ‘on a proposal from the Commission’¹ — that is, on the basis
of a text prepared by the Commission and formally submitted to the Council as
a Commission proposal². The Council may amend a Commission proposal
In certain cases the Council must also consult the Economic and Social Committee. Failure on the part of the Council to carry out the procedure specified in the treaty may be a ground for annulment of a legislative act.

1 See eg the EEC Treaty, art 49(1) (amended by the Single European Act, art 6(3)): ‘… the Council shall, acting ... on a proposal from the Commission, in co-operation with the European Parliament and after consulting the Economic and Social Committee, ...’.
2 See para 52 below.
3 EEC Treaty, art 149(1).
4 See eg ibid, art 43(2), 3rd para: ‘The Council shall, on a proposal from the Commission and after consulting the European Parliament, ...’.
5 See eg note 1 above. As to the co-operation procedure, see para 378 below.
6 See eg note 1 above.
7 See eg Case 138/79 Roquette Frères SA v EC Council [1980] ECR 3333, ECJ, and para 32 above. As to the annulment of legislative acts, see para 64 below.

42. Voting in the Council. Unless the EEC Treaty specifies otherwise, decisions of the Council may be taken by a simple majority. Where the treaty requires unanimity, abstentions are not counted. Where a decision must be taken by qualified majority, the votes of the member states are weighted by reference to their population size. As noted above, the operation of the treaty rules on voting were distorted by the Luxembourg Compromise, which was said to allow any member state to ‘veto’ a proposal which it considered to affect its ‘very important interests’. From a strictly legal point of view no right of veto has ever existed and none exists now. The so-called ‘right of veto’ is in truth merely a recognition of political reality. Where the ‘very important interests’ of a member state are genuinely at stake, it is unlikely that the Commission would refuse to amend its proposal or that a majority of member states would seek to force it through by majority vote. Between 1966 and the adoption of the Single European Act, there were few occasions when a member state invoked the ‘veto’ and was over-ridden. Since the Single European Act came into force, majority voting has again become the rule.

1 EEC Treaty, art 148(1).
2 Ibid, art 148(2) (substituted by the Act of Accession (1985), art 11), under which the United Kingdom has a weight of 10 out of the Council total of 76. Fifty-four votes are required for the Council to act by qualified majority: see the EEC Treaty, art 148(2).
3 See para 14 above.
4 See para 27 above.

(D) THE COMMISSION

(i) The Commission properly so-called

43. Autonomy of the Commission. The Commission is not, as frequently suggested, the civil service or bureaucracy of the Community. It is an autonomous political institution consisting of seventeen members ‘chosen on the grounds of their general competence and whose independence is beyond doubt’. The Commissioners must ‘be completely independent in the performance of their duties’ and ‘neither seek nor take instructions from any Government or Community official’. The EEC Treaty, art 150(1), provides for the appointment of the Commissioners by the President of the Council. The EEC Treaty, art 150(1), provides for the appointment of the Commissioners by the President of the Council.
44. Membership of the Commission. The Merger Treaty provides that

"The Commission must include at least one national of each of the Member States, but may not include more than two members having the nationality of the same State."

In practice, each of the larger member states (France, Germany, Italy, Spain and the United Kingdom) nominates two Commissioners, and the remainder one each. The convention is that one of the United Kingdom Commissioners is a politician, or a person with political experience, from the right of the political spectrum, and the other from the left. Similar conventions apply in some (but not all) other member states.

1 Merger Treaty, art 10(1).
2 For example, the two German Commissioners are usually (though not invariably) drawn from the two parties forming the government coalition in the Federal Parliament.

45. Presidency of the Commission. The Merger Treaty provides that 'the President and the six Vice-Presidents of the Commission shall be appointed from among its members'. In practice, 'the President of the Commission "emerges" by a process of leak and counter-leak, bid and counter-bid, with some regard for rotation amongst the Member States. It is not clear how far he, or anyone else, is able to influence the eventual composition of the Commission as a whole, and the ability of the members of the Commission to work together is a matter of luck as much as good management."

1 Merger Treaty, art 14, 1st para (substituted by the Act of Accession (1985), art 16).
2 European Union, 14th Report of the Select Committee on the European Communities (HL Paper (1984-85) no 226), para 67. In the case of the Commission which took office in 1989, the governments of the member states agreed to the reappointment of President Delors at an early stage, but it seems that he had little influence upon the choice of the British Commissioners (Sir Leon Brittan and Mr Bruce Millan).

46. Collegiality. In taking decisions the Commission acts by simple majority and as a 'college', there being no scope for overt opposition or dissent on the part of individual Commissioners. No legislative power may be delegated by the Commission, but administrative competences may be delegated to an individual Commissioner or, in certain cases, to other bodies, but only within a framework of very tightly defined checks and balances.

1 Merger Treaty, art 17.

47. Responsibilities of the Commissioners. Each Commissioner is assigned one or more 'portfolios' — that is, responsibility for one or more areas of Commission activity. The responsible Commissioner may, and frequently does, issue statements or make speeches on aspects of Commission policy falling within his portfolio, and such statements and speeches are a valuable guide, particularly in the field of competition policy, to the way in which the
body\textsuperscript{1}. Although the use of this power has been attempted on several occasions, it has, as yet, never been exercised\textsuperscript{2}. Individual Commissioners may be compulsorily retired by the Court of Justice on grounds of 'serious misconduct'\textsuperscript{3}.

\textsuperscript{1} EEC Treaty, art 144.
\textsuperscript{2} Each time (of some half dozen times) censure has been threatened, it has progressed a little further along the preliminary process. It seems inevitable that sooner or later a censure motion will succeed, not on a substantive policy matter where a two-thirds majority would be difficult to achieve, but on a procedural matter affecting the privileges of the Parliament.
\textsuperscript{3} Merger Treaty, art 13.

\textbf{(ii) The Services of the Commission}

\textbf{49. The Commission services.} Although, as explained above\textsuperscript{1}, the Commission consists of the seventeen Commissioners acting as a college, most of the work is carried out, and some decisions are taken in the name of the Commission, by the Commission's 'services' — that is, by the officials employed by the Commission.

\textsuperscript{1} See paras 43, 46, above.

\textbf{50. Internal organisation.} In general, the Commission's services are organised under Directorates-General (under Directors-General), which are divided into Directorates (under Directors) and further sub-divided into Divisions (under Heads of Division)\textsuperscript{1}. There are at present twenty-three Directorates-General, each of which is responsible for a general area of policy — for example External Relations (DG I), Competition (DG IV) and Agriculture (DG VI). The responsibilities of the Directorates-General do not necessarily correspond to the portfolios of the Commissioners, two or more of whom may be responsible for aspects of the work of a single Directorate-General. Conversely, one Commissioner may have responsibility for more than one portfolio. Subject to that, the Directorates-General of the Commission may be compared with United Kingdom ministries, the Commissioner being analogous to the minister and the Director-General to the permanent secretary.

\textsuperscript{1} Directorates-General are identified by Roman numerals, Directorates by capital letters, and Divisions by Arabic numerals. Thus, for example, regional aids are at present the responsibility of DG IV (Competition), Directorate E (State Aids), Division 3 (Regional Aids). The appropriate division would be referred to as DG IV E 3.

\textbf{51. The Secretariat-General and the Legal Service.} Certain of the Commission's services are outside the structure of the Directorates-General, notably the Secretariat-General and the Legal Service. The duties of the Secretariat-General correspond roughly to those of the Cabinet Office in the United Kingdom. It is responsible for the preparation of the agenda and administration of the Commission and has overall responsibility for relations between the Commission on the one hand and the other Community institutions and the member states on the other. The function of the Legal Service is to give independent legal advice to the Commission and its services. The Commission relies heavily upon its advice, especially in matters of enforcement of treaty
Legal Service is responsible for deciding how the Commission’s case should be pleaded and it jealously guards its independence in this respect. Both the Secretariat-General and the Legal Service are present as of right at all Commission meetings.

52. **Powers and functions as regards legislation.** Under the EEC Treaty it is normally the exclusive prerogative of the Commission to make proposals for legislation, in the sense that the machinery of legislation can usually be set in motion only by the submission of a proposal by the Commission to the Council. Hence the saying ‘the Commission proposes; the Council disposes’, which expresses the nature of the relationship between the two institutions in the promulgation of law: the Commission proposes but cannot of itself enact; the Council cannot enact in the absence of a Commission proposal. A proposal is developed by the responsible Directorate-General under the authority of its Commissioner and in consultation with other services of the Commission as necessary. The Directorate-General will also, whenever desirable, obtain help and advice from experts from the member states (whether from the national administration or from the private sector); from professional or trade union organisations at the European level (for example the Union des Industries de la Communauté Européenne (UNICE), and the European Trade Union Confederation (ETUC)), and from a variety of other sources. When the file is ready, the draft proposal is submitted by the responsible Commissioner or Commissioners to the Commission itself and there approved, with or without amendment. In practice, amendments at Commission level can be very extensive, reflecting the many political cross-currents which run through it. Once a proposal has been forwarded to the Council, the Commission may, and frequently does, amend it, inter alia in the light of the opinion of the Parliament. As noted above, the Council may amend the Commission’s text only by unanimous vote, so the Commission remains ‘master of the text’ virtually throughout.

1 The Commission is more open than most United Kingdom ministries to discussion of proposed or possible legislation with interested persons and bodies. Indeed, the Commission must often rely upon the expertise of interested groups in technical matters, thus creating an unusual degree of co-operation between the public authority and those who are affected by its acts and decisions. Direct contact with responsible officials is therefore often welcomed rather than shunned.

2 EEC Treaty, art 149(3) (substituted by the Single European Act, art 7). A proposal may also be amended by the Parliament if it is subject to the ‘co-operation procedure’ (see the EEC Treaty, art 149(2) (as so substituted), and para 378 below), but the Commission may re-amend under art 149(3) as long as the Council has not acted.

3 See para 41 above.

53. **Powers and functions as regards subordinate legislation.** The EEC Treaty provides that ‘the Commission shall ... exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter’¹. Whilst the Commission alone enjoys no autonomous legislative authority, it is often empowered by Council regulations to enact delegated legislation in the implementation and administration of a broad legislative programme. This is particularly so in the fields of agriculture² and of competition³. It may in the latter case make regulations and address decisions having the force of law in member states, companies and other persons and may impose fines for
54. ‘Comitology’. The EEC Treaty, as amended by the Single European Act, empowers the Council to confer upon the Commission wide-ranging powers for the implementation of acts of the Council. The Council has now adopted legislation setting out the framework of procedures for exercising these implementing powers through the establishment of committees. The theory and practice of Community committees — known as ‘comitology’ — is discussed below. It remains to be seen how far the institutions will adapt to the new structure.

1 EEC Treaty, art 145 (amended by the Single European Act, art 10).
2 EC Council Decision 87/373 (OJ L197, 18, 7, 87, p 33). This decision was the subject of an unsuccessful annulment action in the European Court of Justice: see para 64, note 3, below.
3 See para 334 below.

55. Enforcement powers and functions. Under the EEC Treaty it is the duty of the Commission to ‘ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied’. To this end the Commission is empowered to raise actions before the European Court of Justice against member states for failing in an obligation imposed by Community law.

1 EEC Treaty, art 155.
2 See ibid, art 169, and para 64 below.

(E) THE COURT OF JUSTICE

(i) The Court

56. Function and jurisdiction of the Court of Justice. Under the founding treaties the function of the Court of Justice is to

‘ensure that in the interpretation and application of this Treaty the law is observed’.

The court is not, however, a court of general jurisdiction. The nature and extent of its jurisdiction, and the conditions for its exercise, are laid down in the treaties. Further detailed provisions are found in the Statutes of the Court (one for each treaty), in the Rules of Procedure, and in a number of supplementary statutes, protocols and regulations. The most relevant of these are gathered together in Selected Instruments relating to the organisation, jurisdiction and procedure of the Court, published by the court.

1 EEC Treaty, art 164. The English version is less illustrative of the jurisdiction of the court than that of other language versions: the court ‘ensures the respect of law’ (French, Dutch, Italian, Greek, Spanish, Portuguese); it ‘safeguards the law’ (German); or it ‘must respect law and justice’
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'the Judges and Advocates-General 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'.

In practice, each member state nominates one judge, and an additional judge (to ensure an uneven number) is appointed by the five larger member states (including Spain) in rotation. Of the six Advocates-General, four are nominated by Germany, France, Italy and the United Kingdom, and the remaining two by the other member states in rotation.

1 EEC Treaty, art 165, 1st para, and art 166, 1st para (amended respectively by the Act of Accession (1985), arts 17, 18).
2 EEC Treaty, art 167, 1st para.

58. The President of the Court. The President of the Court of Justice is elected by the court itself from among the thirteen judges. Latterly the President has held that office for about four years.

1 EEC Treaty, art 167, 5th para.

59. Collegiality. The President of the Court of Justice is empowered to take interim or interlocutory decisions. Subject to that, the court always acts as a college, sitting either in plenary session (the Whole Court), for which the quorum is seven, or in Chambers of three or five judges. Certain cases must be heard by the Whole Court. At present there are four Chambers of three judges and two Chambers of five judges. A case is assigned to a Chamber or to plenary session by the president. In practice, a large number of cases which are required by the treaties to be decided in plenary session but which raise no difficult questions of law are assigned to a 'petit plenum' of seven judges. All judgments are published as the judgment of the court, and no dissenting opinions are expressed or published.

1 EEC Treaty, art 186; and Protocol on the Statute of the Court of Justice of the EEC, art 36.
3 EEC Treaty, art 165 (amended by EC Council Decision 74/584 (OJ L318, 28.11.74, p 22)).
4 Judgments are formally delivered in the language of the case (which is normally chosen by the applicant). Written and oral pleadings may take place in all nine official languages of the Community (Danish, Dutch, English, French, German, Greek, Italian, Portuguese and Spanish) or in Irish: EEC Council Regulation 1 of 15 April 1958 (JO 1958, p 385 (S Edn 1952-58, p 59)), art 1 (substituted by the Act of Accession (1985), art 26, Annex I, Pt XVII); Rules of Procedure of the Court of Justice of 1974, arts 29, 30. In practice, however, the working language of the court is French, and most judgments are drafted and agreed in French. The French text of a judgment should therefore be consulted if, as sometimes happens, the meaning of the English text is not clear.

60. The Advocates-General. The function of the Advocates-General, of whom one is assigned to each case, is 'acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it ...'. The Advocates-General are not advocates. They are, in
opinions or judgments of United Kingdom judges and, although not binding on the court, they are a source of Community law and are frequently the best guide to the reasoning of the court.

1 EEC Treaty, art 166, 2nd para. Unlike the judgment of the court (see para 59, note 4, above), opinions are always written and delivered in the native language of the Advocate-General.

61. The Court of First Instance. In order to ease the workload of the Court of Justice the Single European Act amended the founding treaties so as to empower the Council, upon a request from the Court of Justice, to attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only . . ., certain classes of action or proceeding brought by natural or legal persons. The court, known as the ‘Court of First Instance’, has now been established, with jurisdiction to deal with staff cases, certain matters involving coal and steel production governed by the ECSC Treaty, and actions for annulment of Community acts in the field of competition — areas in which a substantial amount of fact-finding and/or complex economic analysis may be required. The Court of First Instance consists of twelve judges. There is no separate office of Advocate-General, but one of the judges may be called upon to perform the task of Advocate-General. The court normally sits in chambers of three or five judges, but may sit in plenary session. It has its own rules of procedure. Decisions of the Court of First Instance are open to appeal to the Court of Justice on points of law only. If the appeal is successful, the Court of Justice quashes the decision of the Court of First Instance, and may either decide the case itself or remit it to the Court of First Instance for rehearing. Although the Court of First Instance shares the same building as the Court of Justice, as well as common services (such as translation and interpretation), the two courts have separate jurisdictions and each has its own Registrar and Registry. The Statute of the Court of Justice provides for the situation where an action is raised before the wrong court or the same issue is raised before both courts.

1 EEC Treaty, art 168a (added by the Single European Act, art 11).
2 EC Council Decision 88/591 (OJ L319, 25.11.88, p 1) (the substantially amended text of which is published in OJ C215, 21.8.89, p 1), art 1. The court assumed jurisdiction in November 1989. It is known in French as ‘le Tribunal de première instance’, and the words ‘Cour’ and ‘Tribunal’ are used to distinguish between the Court of Justice and the Court of First Instance. Thus, cases now brought before the Court of Justice are numbered ‘C . . .’; whereas those brought before the Court of First Instance are numbered ‘T . . .’.
3 Staff cases are cases where the court acts, in effect as an employment appeal tribunal with sole jurisdiction in cases brought by servants of the Community against the institution which employs them: see para 66 below.
4 See para 64 below.
5 EC Council Decision 88/591, art 3(1).
6 Ibid, art 2(1).
7 Ibid, art 2(3). Unlike that of an Advocate-General in the Court of Justice (see para 60 above), the opinion of a judge of the Court of First Instance acting as Advocate-General may be delivered in writing.
8 Ibid, art 2(4).
9 Ibid, art 11. See the Rules of Procedure of the Court of First Instance (OJ C136, 5.6.90, p 1), and paras 285 ff below.
(ii) Forms of Process

62. Forms of action before the court. The principal forms of process before the European Court of Justice (including the Court of First Instance where that court has jurisdiction) are direct actions\(^1\), references for preliminary rulings\(^2\), indirect challenges by way of the plea of illegality\(^3\), and opinions\(^4\).

1 See paras 63 ff below.
2 See para 68 below.
3 See para 69 below.
4 See para 70 below.

63. Direct actions: the action for failure to fulfil an obligation. The action for failure to fulfil an obligation is an action brought against a member state by the Commission under article 169 or by another member state under article 170 of the EEC Treaty\(^1\). In Scottish terms it is an action for declarator that the defendant member state has failed to fulfil an obligation incumbent on it under Community law. The failure in question may be one of omission — for example failure to implement a directive within the prescribed time limit or failure to implement it properly — or of commission — for example the enactment or enforcement of national legislation or the implementation of national policy in a manner incompatible with Community law. The Commission now pursues defaulting member states with vigour\(^2\). The EEC Treaty provides that:

'If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.'\(^3\)

No further sanction is provided, but no member state has, as yet, refused to comply with a judgment, although there has been considerable delay in some cases. The court has held that a declaration under article 169 that a member state has failed to fulfil an obligation under the treaty has the force of res judicata and 'is a prohibition having the full force of law on the competent national authorities against applying a national rule recognised as incompatible with the Treaty and an obligation on them to take all appropriate measures to enable Community law to be fully applied ...'\(^4\). Even if the legislative or administrative authorities of the member state fail to take appropriate action, its courts are bound if possible to enforce the court's judgment, and not the offending national rule\(^5\).

1 Enforcement by other member states under the EEC Treaty, art 170, has not proved a popular form of action, and has been carried to the stage of judgment only once: Case 141/78 France v United Kingdom [1979] ECR 2923, [1980] 1 CMLR 6, EC.
2 It did not do so in the early years. In 1977, however, the Jenkins Commission decided as a matter of policy to ensure more rigorous enforcement of Community law through the procedure under art 169 of the EEC Treaty. Since 1984 the Commission has reported annually to the Parliament on procedure and progress of enforcement proceedings: see Doc COM (84) 181 final. Nevertheless, the sheer volume of work places a heavy burden upon the staff of the Commission, which now encourages complainants to seek remedies in the national courts where appropriate. As to the enforcement of Community rights through national courts, see paras 86–88 below.
3 EEC Treaty, art 171.
of the Community institutions. Its purpose is to deprive the act in question of legal effect. Article 173 of the EEC Treaty limits the action to review of acts of the Council and Commission, but the Court of Justice has extended it to apply to acts of any Community institution which are capable of affecting legal rights or obligations. The action may be raised (1) as of right by the Commission, the Council or a member state, (2) in certain narrow circumstances, by the Parliament, and (3) subject to rigorous proof of title and interest, by an affected person or corporation. In the interests of legal certainty it is subject to a two-month time bar, which is rigorously enforced. The grounds of action are:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the treaty or of any rule of law relating to its application (including the general principles of Community law);
- misuse of powers.

The first two grounds relate to matters 'external' to the act in question: that the act ex facie is ultra vires, or that an essential procedural requirement has not been observed. The third ground relates to matters 'internal' to the act in the sense that, on examination, it can be shown to be, in whole or in part, incompatible with the requirements of Community law. The fourth ground (détournement de pouvoir in French administrative law) arises where, although the act in question is lawful in form and content, the enabling power has been exercised for a purpose other than that for which it was conferred. An act found to be unlawful upon any of these grounds is annulled by declaration of the court, and the institution which enacted it is required to take all necessary measures in order to comply with the judgment of the court. Annulment of the offending act does not deprive persons who have suffered injury as a result of it of the right to raise an action seeking damages.

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2 EEC Treaty, art 173, 1st para.

3 The Parliament may raise an action of annulment only in order to protect its privileges (prerogatives) and upon the sole ground that they are threatened: Case C-70/88 European Parliament v EC Council, judgment of 22 May 1990, EC (not yet reported). Cf the earlier judgment in Case 302/87 European Parliament v EC Council [1988] ECR 5615, EC ('Comitology'), in which the court found that the Parliament had no standing to raise an action under the EEC Treaty, art 173.


5 EEC Treaty, art 173, 3rd para. For the method of computing this and other similar time limits, see Case 152/85 Misset v EC Council [1987] ECR 223, EC, and Case T-125/89 Filtrona Española v EC Commission, judgment of 10 July 1990, CFI (not yet reported).

6 See paras 94--99 below.

7 EEC Treaty, art 173, 1st para.

8 If it is declared 'void': ibid, art 174, 1st para. However, art 174, 2nd para, empowers the court to declare the provisions of such an act operative 'if it considers this necessary'. Thus eg in Case 34/86 EC Council v European Parliament [1986] ECR 2155, [1986] 3 CMLR 94, EC, the court held the Parliament's purported adoption of the 1986 budget to be void. However, owing to the
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9 EEC Treaty, art 176, 1st para.
10 Ibid, art 176, 2nd para: see para 67 below.

65. Direct actions: the action for failure to act. In Scottish terms the action under article 175 of the EEC Treaty for failure to act is comparable to a petition to the Court of Session for an order requiring the specific performance of a statutory duty. The purpose of the action, which may be raised by any member state or another institution, is to compel one of the institutions to do something which, under Community law, it is legally bound to do. The action is admissible only if the institution has first been called upon to act. The rules as to title and interest are essentially the same as those applying to the action of annulment except that the Parliament has standing as of right, along with the Commission, the Council and the member states, to raise such an action. It is a most difficult action successfully to pursue, and this has occurred only once. An institution found by the court to have failed in a duty under the treaty is required to take the necessary measures to comply with the judgment.

Any natural or legal person may also, under the conditions laid down above, complain to the court that a Community institution has failed to address to that person any act other than a recommendation or an opinion.

66. Direct actions: staff cases. Any dispute between a Community institution and its servants falls exclusively within the jurisdiction of the two Community courts. In the years up to 1989 staff cases occupied fully one-third of the list of the Court of Justice. All staff cases must now be brought before the Court of First Instance.

67. Direct actions: the action of damages or indemnity. As it has developed so far, the action for damages or indemnity under article 178 and the second paragraph of article 215 of the EEC Treaty is essentially an action of reparation, the ground of action being that the Community or its servants have in the performance of their duties unlawfully caused loss or damage — that is, Aquilian liability. Fault (culpa) and the causal connection between fault and the loss claimed must, as in Scots law, be proved; and, as in Scots law, the foreseeability of loss or damage is an essential component of fault.
68. Reference for a preliminary ruling. Apart from direct actions of the foregoing types, the main work of the Court of Justice consists in giving preliminary rulings (in French renvoi préjudiciel — reference before judgment — which more accurately describes their nature and purpose) under article 177 of the EEC Treaty on points of Community law. This procedure is modelled upon German and Italian procedures which enable any court to obtain from the Constitutional Court a ruling on a question of constitutional law arising in the course of other proceedings. The Community procedure enables any national court or tribunal to refer to the Court of Justice any question on the interpretation of Community law or the validity of a Community act which arises in the course of proceedings before it. Any national court or tribunal may request such a ruling when it considers that such a ruling is necessary to enable it to give judgment. The ruling of the Court of Justice is then transmitted back to the referring national court, which must apply it in disposing of the dispute before it. The discretion to seek a ruling rests with the national court alone; it is under no obligation to do so at the request of one or even all of the parties. There are two exceptions. First, when a question of interpretation or validity is at issue before a national court or tribunal from which there is no appeal, that court or tribunal must refer the question to the Court of Justice. Second, the Court of Justice alone has jurisdiction to declare a Community act invalid.


2 EEC Treaty, art 177, 1st para.
3 Ibid, art 177, 2nd para. There has been some debate as to the courts or tribunals to which this obligation applies. Does it apply only to courts against whose decision there is never a right of recourse, or does it apply also to courts against whose decision there is no (or there is unlikely to be) right of recourse in the instant case? Lord Denning MR clearly favoured the former approach (H P Bulmer Ltd v J Bollinger SA [1974] Ch 401 at 420, [1974] 2 All ER 1226 at 1233, CA); the European Court of Justice the latter (Case 6/64 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199, [1988] 3 CMLR 57, ECJ). The dangers inherent in the former approach are well illustrated by the English case of Magnavision NV/SA v General Optical Council (No 2) [1987] 2 CMLR 262, DC. See further Case 283/81 CILFIT Srl v Ministry of Health [1982] ECR 3415, [1983] 1 CMLR 472, ECJ, cited in para 79 below.

5 Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199, [1988] 3 CMLR 57, ECJ. A (lower) court with no obligation to refer the question may always decide that the allegedly invalid act is not invalid and must therefore be applied. It cannot of its own jurisdiction decide that the act is invalid and refuse to apply it.

69. Indirect challenge: the plea of illegality. It is very difficult for a natural or legal person (other than the addressee of an individual act) to claim the title and interest necessary to raise an action of annulment of an act of a Community institution. This incapacity is mitigated to an extent by the ancillary 'plea of illegality' under article 184 of the EEC Treaty. Article 184 does not constitute an independent cause of action. Rather it permits any person to challenge the legality of an act of an institution without time limit where the act is 'in issue' in an action properly before the Court of Justice. The plea of illegality is invoked
unlawful parent act. If the plea is successful, the individual act, deprived of its legal foundation, is annulled, rendering the general measure 'inapplicable' to the person concerned 4. In effect, article 184 provides a defence against the application by a Community institution of an unlawful 'legislative' act directly to an individual, company or firm. Taken together, article 184 and the jurisdiction of the Court of Justice under article 177 5 to determine the validity of a Community act when applied by a national authority mitigate the restricted right of natural and legal persons directly to seek judicial review of Community acts.

1 See para 64, note 4, above.
3 EEC Treaty, art 184.
5 See para 68 above.

70. Opinions. The Court of Justice may be called upon to give an opinion on the compatibility with the EEC Treaty of a proposed agreement between the Community and a third state or group of states or an international organisation 1, and may have jurisdiction conferred on it by a convention such as the Judgments Convention 2.

1 EEC Treaty, art 228(1), 2nd para.
2 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; EC 46 (1978); Cmd 7395; OJ C97, 11.4.83, p 2), incorporated into Scots law by the Civil Jurisdiction and Judgments Act 1982 (c 27), and in force from 1 January 1987.

(F) OTHER ORGANS

71. The Court of Auditors. The Treaty amending Certain Financial Provisions (1975) established an independent Court of Auditors 1 whose function is to 'examine the accounts of all revenue and expenditure of the Community' 2 and, in particular, to 'examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound' 3. The Court of Auditors consists now of twelve members 4, and sits in Luxembourg.

1 EEC Treaty, art 206(1) (substituted by the Treaty amending Certain Financial Provisions (Brussels, 22 July 1975), art 15). The French name is Cour des Comptes. The nearest United Kingdom equivalent is the National Audit Office. See further paras 449 ff below.
3 EEC Treaty, art 206a(2) (as so added).
4 Ibid, art 206(2) (as substituted (see note 1 above), and amended by the Act of Accession (1985), art 20).

72. The Economic and Social Committee. The EEC Treaty provides for the appointment of an Economic and Social Committee with advisory status 1. In terms of the treaty it is to consist of 'representatives of the various categories
the Committee shall take account of the need to ensure adequate representation of the various categories of economic and social activity. It consists now of 188 members drawn from the member states by fixed allocation. In practice, they are appointed and work in three Groups. Group I represents employers, Group II employees, and Group III others.

1 EEC Treaty, art 193, 1st para. See generally arts 193–198. The committee also acts under the Euratom Treaty (see arts 165–170), but not under the ECSC Treaty. See further paras 430 ff. below.
2 EEC Treaty, art 193, 2nd para.
3 Ibid, art 195(1), 2nd para.

73. The European Investment Bank. The EEC Treaty established the European Investment Bank with legal personality. Its task is to contribute, by having recourse to the capital market and utilizing its own resources, to the balanced and steady development of the common market in the interest of the Community. For this purpose the Bank shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of projects and undertakings or for developing fresh activities . . . .

1 EEC Treaty, art 129, 1st para. See further paras 443 ff below.
2 Ibid, art 130.

(c) The Sources and Methods of Community Law

74. Sources. The sources of Community law can be categorised as follows:
(1) (a) the founding treaties establishing the Communities;
(b) the Treaties of Accession providing for the accession of new member states;
(c) protocols, conventions and Acts ancillary to the founding treaties and the Treaties of Accession;
(d) treaties amplifying, modifying or amending the founding treaties, such as the Merger Treaty and the Single European Act;
(e) conventions between the member states concluded within the context of the founding treaties, such as the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968);
(f) agreements between the Community and third countries, such as the Lomé Convention between the Community and the ACP (African, Caribbean and Pacific) countries, and the Free Trade Agreements between the Community and the EFTA countries;
(g) other international agreements to which the Community as such is a
(3) the jurisprudence (case law) of the Court of Justice in so far as it states or applies principles of Community law or provides an interpretation of legislative provisions in cases involving different parties;

(4) ‘general principles of law’ derived from the constitutions and laws of the member states or from international agreements, such as the European Convention on Human Rights9, to which the member states, but not the Community, are party.

1 A guide to Community source materials may be found at the end of this title: see paras 437 ff below.

2 Le the Treaty of Paris establishing the ECSC (the ECSC Treaty) and the two Treaties of Rome establishing the EEC and Euratom (the EEC Treaty and the Euratom Treaty).

3 Le the Treaties of Accession of 1972 (TS18 (1979); Cmd 7463) (Denmark, Ireland, Norway and the United Kingdom — though Norway subsequently failed to ratify), of 1979 (EC18 (1979); Cmd 7650) (Greece), and of 1985 (TS27 (1985); Cmd 9614) (Spain and Portugal). Each treaty includes an Act of Accession which sets out the conditions for accession.

4 As to the Merger Treaty (the Treaty establishing a Single Council and a Single Commission of the European Communities), see para 12 above.

5 As to the Single European Act, see paras 25–28 above.


8 Le Agreements between the EEC and (1) Austria (Brussels, 22 July 1972; JO L300, 31.12.72, p 2 (S Edn 1972 (31 December) (1) p 4)); (2) Iceland (Brussels, 22 July 1972; JO L301, 31.12.72, p 2 (S Edn 1972 (31 December) (2) p 4)); (3) Finland (Brussels, 5 October 1973; JO L328, 28.11.73, p 2); (4) Norway (Brussels, 14 May 1973; OJ L171, 27.6.73, p 2); (5) Sweden (Brussels, 22 July 1972; JO L300, 31.12.72, p 97 (S Edn 1972 (31 December (1)), p 99)); and (6) Switzerland (Brussels, 22 July 1972; JO L300, 31.12.72, p 189 (S Edn 1972 (31 December) (1) p 191)).


75. Ancillary sources. Although they are not, strictly speaking, ‘sources’ of law, the following may be invoked as offering guidance to the interpretation and application of Community law:

(1) learned opinion (academic writings; respected reports such as those of the House of Lords Select Committee on the European Communities);

(2) answers to parliamentary questions in the European Parliament;

(3) notices and other statements of policy issued by the Commission.

76. Methods of interpretation. It is sometimes suggested that the approach of the Court of Justice to the interpretation of the sources of Community law is in some sense ‘continental’ and unlike that of the common law. This is true to the extent that the Court of Justice does not adopt the literal method of interpretation adopted by the United Kingdom courts in construing statutes, and that judgments of the Court of Justice do not constitute binding precedents the effect of which can only be altered by legislation. In other respects the suggestion is based on a misconception as to the nature of the sources of Community law.

77. Contractual nature of the treaties. The treaties themselves are not legislative acts but international agreements. They state the purposes for which they have been entered into and provide provisions aiming at achieving those purposes.
the rule of international law that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [including its preamble and annexes] in their context and in the light of its object and purpose'1.

1 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmd 7964), art 31: see PUBLIC INTERNATIONAL LAW, vol 19, para 622.

78. Context of interpretation. The approach of the Court of Justice to the interpretation of legislative and other binding acts of the Community institutions is equally understandable in its context. In the first place, the powers of the institutions are derived from the treaties and can only be exercised in a manner compatible with the treaties. In the second place, the treaties prescribe that legislative and other binding acts of the institutions must 'state the reasons on which they are based and ... refer to any proposals or opinions which were required to be obtained ...'1. In that context, it would be inappropriate to construe the dispositive provisions of such acts as if they were sections of a United Kingdom statute.

1 EEC Treaty, art 190. Failure to state sufficient reasons may constitute an infringement of the treaty (ie of art 190) within the meaning of art 173 (see para 64 above) and thereby render the measure liable to annulment: see eg Case 158/80 Rewe Handelsgesellschaft Nord mbH v Hauptzollamt Kiel [1981] ECR 1805, [1982] 1 CMLR 449, EC (the Butter Boats Case). It is necessary not only to state reasons but also to state the correct reasons; thus a Council act which cites as its basis in the EEC Treaty the wrong article of the treaty may be annulled: see eg Case 45/86 EC Commission v EC Council [1987] ECR 1493, [1988] 2 CMLR 131, EC, and Case 131/86 United Kingdom v EC Council [1988] ECR 905, [1988] 2 CMLR 364, EC (Battery Hens). This has acquired particular significance since the entry into force of the Single European Act, prior to which most legislation harmonising national rules required Council unanimity (under art 100 or art 235 of the EEC Treaty), but since which majority voting is possible in some areas (see art 100a, and paras 124, 151, below). The legal basis of a Commission proposal has therefore become a major issue as it determines the voting procedures to be followed in the Council.

79. The autonomy of Community law. Community law is an autonomous legal system drawing inspiration from, but independent of, the legal systems of the member states1. The consequences for the interpretation of Community law were summarised by the Court of Justice as follows:

'To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

It must also be borne in mind, even when the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various member states.

Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'1.

court of last resort to refer a question of Community law where ‘the Community provision in question has already been interpreted by the Court’\(^1\). This implies that a previous decision on the interpretation of a specific legislative provision can, for practical purposes, be treated as binding. Further, the court frequently makes reference to ‘the constant [or well-established] case law of the Court’, implying that a series of decisions in the same sense on an issue of principle can be treated as binding authority.

\(^1\) Case 283/81 CILFIT Srl v Ministry of Health [1982] ECR 3415, [1983] I CMLR 472, ECJ.

### (d) The Nature and Enforcement of Community Law

#### 81. Direct effect

In an early case\(^1\) it was argued that, whilst the EEC Treaty conferred rights and obligations on the signatory states, it did not confer rights on individuals which they could enforce in the national courts. The Court of Justice disagreed; it said that:

> ‘the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only 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’\(^2\).

Hence the doctrine of ‘direct effect’, which holds that Community law is of itself capable of creating rights and obligations enforceable before national courts. As developed and refined by the Court of Justice\(^3\), the doctrine applies where a treaty or legislative provision:

1. is clear and concise;
2. is unconditional and unqualified and is not subject to the taking of any further measures on the part of the member states or of the Community;
3. leaves no substantial discretion to the member states or the Community institutions.

In such circumstances, where the provision in question creates rights or obligations, it is said to have direct effect and may be enforced before the appropriate national court or tribunal. The Court of Justice has held that a number of articles of the EEC Treaty have direct effect\(^4\). It has also held directly effective a great mass of Community legislation implementing those treaty rights and obligations which are not themselves directly effective. In terms of the European Communities Act 1972, rights created by directly effective Community law are ‘enforceable Community rights’ in the United Kingdom\(^5\).

\(^1\) Case 283/81 CILFIT Srl v Ministry of Health [1982] ECR 3415, [1983] I CMLR 472, ECJ.

\(^2\) [1963] ECR 1 at 23, [1963] I CMLR 105 at 129; ‘Heritage’ is an inadequate translation of *patrimoine*. ‘Patrimonial rights’ would be a more meaningful translation to a Scots lawyer.

\(^3\) See eg Case 148/78 Pubblico Ministero v Ratti [1979] ECR 1629 at 1651, [1980] I CMLR 96 at 102, ECJ, per Advocate-General Reischl.

\(^4\) Ie the EEC Treaty, art 9 (in conjunction with other articles); arts 12, 13(2), 16, 30, 31; art 32, 1st para and 2nd para (first sentence); art 34, art 36 (last sentence); arts 17(1), (2), 48, 52, 53; art 59, 1st para; art 60, 3rd para; arts 85, 86; art 90(1) (in conjunction with art 86); art 93(2); art 95, 1st and
'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and 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, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.'

This application of the doctrine of international law that *pacta sunt servanda* is known as the doctrine of the primacy (or supremacy) of Community law. It is a doctrine which is well known in federal systems where, in the event of conflict, the law of the federal authority must have precedence over the law of the regional authorities.


83. The status of Community law generally. The doctrine of direct effect seeks to ensure that rights accruing from Community law are available to the individual, whilst the doctrine of primacy ensures that such rights will take precedence over any conflicting national rule or practice. So far as Community law is concerned, the obligations imposed upon national courts and tribunals are clear, and are best stated in a 1978 judgment of the Court of Justice:

'[I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures ... render automatically inapplicable any conflicting provisions of current national law ... [and] preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions ... [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.'

1 As to direct effect, see para 81 above.
2 As to primacy, see para 82 above.

84. The status of Community law in the United Kingdom. There are, at least in theory, difficulties in applying the doctrine of primacy in some member states. In the United Kingdom the difficulty stems from the doctrine of parliamentary supremacy, by which there are no entrenched laws and the provisions of an Act of Parliament will impliedly repeal any prior rules of law (which might include Community rules) with which they are inconsistent. United Kingdom courts are therefore required to wrestle with the proper construction, breadth and application of section 2 of the European Communities Act 1972 (c 68). The constitutional issue has not yet been fully addressed by Scottish courts, but Lord Denning said that the English courts will give effect to rights and obligations arising from Community law even over subsequent legislation unless Parlia-
the House of Lords held that it is legitimate and proper to adopt a purposive construction of United Kingdom legislation the intention of which is to give effect to a Community right, and was thus able to find no inconsistency between the Community law and United Kingdom law 4. This approach was reaffirmed in a subsequent Scottish case in the House of Lords, where additional words were read into an implementing regulation in order to give full effect to the Community directive which it was intended to implement 5. Recently Lord Bridge in the House of Lords said that the effect of section 2(4) of the European Communities Act 1972 is that an Act of Parliament is to be read 'as if a section were incorporated in [the Act] which in terms enacted that the provisions ... were to be without prejudice to ... directly enforceable Community rights ...'. Whether or not United Kingdom courts would give effect to a United Kingdom statute which intentionally and expressly repudiated the EEC Treaty is, and is likely to remain, an open question 7.

1. Macarthys Ltd v Smith [1979] 3 All ER 325 at 329, [1979] 3 CMLR 44 at 47, CA.
6. R v Secretary of State for Transport, ex parte Factorume Ltd [1989] 3 CMLR 1 at 10, HL.
7. As to the constitutional issues generally, see CONSTITUTIONAL LAW, vol 5, paras 320ff, 354.

85. Enforcement of Community rights before the Court of Justice. The EEC Treaty provides for judicial review of acts of the Community institutions. Any act of any institution having legal effects may be annulled by the Court of Justice in an action under article 173 8 or may be declared invalid in a preliminary ruling delivered by the Court of Justice under article 177 2. The theoretical difference between annulment and declaration of invalidity stems from the difference in the nature of the jurisdiction conferred upon the court. However, since the court has found that a declaration of invalidity in a preliminary ruling has effect erga omnes 3, the practical difference between invalidity and annulment lies in the means by which the issue is raised rather than in the legal outcome. The treaty also provides an action for damages for loss caused by the Community institutions 4. In all these actions the Court of Justice has (or shares with the Court of First Instance) exclusive jurisdiction.

1. As to the EEC Treaty, art 173, see para 64 above.
2. As to ibid, art 177, see para 68 above.
3. Case 66/80 International Chemical Corp SpA v Amministrazione delle Finanze dello Stato [1981] ECR 1191, [1983] 2 CMLR 593, EC]. Care should be taken with this judgment, as the English text (in both ECR and CMLR) is misleading on this point.
4. See the EEC Treaty, art 178 and art 215, 2nd para, and para 67 above.

86. Enforcement of Community rights before national courts. Since the local day-to-day administration of most substantive aspects of Community law lies with national authorities, and since in accordance with the doctrine of direct effect Community law gives rise to rights and obligations enforceable by national courts ('enforceable Community rights') 5, the vigilance of the individ-
European Community Law
Para 88

87. Methods of enforcement. Where a person wishes to enforce Community rights against national authorities before a national court, the basic principle is that, in the absence of relevant Community rules, national remedies should be used. In Scotland therefore a pursuer would normally seek judicial review, interdict or damages as appropriate. No rule of national law—for example the rule that an interdict cannot be granted against the Crown, or the rule that the courts cannot set aside an Act of Parliament—can be invoked to prevent the grant of a remedy for the effective protection of a Community right. In criminal proceedings a defence may be raised that the national measure creating the offence is contrary to Community law; if the national measure is found to be so, a conviction is incompatible with Community law. Where a party can establish an enforceable Community right against another person or persons, which arises most frequently under the Community rules on competition, the national court must enforce that right. However, an individual seeking enforcement against national authorities or against another person of a Community right where that right is not directly effective has no remedy under national law; the only available remedy is enforcement proceedings brought by the Commission under article 169 of the EEC Treaty.

1 See eg Brown v Secretary of State for Scotland 1989 SLT 402 at 405, [1988] 2 CMLR 835, OH.
2 See eg Argyll Group plc v Distillers Co plc 1987 SLT 514, [1986] 1 CMLR 764, OH.
3 R v Secretary of State for Transport, ex parte Factoritame [1989] 3 CMLR 1, HL.
4 Case C-213/89 R v Secretary of State for Transport, ex parte Factoritame Ltd, judgment of 19 June 1990, ECJ (not yet reported).
7 For the competition rules, see paras 155-165 below.
8 For the EEC Treaty, art 169, see para 63 above.

88. Damages against public authorities. A further question is whether an action may be raised against public authorities in the member states for damages for breach of Community obligations. In France the Conseil d'Etat has upheld an award of damages against the state for harm caused to a company by actions of the government found subsequently to have been contrary to Community law. In England the House of Lords strongly expressed the view that a breach of article 86 of the EEC Treaty by a body such as the Milk Marketing Board will give rise to liability in tort for breach of statutory duty. In another case the English Court of Appeal held that an action of damages will not lie against a minister of the Crown for breach of Community law unless there is an abuse of power; but that decision was appealed to the House of Lords and was settled before judgment. The matter has not yet arisen for decision in Scotland. It is suggested that, having (in common with the civil law systems) a developed general law of obligations, Scots law need not characterise a breach of Community law as a breach of statutory duty or as an innominate tort. It is sufficient to give rise to a right of action that there be a breach of a legal obligation...
(e) The Forms and Application of Community Legislation

89. Forms of Community legislation under the ECSC Treaty. Article 14 of the ECSC Treaty provides:

'In order to carry out the tasks assigned to it the High Authority shall, in accordance with the provisions of this Treaty, take decisions, make recommendations or deliver opinions.

Decisions shall be binding in their entirety.

Recommendations shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed.

Opinions shall have no binding force'.

1 ECSC Treaty, art 14, 1st–4th paras (emphasis added).

90. Forms of Community legislation under the EEC and Euratom Treaties. Article 189 of the EEC Treaty and article 161 of the Euratom Treaty provide, in identical terms:

'In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force'.

1 EEC Treaty, art 189, 1st–5th paras; Euratom Treaty, art 161, 1st–5th paras (emphasis added).

91. Comparison of terminology. It will be seen that decisions and recommendations under the ECSC Treaty correspond to regulations and directives respectively under the EEC and Euratom Treaties and that these, together with decisions under the latter treaties, are the only types of act which were intended to have binding legal effect. A distinction is drawn between acts which have immediate legal effect (decisions under the ECSC Treaty; regulations and decisions under the EEC and Euratom Treaties) and those which require further implementing measures (recommendations under the ECSC Treaty and directives under the EEC and Euratom Treaties).
93. Application of legislation. The following points in relation to the application of Community legislation should be noted:

First, the statement that a regulation 'shall be binding in its entirety and directly applicable in all Member States' means that a regulation has immediate legislative effect without any necessity for implementing legislation or other action in the member states. It does not mean that it has 'direct effect'. A provision of a regulation may or may not have direct effect, depending on whether it fulfils the criteria mentioned above. On the other hand, the fact that a regulation is 'directly applicable' and requires no implementing legislation means that a member state may not even attempt to pass implementing legislation which might have the consequence of limiting or altering its effects: the regulation must be enforced as it stands.

Second, the provisions relating to the jurisdiction of the court in actions of annulment mean that the lawfulness of regulations may be impugned only by a Community institution or by an identifiable person or a closed class of persons directly and specifically affected by it. However, even if a regulation has not been the subject of an action of annulment, its lawfulness may still be called in question either before the Court of Justice or the Court of First Instance if and when applied by a subsequent Community act to natural and legal persons in an individual manner, or before a national court if and when it is applied by national authorities. The national court may, in the latter case, request the Court of Justice to consider the validity of the regulation in a preliminary ruling. The jurisdiction of the court to invalidate a Community act through the ancillary plea of illegality or in the course of a preliminary ruling is not subject to time bar.

Third, although a directive requires implementation by the member states, its provisions may have direct effect and be directly enforceable in the national courts. This will be so where its provisions impose upon member states a clear, precise and unconditional obligation but a member state has failed to implement the directive (or has failed to do so properly) within the prescribed time limit. However, the Court of Justice has held that in such circumstances a directive can of itself be enforced only against the defaulting member state or an 'emanation' of the state (‘vertical direct effect’) and not against another person in private litigation (‘horizontal direct effect’).

Fourth, directives are frequently given effect in the United Kingdom by amendment of relevant statutes. Their effect is therefore not always perceived by the practitioner as an aspect of Community law. It may nevertheless be necessary to consider the original directive as a guide to the interpretation of the statute or where it is suggested that the directive has been incorrectly or incompletely implemented. The notes in Current Law Statutes will normally identify British enactments which have been ‘inspired’ by Community directives. The Explanatory Memorandum annexed to statutory instruments and Orders in Council will identify any Community measure on which such subordinate legislation is based.

Finally, the list of measures in article 189 of the EEC Treaty is not exhaustive. The Community institutions may create legally binding acts — and therefore acts susceptible of annulment or invalidation — by means other than those mentioned in article 189, for example through a resolution or by entering into a treaty with third states.
f) The General Principles of Community Law

94. General principles of law. As in other legal systems, it has been necessary for the Court of Justice to develop legal principles of general application to assist in applying the law and to temper its rigidities. The authority to do so derives from the direction in article 164 of the EEC Treaty that the court is to 'ensure that... the law is observed'. In theory, the principles developed by the court are 'general principles common to the law of the member states', the shared tradition of the member states being seen as a source of law prior to the written law of the treaty. In practice, the court has not generally felt bound to limit itself to principles found in the law of all the member states and has adopted those which seemed best adapted to the Community system. Since much of Community law is administrative law, some of the most important principles have been taken from the highly developed administrative law of France and Germany. Latterly, the court has adopted some of the principles of natural justice as developed in the United Kingdom.

The most important principles referred to by the court can be grouped into four categories: (1) fundamental human rights; (2) legal certainty; (3) proportionality; and (4) equality of treatment or non-discrimination. They are discussed in the paragraphs which follow.

95. The principle of fundamental human rights. The Court of Justice has held that 'respect for fundamental human rights forms an integral part of the general principles of law protected by the Court of Justice'. Such rights find their sources in 'the constitutional traditions common to the Member States' and 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' — the most important of the latter being of course the European Convention on Human Rights. Respect for fundamental rights constitutes a constraint both upon the legislative and executive action of the Community institutions and upon that of the authorities of the member states when they are applying, or are obliged to apply, Community rights and obligations.

Principles related to fundamental rights, and aligned with British concepts of natural justice, which are particularly applicable where the Community institutions deal with administrative matters, will be illustrated in the following paragraphs.
(2) **Non bis in idem:** no-one should be tried twice for the same offence; and no-one should be subjected to two penalties for the same offence.  

(3) **The right to legal assistance:** a person is entitled to the help of a lawyer, and to be represented by a lawyer when his legal rights are in issue. This principle leads in turn to two further principles: (a) that the lawyer is entitled to see all the relevant documents; and (b) that communications between lawyer and client are confidential.  

(4) **Protection from self-incrimination:** whilst a person may be required to supply information to a Community authority, even if the information supplied would incriminate him, he cannot be compelled to answer leading questions the answers to which would constitute an admission of unlawful activity, that being for the Community authority to establish.  

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3 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). It should be noted that there was at one time some difficulty (probably more theoretical than actual) in reconciling Community law with recognition of human rights as enshrined in the Basic Law of Germany and in this convention. The problem appears finally to have been resolved now that all member states have ratified the convention, recognised the right of individual petition to the Commission of Human Rights and accepted the compulsory jurisdiction of the European Court of Human Rights. The Preamble to the Single European Act refers expressly to 'the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter ...'. It is thought that the Court of Justice will therefore feel able unreservedly to refer to these as sources of Community law: see eg Case 222/86 Union Nationale des Entraineurs et Cadres Techniques Professionnels du Football v Heylens [1989] 1 CMLR 901, ECJ. See also Case 249/86 Germany v EC Commission, judgment of 18 May 1989, ECJ (not yet reported), where the court refers simply to its own case law 'reaffirmed in the preamble to the Single European Act'.  
6 See eg Case 115/80 Demont v EC Commission [1981] ECR 3147, ECJ.  
8 See Case 374/87 Orkem v EC Commission, judgment of 18 October 1989, ECJ (not yet reported).  

96. **The principle of legal certainty.** The application of the law to a specific situation must be predictable. From this general principle of legal certainty spring other principles:  

(1) **Respect for acquired rights:** a legal right, once acquired, should not be withdrawn. Read within the more general principle of legal certainty, this leads in turn to the principle that a case must be judged in the light of the law as it stood at the time of the events in question, not as it may have been changed or developed subsequently.  

(2) **Non-retroactivity:** a law cannot be applied to a person who could not have known of its existence. In particular, criminal offences cannot be declared...
(5) Prescription: an act cannot be declared unlawful, a penalty exacted or performance of an obligation required after an excessive lapse of time.

3 See eg Case 63/83 R v Kirk [1984] ECR 2689, [1984] 3 CMLR 522, ECJ.
4 See eg Case 112/77 Töpfer & Co GmbH v EC Commission [1978] ECR 1019, ECJ. For a summary of the circumstances where the principle can be applied to assurances given by a Community authority, see Case T-123/89 Chomel v EC Commission, judgment of 27 March 1990, CH (not yet reported).

97. The principle of proportionality. The principle of proportionality requires that the means employed must be proportionate to the end to be achieved. So, derogations from a general rule may only be such as are necessary to achieve the purpose of the derogation; penalties must be proportionate to the gravity of the offence; and a heavy burden should not be imposed upon some people in order to achieve something that is only of small importance to others.


98. The principle of equality of treatment or non-discrimination. Equal situations must be treated equally or, otherwise expressed, similar situations should not be treated differently unless there is an objective justification for treating them differently. The corollary of this principle is that unequal situations can, and sometimes should, be treated differently. This principle has two specific treaty applications: (1) that men and women should be treated equally; and (2) that a member state may not deny to its own nationals rights which the EEC Treaty requires it to accord to the nationals of other member states.


99. Applicability of the general principles. Although the Court of Justice has referred to all these principles in decided cases, it has in some instances held that the principle in question did not apply to the facts of the case before it. Also, in relation to the confidentiality of communications between lawyer and client,
(3) THE STRUCTURE AND MAIN PROVISIONS OF THE EEC TREATY

(a) Introduction

100. The structure of the EEC Treaty. The EEC Treaty consists of a Preamble and six Parts. The substantive treaty law of which the practitioner should be aware is nearly all contained in Parts One and Two and Title I of Part Three. He should also be aware, however, that in keeping with its general approach, the European Court of Justice will have recourse to the treaty as a whole, including the Preamble, as an aid to interpretation of a particular point of Community law. Further, new Community rules of substantive law may emerge in legislation adopted pursuant to other parts of the treaty.

1 Part One of the EEC Treaty ('Principles') comprises arts 1–8c; Part Two ('Foundations of the Community') comprises arts 9–84; and Part Three ('Policy of the Community'), Title I ('Common rules') comprises arts 85–102.

2 See paras 76–80 above.

101. Principles. Part One of the EEC Treaty is entitled 'Principles'. The German text used the word *Grundsätze* (ground rules), which expresses more clearly what is implied — namely, that this Part of the treaty sets out the basic principles in the light of which the remainder of the treaty is to be interpreted and applied.

1 The EEC Treaty, Part One, comprises arts 1–8c: see paras 104 ff below.

102. Foundations of the Community. Part Two of the EEC Treaty is entitled 'Foundations of the Community' and is divided into four Titles. Title I deals with free movement of goods, of which agricultural products (Title II) are a special category. Title III deals with free movement of persons, services and capital, and Title IV with transport — a special category of services. In essence, all forms of economic activity are seen as comprehended within four categories: goods, persons, services and capital — hence the expression 'the four freedoms'.

1 The EEC Treaty, Part Two, comprises arts 9–84.

2 Ibid, Part Two, Title I, comprises arts 9–37: see paras 113 ff below.

3 Ibid, Part Two, Title II, comprises arts 38–47: see para 130 below.

4 Ibid, Part Two, Title III, comprises arts 48–73: see paras 131 ff below.

5 Ibid, Part Two, Title IV, comprises arts 74–84: see para 150 below.


1 The EEC Treaty, Part Three, Title I, comprises arts 85–102.

2 Ibid, Part Three, Title I, Chapter 1, comprises arts 85–94: see paras 152 ff below.

3 Ibid, Part Three, Title I, Chapter 2, comprises arts 95–99: see paras 168–170 below.

4 Ibid, Part Three, Title I, Chapter 3, comprises arts 100–102.
steel and nuclear energy. Apart from its long-term political and economic objectives, its immediate purpose is to create a 'common market' for all forms of economic activity. The common market is not defined in the treaty. In order to achieve a common market, it is necessary to remove, not only such obvious barriers to free trade as tariffs and quotas, but also hidden 'non-tariff' barriers. These may consist in obvious protectionist devices designed to protect domestic producers and suppliers against foreign competition, or they may simply be the result of the fact that independent states have pursued their own policies, and developed their own laws and administrative practices, in a different way from each other. Thus differences in the law of trade marks and patents may be an obstacle to the free flow of manufactured goods between countries, and differences in professional organisation and rules of conduct may be an obstacle to a professional person practising his profession in another country. Individuals and companies, too, may erect their own barriers to the free flow of goods or services where, for example, they agree not to compete with each other in the same market. The treaty seeks to remove all these forms of barrier.

1 See, however, the definition of 'internal market' in para 111 below.

105. Creation of the common market. The EEC Treaty sets out the means by which the Community is to achieve the removal of all these barriers:

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; . . .

(b) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; . . .

(f) the institution of a system ensuring that competition in the common market is not distorted; . . .

(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market 1.

1 EEC Treaty, art 3(a), (c), (f), (h).

106. Third countries. A necessary corollary of the establishment of a single internal market is 'the establishment of a common customs tariff and a common commercial policy towards third countries' 1. This is essential to ensure that one member state cannot distort the structure of the internal market by granting more favourable trading conditions to third countries than other member states.

1 EEC Treaty, art 3(b).

107. Application of article 3. The statement of these fundamental economic objectives in article 3 of the EEC Treaty is one of the 'Principles' which govern the interpretation and application of the remainder, and the Court of Justice frequently refers to article 3 in this context.

108. General obligations of member states. Article 5 of the EEC Treaty imposes on the member states two general obligations, one positive, the other negative. There is a positive obligation on the member states to:

'take all appropriate measures, whether general or particular, to ensure fulfilment of
'abstain from any measure which could jeopardise the attainment of the objectives of
the Treaty'.

These fundamental legal obligations are frequently referred to by the Court of
Justice when assessing the lawfulness of the conduct of member states.

1 EEC Treaty, art 5, 1st para.
2 Ibid, art 5, 2nd para.

109. Non-discrimination. Article 7 of the EEC Treaty states one of the most
important principles affecting the rights of individuals:

'Within the scope of application of this Treaty, and without prejudice to any special
provisions contained therein, any discrimination on grounds of nationality shall be
prohibited'.

The effect, for practical purposes, is to require the member states to be 'national­
ity-blind' and to ensure equality of treatment for economic purposes of the
citizens of all the Community countries. This includes the general obligation
not to practise 'reverse discrimination' by treating the member state's own
nationals less favourably than it is required to treat the nationals of others.

1 EEC Treaty, art 7, 1st para.
2 See para 98 above. For examples, see Case 71/76 Thierry v Conseil de l'ordre des avocats à la Cour de
Mayras; Case 125/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, [1979] 2
CMLR 357, ECJ. See, however, paras 115, 130 below.

110. The transitional period. Article 8 of the EEC Treaty laid down the
timetable for implementation of the treaty with a 'transitional period' of twelve
years ending on 31 December 1969. The timetable was not adhered to, but
article 8(7) was important for the interpretation of some later treaty articles. It
provides that:

'Save for the exceptions or derogations provided for in this Treaty, the expiry of the
transitional period shall constitute the latest date by which all the rules laid down
must enter into force and all measures required for establishing the common market
must be implemented'.

This enabled the Court of Justice to hold that, where a rule in the treaty
prescribes a result to be achieved by the end of the transitional period, that rule
must have direct effect and be enforceable in the courts once the transitional
period has expired.

1 EEC Treaty, art 8(1).
2 See e.g Case 2/74 Reyners v Belgium [1974] ECR 631, [1974] 2 CMLR 305, ECJ, and Case 41/76

III. The internal market. The common market was not in fact fully com­
pleted by the end of the transitional period. In 1985 Lord Cockfield, then
Commissioner with responsibility for the internal market, produced his White
Paper, which identified the remaining barriers to trade within the Community,
grouping them into three principal categories: physical barriers, technical bar­
rriers and fiscal barriers. The White Paper then set out some three hundred items
of legislation which, it argued, would be both necessary and sufficient to
for its completion by 31 December 1992\(^3\), and specific legislative procedures to assist in achieving it\(^4\). A Declaration annexed to the Single European Act states that the setting of this date is not to have any ‘automatic legal effect’\(^5\).

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2. EEC Treaty, art 8a, and para (added by the Single European Act, art 13).
3. See the EEC Treaty, art 8a, 1st para (as so added).
4. See ibid, arts 100a, 100b (added by the Single European Act, arts 18, 19), and para 151 below.

(c) The Foundations of the Community; The Four Freedoms

112. General. As noted above, the aim of the EEC Treaty is to establish a free and open common market for all forms of economic activity. These are dealt with in Part Two\(^1\) under four general headings — goods, persons, services and capital — and these four categories are intended to comprehend all possible forms of economic activity. The lines of demarcation between them are not always clear-cut, persons and services being dealt with under three headings — ‘Workers’, ‘Right of establishment’ and ‘Services’\(^2\), while the rules on movement of money, although comprehended within the general category of ‘capital’\(^3\), depend on whether the movement is a self-standing investment or connected with the movement of goods, persons or services.

Two further preliminary points should be noted. First, the treaty frequently speaks of ‘effects’. Thus, in dealing with the free movement of goods, the treaty envisages the prohibition of ‘customs duties on imports and exports and of all charges having equivalent effect’\(^4\). The significance of this is that the treaty considers the substance of what is done — what actually happens and what is its practical effect — rather than the form or method by which it is done.

Second, in general the treaty imposes obligations on member states. But a state may act through a variety of organs, notably the legislature, the executive and the judiciary, and the way in which a particular result is achieved may vary from state to state. Thus, one state may require action by the legislature or the judiciary where another can achieve the same result through administrative action. The treaty is not concerned with the methods adopted, provided the required result is achieved. An important consequence is that action by the courts — for example the enforcement of a contract or the granting of an interdict for the protection of property rights — may, in treaty terms, be action by the member state and involve a breach of the treaty. Similarly, action by a regional or district authority, or by a public body such as the Scottish Development Agency, may constitute a breach of the treaty by the United Kingdom\(^5\).

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1. The EEC Treaty, Pt Two, comprises arts 9–84.
2. Ibid, Pt Two, Title III, Chapters 1–3 (arts 48–51, 52–58, 59–66).
3. Ibid, Pt Two, Title III, Chapter 4 (arts 67–73).
4. Ibid, art 9(1).
(A) FREE MOVEMENT OF GOODS; THE CUSTOMS UNION

II3. Goods. The EEC Treaty provides that ‘the Community shall be based upon a customs union which shall cover all trade in goods . . .’. ‘Goods’ is not defined in the treaty, but the Court of Justice has said that ‘by goods . . . there must be understood products which can be valued in money and which are capable as such of forming the subject of commercial transactions’. The category is not limited to consumer goods, articles of general use or ordinary merchandise, and may extend, to cite but one example, to coins which were but are no longer legal tender.

II4. Territory of the customs union. The territory of the customs union is set out in the EEC Treaty and in legislation. Generally the customs union incorporates the territory, the territorial sea and the air space of all the member states, including those European territories for whose external relations a member state is responsible. It does not include the Faeroe Islands, the Canary Islands, the sovereign base areas in Cyprus or, now, Greenland. It does include the Channel Islands and the Isle of Man and most of the French overseas départements.

II5. Free circulation. Article 9 of the EEC Treaty applies the treaty provisions relating to the elimination of customs duties and quantitative restrictions between member states to products originating in Member States and to products coming from third countries which are in free circulation in Member States. Article 10 provides that:

‘Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.’

In other words, goods coming from third countries are in free circulation after being subject to further control by the customs authorities. Once in
II6. **Tariff and non-tariff barriers.** The EEC Treaty goes on to deal with the market in goods under two chapters: the Customs Union, and the Elimination of Quantitative Restrictions between Member States. The chapter on the Customs Union¹ deals with restrictions on the movement of goods created by the requirement to pay money when goods cross a frontier. The second chapter deals with ‘non-tariff barriers’² — restrictions on the volume of goods which may cross a frontier. The most obvious of such restrictions are import and export quotas, but restrictions may also arise in relation to a single article or category of articles. For example, export may be prohibited on the ground that the article forms part of the national heritage; import or sale may be prohibited on the ground that the article does not meet national safety standards or (to an extent³) that it bears a trade mark protected in the receiving country.

¹ EEC Treaty, Pt Two, Title I, Chapter I (arts 12-29).
² Ibid, Pt Two, Title I, Chapter 2 (arts 30-37).
³ See para 127 below.

II7. **Essence of the customs union.** The effect of the chapter on the customs union¹ is, first, to abolish all customs and other charges on the movement of goods across the internal frontiers of the Community, and second, to establish a Common Customs Tariff for goods entering the Community through any member state from a third country.

¹ EEC Treaty, Pt Two, Title I, Chapter I (arts 12-29).

II8. **Customs duties.** Articles 12 and 13 of the EEC Treaty provide for the elimination of all customs duties and charges having equivalent effect in trade within the Community. This prohibition is rigorously applied, and has been directly effective since 1969 (the end of the transitional period)¹. A charge having equivalent effect to a customs duty has been defined by the Court of Justice as:

> "any pecuniary charge, however small, and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, ... even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product"².

¹ See eg Case 33/70 SACE SpA v Italian Ministry for Finance [1970] ECR 1213, [1971] CMLR 123, EC. As to the transitional period, see para 110 above.

II9. **Customs duties and internal taxation.** A charge upon imported goods which appears to have an effect equivalent to a customs duty may in fact be a
120. Quantitative restrictions. The chapter of the EEC Treaty on quantitative restrictions addresses the elimination of all import and export quotas. To achieve their elimination, articles 30 and 34 lay down a general prohibition against 'quantitative restrictions' on imports and exports 'and all measures having equivalent effect'. Measures having equivalent effect to a quantitative restriction have been defined by the Court of Justice as:

'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.

The prohibition is directly effective.

1 EEC Treaty, Pt Two, Title I, Chapter 2 (arts 30–37).
2 Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837 at 852, [1974] 2 CMLR 436 at 453, 454, ECJ. This formula has been used repeatedly by the court.

121. Derogation. Article 36 of the EEC Treaty provides for a limited category of permissible restrictions, but these are permissible only so long as they do not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. In other words, the restriction must genuinely have been imposed for one of the permitted purposes and not as a disguised protectionist device. The permissible restrictions are those which are justified on grounds of:

- public morality, public policy or public security;
- the protection of health and life of humans, animals or plants;
- the protection of national treasures possessing artistic, historic or archeological value; or
- the protection of industrial or commercial property (for example patents and trade marks).

2 EEC Treaty, art 36.

122. Application of article 36. Since article 36 of the EEC Treaty constitutes an exception to the general prohibition against restrictions on trade, the Court of Justice has said that it must be interpreted restrictively. It is not enough for a member state to assert that it considers a restriction to be justified on one of the specified grounds. The restriction must be 'objectively justified' — that is, capable of standing up to independent scrutiny — and it must be proportionate. Thus, a member state may prevent the importation of goods alleged to endanger public morality only if it has adopted measures which effectively inhibit domestic production of the goods in question. If there is Community legislation which harmonises national law in, and comprehensively occupies, a particular field, a member state may no longer invoke article 36.

2 See para 97 above.
difference of national standards (such as marketing rules) which do not discriminate overtly against imports but do, nevertheless, have the effect of impeding the intra-Community flow of goods. In the Cassis de Dijon judgment the court laid down the general principle that where a product has been lawfully produced and marketed in one member state, it must be allowed to be traded freely throughout the Community. However, the court recognised that in certain cases, so long as national standards have not been harmonised, member states must be allowed to take measures to ensure 'the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial dealings and the defence of the consumer'. These so-called 'mandatory requirements' (a clumsy translation of the French exigences impératives) form a further, but temporary, exception to the general prohibition on restrictions on trade in goods. This temporary exception to the strict treaty rules is sometimes called the 'rule of reason'. Its effect is that the application of a national law or practice which impedes the intra-Community flow of goods, but does not discriminate overtly against imports as compared with domestic products, will be permissible provided that objectively it satisfies one or more of the criteria mentioned by the court. If it does so, article 30 of the EEC Treaty offers no remedy to its disruptive effects upon trade, which can be resolved only by the harmonisation of the national rules and standards at issue.

1 Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649, [1979] 3 CMLR 494, ECJ.
2 The list is exemplificative, not exhaustive, and the doctrine has been applied also to the protection of cultural matters (Joined Cases 60, 61/84 Cinéthèque SA v Fédération national des cinémas français [1985] ECR 2605, [1986] 1 CMLR 365, ECJ) and of the environment (Case 302/86 EC Commission v Denmark [1989] 1 CMLR 619, ECJ (Returnable Bottles)).
3 A national law or practice which is discriminatory cannot rely upon the mandatory requirements, and is permissible only by recourse to the far narrower grounds of article 36 of the EEC Treaty (for which see para 121 above): see Case 113/80 EC Commission v Ireland [1981] ECR 1625, [1982] 1 CMLR 706, ECJ (Irish Souvenirs), reaffirmed in Case 434/85 Allen and Hanburys Ltd v Generics (UK) Ltd [1988] ECR 1245, [1988] 1 CMLR 701, ECJ.

124. Harmonisation of technical barriers to trade. Article 100 of the EEC Treaty empowers the Council to adopt directives in order to harmonise (or 'approximate') national rules so as to eliminate 'technical barriers to trade'. However, harmonisation of national laws under article 100 requires unanimity in the Council, and has proved over the years to be a painstaking and time-consuming task. The Cockfield White Paper identified remaining technical barriers as a serious obstacle to the completion of the internal market. The Single European Act therefore amended the treaty to enable the Council, by qualified majority vote, to adopt harmonisation measures necessary for the completion of the internal market. In order to protect 'major needs' (exigences importantes) such as those of article 36 or protection of the environment or the working environment, it authorised member states with higher standards than the norm to maintain those standards following harmonisation legislation and exclude goods which do not meet them. The treaty provides for a special procedure by which the Commission or a member state can apply directly to the Court of Justice where it considers that another member state is making improper use of these powers of derogation. It also now envisages the complete harmonisation by these procedures of all remaining national rules and standards by the end of...
European Community Law

Para 128

3 EEC Treaty, arts 100a, 100b (added by the Single European Act, arts 18, 19).
4 This is understood to have been the intention of the EEC Treaty, art 100a(4), which was inserted in the Single European Act at the last stage of negotiation. Its effect is controversial and, as yet, uncertain.
5 EEC Treaty, art 100a(4), 3rd para (added by the Single European Act, art 18).
6 EEC Treaty, art 8a (added by the Single European Act, art 13), referring to arts 100a, 100b.

125. Reverse discrimination. The application of the doctrines of Cassis de Dijon\(^1\) may have the effect of discriminating against home producers. Thus, where national rules regulate the production of goods in a manner more stringent than under those which obtain in other member states, yet Cassis de Dijon requires that goods produced in those other member states must have access to the home market, the home producer will be operating at a cost or other comparative disadvantage. It was argued that this offends the general Community principle of non-discrimination\(^2\), so that a home producer ought to be exempt from the national rules in so far as competitors may do so whilst retaining access to the market. However the Court of Justice held that in this context reverse discrimination is not prohibited by the EEC Treaty and national rules remain applicable to national producers\(^3\).

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1 Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649, [1979] 3 CMLR 494, ECJ.
2 See para 98 above.

126. Exports. Article 34 of the EEC Treaty prohibits quantitative restrictions and all measures having equivalent effect on exports\(^1\). However, in contradistinction to the substantive law which has developed in the application of article 30, the Court of Justice has indicated that national measures which impede exports will fall foul of article 34 only if they are discriminatory in nature\(^2\).

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1 EEC Treaty, art 34(1).

127. Industrial property rights. One area in which the application of national rules might fragment the Community market is the protection of industrial and intellectual property rights. National rules governing property ownership are safeguarded by article 222 of the EEC Treaty, whilst article 36 specifically mentions the protection of industrial or commercial property as a permitted exception to articles 30 and 34. However, the Court of Justice has held that whilst the existence of such rights is not affected by the treaty, their exercise may infringe the rules on free movement\(^1\). The question therefore is not whether it is compatible with the treaty for a member state to confer exclusive rights upon inventors or traders, but whether the holders of such rights should be able to enforce them in such a way as to restrict the free movement of goods. As a general rule, the right is said to be ‘exhausted’ once a product has been put into free circulation anywhere within the Community by the holder of the right or with his consent\(^1\). Enforcement of an industrial property right in pursuance of an agreement or concerted practice with another private party may also infringe the Community rules on competition\(^2\).

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1 See eg Case 78/70 Deutsche Grammophon Gesellschaft mbH v Metro SR-Griffinsdorfer GmbH & Co.
character’. This must be read together with later provisions relating to the application of the competition rules to public undertakings, to state aids and to discriminatory internal taxation.

1 See the EEC Treaty, arts 90, 92, 93, 95.

129. The Common Customs Tariff. The attainment of a customs union requires the creation of a common tariff wall for goods from third countries entering the Community through any member state. The EEC Treaty provided for the progressive establishment of the Common Customs Tariff, which was fully implemented by 1969. The tariff is amended from time to time by the Council and published annually in the Official Journal in updated and consolidated form. Since its coming into force, member states are no longer competent to impose any autonomous duties upon goods from third states.

1 EEC Treaty, Pt Two, Title I, Chapter 1, Section 2 (arts 18-29); EC Council Regulation 950/68 (L172, 22.7.68, p 1 (S Edn 1968 (i) p 275), now repealed and replaced by a system called the Integrated Community Tariff ('Taric'): see EC Council Regulation 2658/87 (OJ L256, 7.9.87, p 1).


130. Agriculture. There are special and very complex rules governing trade in agricultural products. Agriculture is an important part of the economy of some member states and enjoyed subsidies in all of them. Further, in the aftermath of the 1939-45 war self-sufficiency in food was regarded as an important and praiseworthy objective. The EEC Treaty therefore made special provisions for agriculture in two ways: first, by making special rules for the trade in agricultural products, and second, by providing for the development of a Common Agricultural Policy. The workings of the Common Agricultural Policy are beyond the scope of this title, and are dealt with more fully elsewhere in this work. Nevertheless, three general points should be noted:

First, 'agricultural products' is defined as 'the products of the soil, of stock-farming and of fisheries and products of first-stage processing directly related to these products'. The Fisheries Policy is therefore an aspect of agricultural policy.

Second, the treaty provides that 'save as otherwise provided . . . , the rules laid down for the establishment of the common market shall apply to agricultural products'.

Third, the treaty provides for the organisation of agricultural markets in three possible ways, one of which is the creation of 'a European market organisation'. This is the method which has in fact been adopted, and detailed systems have been developed for the organisation of the market in beef, mutton, cereals, and so on. The rules may differ according to the market concerned. The Court of Justice has held, first, that products not specified in Annex II, or products for which the Community has failed to create a market organisation, are subject to the application of the normal rules of the treaty, and secondly, that the creation of a market organisation has the effect of depriving the member states of the power to take any measure which might undermine or create exceptions to it.
The distinction between persons and services. The EEC Treaty deals with the three categories, persons, services and capital, in four chapters. 'Capital' is dealt with in a chapter of its own, but persons and services are treated under three heads: 'Workers' — the right of wage and salary earners to work in other countries; 'Right of establishment' — the right of self-employed individuals ('natural persons') and companies or firms ('legal persons') to establish a permanent base in another country; and 'Services' — the right to cross frontiers in order to provide or receive services without establishing a permanent base in the country where the service is provided or received. This distinction is confusing, since 'free movement of persons' would normally be taken to imply the right of individuals to move from one country to another, whether temporarily or permanently, while 'free movement of services' would be taken to imply the more abstract concept of an unrestricted right to provide or receive services in any part of the Community. But that is not how the treaty approaches the matter.

Clarification of the distinction. The simplest way of explaining the distinction is to consider first the chapters on Workers and Services and then the chapter on Right of establishment. The chapter on Workers is concerned with enabling individual wage or salary earners to find employment within the context of the economic operations of actual or potential employers. It is not concerned with the freedom of employers to conduct those operations. The chapter on Services applies only where the provider of services is established, or is deemed to be established, in a member state other than that of the recipient. With those two specific exceptions, all other aspects of free movement of persons and services (in their usual meanings) are governed by the chapter on Right of establishment.

1 EEC Treaty, Pt Two, Title III, Chapter 4 (arts 67–73): see para 149 below.
2 Ibid, Pt Two, Title III, Chapter 1 (arts 48–51).
3 Ibid, Pt Two, Title III, Chapter 2 (arts 52–58).
4 Ibid, Pt Two, Title III, Chapter 3 (arts 59–66).
Justice tends to treat them as particular aspects of a uniform system and, unless concerned with the specific rules of a particular chapter, to construe them in the same manner. Essentially, the EEC Treaty is concerned with three types of obstacle to the free movement of persons and services: (1) restrictions on grounds of nationality; (2) other unjustifiably restrictive restrictions which can be abolished altogether; and (3) restrictions which cannot be abolished altogether but whose adverse effect upon free movement can be removed by harmonisation or co-ordinating legislation. Most of the basic rules now have direct effect and can be enforced in national courts without further legislation.

134. Beneficiaries. The primary beneficiaries of the EEC Treaty provisions on free movement of persons and services are nationals of a member state and companies or firms formed in accordance with the laws of a member state. A ‘Community national’ is a national of any member state as defined by the nationality laws of that state. Channel Islanders and Manxmen are excluded, but the rights enjoyed by them in the United Kingdom remain unaffected. The treaty provides for extension of the chapter on Services to nationals of third countries. Nationals of third countries may also benefit from treaty rights conferred upon their spouses, parents and children.

135. Meaning of ‘workers’. The term ‘workers’ is not defined in the EEC Treaty or in Community legislation. Nevertheless, the Court of Justice has said that the term is a concept in Community law with a Community law meaning. It covers anyone pursuing or wishing to pursue effective and genuine employment, even if part time, so long as the work is not so infinitesimal as to be disregarded as such, and even if reimbursement is at a rate lower than a minimum guaranteed wage or is non-existent, as in the case of a religious community. In what follows the word ‘workers’ is used in its treaty sense.

136. Entry and residence. The EEC Treaty gives workers the right to move freely within the territory of the member states in order to accept ‘offers of employment actually made’, to stay within a member state for the purpose of employment and to remain there after employment. The chapters on Right of establishment and Services are less explicit but might well have been construed by the Court of Justice as involving the same rights mutatis mutandis. In fact, detailed rules — which apply to workers and also to natural persons seeking to establish themselves or to provide or receive services — are laid down by
of employment has been taken to include the right to enter a member state in order to look for employment. Thus even if unemployed and without an offer of work, a worker is entitled to enter a member state so long as he genuinely intends to look for work for what is generally understood to be a minimum period of three months. Once exercising a right to work, right of establishment or right to provide or receive services in a member state, a Community national is entitled to reside there. Workers and natural persons established in a member state are entitled to a residence permit, valid for at least five years and automatically renewable. A natural person seeking to provide or receive ‘services’ has a right of residence during the duration of the ‘service’. If the period is greater than three months he is entitled to a certificate of ‘right of abode’ as proof of his right of residence. Both workers and natural persons established in a member state other than their own have a right of residence there (the ‘right to remain’) following completion of their employment or activities, for example upon retirement.

1 EEC Treaty, art 48(3). These rules are directly effective: see Case 48/75 Royer [1976] ECR 497, [1976] 2 CMLR 614, ECJ.
2 EEC Treaty, Pt Two, Title III, Chapters 2, 3 (arts 52–58, 59–66).
3 See ibid, arts 52–54, 59, 62, 63, 65. As to the direct effect of some of these articles, see para 143 below.
7 EC Council Directive 68/360, arts 4–7 (workers); EC Council Directive 73/148, art 4(1) (establishment). In order to obtain the residence permit, a worker may be required to produce his identity card or passport and confirmation of his employment; and a person exercising the right of establishment may be required to produce his identity card or passport and proof that he is to be considered as exercising the right. 8 EC Council Directive 73/148, art 4(2).

137. Equal treatment. The EEC Treaty lays down a general prohibition against discrimination based upon nationality, the purpose of which is to ensure ‘equal treatment’ of the nationals of all the member states (including companies and firms) wherever they may be within the Community and whatever the nature of the economic activity they wish to pursue. So any rule which makes it more difficult for a Community national to find work, establish himself or provide ‘services’ in another Community country is prima facie contrary to the treaty. This includes not only rules created by legislation, but administrative rules and practices and rules made by autonomous professional bodies. The treaty is here concerned with substance rather than form — with the practical effect of the rule, rather than its theoretical nature or source. For workers, the right to equal treatment is amplified in a regulation of 1968, which seeks to guarantee the right to take up employment with the same priority as home nationals. Thus any form of limitation of employment to home nationals, recruitment procedures designed specifically for them, restrictive advertising and eligibility limited to conditions which other Community nationals cannot reasonably meet (for example registration at a local employment office) are
138. Families. Clearly persons entitled to free movement throughout the Community would be less inclined to exercise that freedom if they were unable to bring their families with them. Community legislation therefore provides that the rules on entry and residence for persons seeking to work, to establish themselves or to provide or receive a service apply, irrespective of nationality, also to:

(i) their spouses, and their own and their spouses' descendants who are either under twenty-one years of age or are dependants; and

(ii) dependent relatives in the ascending and descending line of both spouses.

A 'spouse' exists only by virtue of a lawfully contracted marriage. Admission of other family members who do not fall within head (i) or head (ii), but who are dependent upon the holder of the primary right, must be 'facilitated' (workers) or 'favoured' (establishment and services). The meaning of these terms has not yet been explored. Family members of a worker or of a person exercising a right of establishment in another member state have the right to work there (an important advantage for family members who are not Community nationals), even if the family member seeks to work in a controlled profession, provided he has qualifications entitled to recognition. They also have a right to education and to vocational training in the member state upon an equal footing with home nationals.

139. Social security. Persons entitled to free movement throughout the Community would be disinclined to exercise that freedom if by so doing they jeopardised any accrued entitlement to social security benefits — the most obvious example being pension rights. A regulation of 1971 therefore seeks to co-ordinate existing national social security schemes so as to ensure fair entitlement to Community nationals exercising their rights under the EEC Treaty. Although the regulation covers social security of 'workers', it applies not only to workers within the meaning of article 48 of the treaty but also to anyone affiliated with a social security scheme, thus including those exercising a right of establishment and, where appropriate, those providing or receiving 'services'. Their families, as defined by the applicable national legislation, also fall within the ambit of the regulation. Generally, the regulation provides for the

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1 EEC Treaty, art 7 and, more specifically in this area, art 48(2).
2 Ibid, arts 3, 4.
3 Ibid, arts 7–9. As to the breadth of 'social advantages', see Case 59/85 Netherlands v Reed [1986] ECR 1283, [1987] 2 CMLR 448, ECJ (right of residence of worker's alien 'common law' partner if the right is enjoyed by such partners of home nationals).
4 EEC Treaty, Pt Two, Title III, Chapters 2, 3 (arts 52–58, 59–66).
5 See paras 143–147 below.
In determining entitlement to benefits, recourse should be had to the detailed rules of each chapter of the regulation. Generally, the Court of Justice has interpreted the regulation generously, in a manner designed to maximise the benefits to which claimants are entitled. In this context it has been said that the treaty looks at people as human beings, with the ordinary concerns of human beings, rather than simply as economic factors of production.

1. EC Council Regulation 1408/71 (JO L149, 5.7.71, p1 (S Edn 1971 (II) p416)), implemented by EC Council Regulation 574/72 (JO L74, 27.3.72, p1 (S Edn 1972 (I) p159)). Both are updated and consolidated by EC Council Regulation 2001/83 (OJ L230, 22.8.83, p6), although the primary instrument remains (and is still called) Regulation 1408/71.

2. See para 135 above.


4. EC Council Regulation 1408/71, art 1(f) (as so substituted).

5. As to the determination of the competent state (and therefore the applicable schemes and legislation), see ibid, arts 12-15 (as so substituted).


140. Matters purely internal to a member state. A person can claim the rights of the EEC Treaty only by seeking genuinely to exercise them. If a given case contains no element beyond the purely national, then Community rules will not apply. The question rarely arises in the provision or receipt of 'services', which as a general rule necessarily involves trans-frontier movement, but it commonly arises in the context of the rights of workers or the right of establishment. In the absence of an 'appreciable Community element' a matter is purely internal to a member state and will be governed by its rules without reference to Community law. Thus the defendant in proceedings for breach of an English binding-over order cannot claim the right of free movement as a worker if she has never been outside the United Kingdom. A person cannot claim a Community right of equal treatment from his own national authorities on the ground that he may some day seek work elsewhere in the Community. Non-Community nationals cannot claim right of residence with families who have never resided outside their own member state. A firm cannot evade planning rules in its own member state on the ground that they infringe Community rules on right of establishment.


141. Restrictions. The EEC Treaty recognises certain permissible restrictions on the free movement of persons. They are:

(1) restrictions on entry or movement justified on grounds of public policy, public security or public health; and
they may invoke it to deny a Community national the exercise of his treaty rights only if he constitutes ‘a genuine and sufficiently serious threat to public policy’.

A member state may not justify restrictions upon entry and residence of a Community national upon grounds of public policy where that state has adopted no measures effectively to combat the activities alleged to offend public policy among its own nationals. Nor may it take a broad view of what constitutes ‘public service’ or ‘public authority’ and so restrict employment in those fields to home nationals. The court has held that such restriction is justified only in areas in which the exercise of powers is conferred by public law for the purpose of safeguarding the particular interests of the state.

1 EEC Treaty, arts 48(3), 56(1).
2 Ibid, art 48(4), art 55, 1st para.
3 See paras 121-123 above.
4 Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219 at 1231, [1976] 1 CMLR 140 at 155, ECJ. The original French (une menace reelle et suffisamment grave pour l'ordre public) is clearer. It also illustrates the linguistic and cultural difficulties in Community law, ‘public policy’ is a very unsatisfactory translation of ordre public (öffentliche Ordnung; openbare orde; ordine pubblico), all of which have well-established and specific meanings in the national law of other member states which are not rendered by ‘public policy’.

142. Directive 64/221. In 1964 the Council adopted a directive which lays down procedural safeguards to ensure that member states cannot abuse their right to restrict the EEC Treaty rights of persons upon grounds of public policy, public security and public health. They may not be invoked to serve economic ends. The only diseases or disabilities which may justify refusal of entry upon grounds of public health (they cannot justify expulsion once lawfully resident) are listed, and member states cannot unilaterally add to that list. Measures adopted upon grounds of public policy or security must be based exclusively upon an individual’s personal conduct. A criminal record is not in itself sufficient justification for exclusion or expulsion. A person has the right to be informed of the reasons for refusal of entry or expulsion, the right to appeal the decision in a court of law and the right, except in cases of urgency, to remain for at least fifteen days (entry) or a month (expulsion). The directive is itself directly effective. In the United Kingdom its provisions are incorporated into the Immigration Rules.

2 EEC Council Directive 64/221 originally applied only to workers and their families. It was extended to apply also to persons seeking a right of establishment or to provide or receive services and their families: EC Council Directive 75/35 (OJ L14, 20.1.75, p 14).
5 Ibid, art 3(1).
6 Ibid, art 3(2).
7 Ibid, art 6.
8 Ibid, art 8. The requirement of a right of appeal will not apply where an order of expulsion
143. Right of establishment. As mentioned above, the EEC Treaty deals separately with two readily identifiable situations — free movement of workers and freedom to provide or receive 'services' — leaving all other aspects to be covered by the chapter on Right of establishment. The treaty does not define the term 'establishment'. In very broad terms, it implies the right of domiciliation in another member state, but its scope extends to 'the setting up of agencies, branches or subsidiaries'. The framers of the treaty realised that in this area obstacles may exist (other than those connected with public policy, public security, public health and the public service) which are justified, as in the case of goods, by considerations related to the protection of the consumer or of the public generally. Obvious examples are the rules regulating the professions and certain trades, and those regulating banking, insurance and similar activities. The chapter on Right of establishment therefore has four distinct elements or phases:

1. the prohibition of any new restrictions on the right of establishment of nationals of other member states ('the standstill');
2. the abolition of any restriction on the ground of nationality by the end of the transitional period and prohibition of any such restriction after that date;
3. the implementation of a 'General Programme for the abolition of existing restrictions on freedom of establishment within the Community';
4. the adoption of directives 'in order to make it easier for persons to take up and pursue activities as self-employed persons'.

Phases (1) and (2) relate solely to the removal of restrictions which amount, directly or indirectly, to restrictions on grounds of nationality. The relevant provisions are directly effective. They extend to a duty to recognise the professional qualifications of a national of another member state if those qualifications would be recognised when held by a home national and a prohibition of restrictions the effect of which is to discriminate against nationals of other member states. Generally the Court of Justice has emphasised that the treaty is concerned with 'activities' — what people actually do and the practical restrictions on whether or how they may do it — rather than the way in which member states happen to organise the performance of those activities. This is particularly important when considering professional activities, since the lines of demarcation between different professions in the member states are not always the same.

Phases (3) and (4) require the Community institutions to act. Phase (3), as the language of article 54 makes clear, is concerned with the abolition of restrictions. As to Phase (4), the language of article 57 ("making it easier to take up and pursue activities") shows that it is not concerned with restrictions to be abolished, but rather with measures to secure mutual recognition and co-ordination of national regulatory provisions and methods. The treaty does not call for or require the creation of a market for professional and other services which is 'free' in the sense of being unregulated. Nor is it a manifesto for deregulation. Some of the measures adopted in pursuance of it may have that effect, but that is in part a matter of political choice, and in part a consequence of the developed rules on competition which complement the rules of the common market.

1 See para 132 above.
2 EEC Treaty, p. 273, Title III, Chapter 3.
7 EEC Treaty, art 54; General Programme for the abolition of restrictions on freedom of establishment (Brussels, 18 December 1961; OJ 1962 p 36 (S Edn (2nd series) IX, p 7)).

8 EEC Treaty, art 57. 'Self-employed persons' is a bad translation of the original personnes non-salaries, which includes, in that context, companies and firms as well as self-employed individuals.


13 A good practical example is radiography. A British radiographer may be qualified in diagnostic radiography, therapeutic radiography and/or nuclear medicine. In many other member states the last two activities may be carried out only by doctors.

14 For the rules on competition, see paras 152ff below.

144. Harmonisation and mutual recognition of qualifications. The Council has adopted directives in a number of sectors harmonising national rules on educational or professional qualifications, and so enabling the holder of a qualification in one member state to establish himself (or to provide services) in any other member state. There have been directives on the mutual recognition of the qualifications of, for example, those engaged in the wholesale trade, those engaged in the retail trade, commercial agents, veterinarians, dentists, nurses, midwives, pharmacists and architects. There is also the 'Lawyers' Directive' of 1977 which grants to lawyers qualified in one member state a limited right of audience in the courts of another, but within the treat context of Provision of Services only. However, the process of sectoral harmonisation proved to be excessively time-consuming, and, in the more difficult sectors where national traditions vary widely, impossible. Now, following the lead of the Court of Justice in relation to goods, there has been a policy shift from harmonisation to the so-called principle of 'mutual recognition' or 'equivalence'. A directive of 1989 created a general system for the recognition of higher education diplomas, the effect of which (very broadly) is to require member states to give the fullest possible recognition to professional qualifications and experience gained in other member states. A similar, complementary directive covering professional education and training of less than three years' duration has been proposed by the Commission, but as at the beginning of September 1990 has not been adopted by the Council.

1 EEC Council Directive 64/223 (JO 1964 p 863 (S Edn 1963-64 p 123)).
3 EC Council Directive 64/224 (JO 1964 p 869 (S Edn 1963-64 p 126)).
145. **Scope of the free movement of services.** The chapter of the EEC Treaty on Services\(^1\) applies only where the provider and the recipient are established in different member states\(^2\). The effect is that, in modern business practice, the chapter on Services may be of limited benefit to the **provider** of professional and other services (in the conventional sense of the word). On the other hand, the concept of ‘services’ (in the treaty sense) includes the right to **receive** a service as well as the right to provide it, and the Court of Justice has taken a liberal approach to what may constitute a ‘service’. So the provisions of this chapter apply to education (at all levels)\(^3\), tourism and health care\(^4\), and, indeed, virtually any lawful but temporary presence of a Community national in another member state\(^5\).

1 EEC Treaty, Pt Two, Title III, Chapter 3 (arts 59-66).
2 Ibid, art 59: see para 132 above.
3 Case 293/83 Gravier v City of Liège [1985] ECR 593, [1985] 3 CMLR 1, ECJ.

146. **Services and the public interest.** The chapter on Services\(^1\) shares with the chapter on the Right of establishment\(^2\) the difficulties of protecting the public interest by ensuring appropriate qualifications. There is a further difficulty in that the provider of ‘services’ is, *ex hypothesi*, domiciled outwith the jurisdiction of professional or trade bodies which regulate the provision of the service in question in the host state. The Court of Justice has held that a person may not, in order to evade the professional rules of conduct in one member state, establish himself in another and then rely upon the EEC Treaty in order to provide ‘services’ in the former\(^3\).

1 EEC Treaty, Pt Two, Title III, Chapter 3 (arts 59-66).
2 Ibid, Pt Two, Title III, Chapter 2 (arts 52-58).

147. **Financial services; company law.** Banks, insurance companies and other providers of financial services are ‘persons’ enjoying rights of free movement under the EEC Treaty. But the Court of Justice has recognised that special rules are necessary in the field of financial and other services where the protection of the consumer is particularly important\(^4\). There have been a number of directives in this field\(^2\). Further directives are at various stages in the legislative process. In general the approach now is that Community legislation lays down minimum standards, on the basis of which there will be mutual recognition of the ‘home country licence’ and ‘home country control’. There have also been directives dealing with the structure, capitalisation and management of companies in order to ensure that companies incorporated in one country can operate freely in another\(^5\). In 1989 the Commission published a draft regulation on the formation of the European Company (Societas Europaea)\(^4\), but as at the beginning of May 1990 the Council has not adopted it into law.


4 COM 89 (268) final.

148. The Single European Act. The free movement of persons and services is a fundamental aspect of the internal market. The Single European Act therefore envisages that remaining barriers will be eliminated, or necessary co-ordination completed, by the end of 1992. However, legislative measures relating to the free movement of persons are not susceptible to majority voting in the Council; they require unanimity, and in some respects the Single European Act has made the EEC Treaty more restrictive than it was previously.

1 EEC Treaty, art 8a, 2nd para (added by the Single European Act, art 13): see para 141 above.
2 EEC Treaty, art 8a, 1st para (as so added).
3 Ibid, art 100(a)(2) (amended by the Single European Act, art 18).
4 EEC Treaty, arts 57(2), 100a(2) (amended by the Single European Act, arts 6(7), 16(2), 18).

149. Capital. The chapter of the EEC Treaty on Capital has not been fully implemented, and few of its provisions have direct effect. The Court of Justice has, however, held that current payments connected specifically with the movement of goods, persons or services cannot be prevented on grounds of exchange control. Given the breadth of what constitutes a 'service', member states may not enforce currency controls upon capital payments intended to support a variety of activities in other member states — to give but two examples, private health care or tourism — even if those are the only economic activities in which the receiver of the service is engaged. In 1988 the Council adopted a new directive requiring the liberalisation of a wide range of capital movements. The directive was to be implemented by July 1990, and marks a significant development in the free movement of capital.

1 EEC Treaty, Pt Two, Title III, Chapter 4 (arts 67-73).
3 See para 145 above.

150. Transport. Transport is a particular aspect of services in which the EEC Treaty rules are to be implemented by a Common Transport Policy. The
were amended by the Single European Act a common policy on sea and air transport required unanimous action by the Council; as at the beginning of May 1990 it has not yet been achieved. The treaty rules on competition nevertheless apply to certain aspects of transport at least.

1 EEC Treaty, art 74. Transport is dealt with in Pt Two, Title IV (arts 74–84).
6 EEC Treaty, art 84(1).
7 EEC Treaty, art 84(2). It now requires a qualified majority: art 84(2) (amended by the Single European Act, art 16).
8 For the competition rules, see paras 155 ff below.
9 For a good discussion and explanation of the treaty provisions relating to transport, see the opinion of Advocate-General Lenz in Case 66/86 Ahmed Saeed Flugreisen and Silver Line Reisbüro GmbH v Zentrale zur Bekämpfung Unlauteren Wettbewerbs ev [1990] 4 CMLR 102, ECJ.

(d) The Common Rules

151. General. The Title of the EEC Treaty entitled ‘Common rules’ is divided into three chapters:
1. Rules on competition;
2. Tax provisions;
3. Approximation of laws.

The chapter on Approximation (or harmonisation) of laws sets out the machinery for Community legislation designed to eliminate differences in the laws of the member states which affect the functioning of the common market. Originally unanimity was required for harmonisation measures. However, progress in the area was slow and painstaking and insufficient to the task of completing the internal market. As a result of new provisions introduced by the Single European Act the Council is now empowered, with some exceptions, to adopt harmonisation measures by qualified majority vote. Although the harmonisation procedures are clearly of great importance in the ‘fine tuning’ of the customs union and the completion of the internal market, Chapter 3 on Approximation of laws does not itself enact any substantive rules of law. Chapters 1 and 2 do, however, contain rules which may be of more concern to the Scottish practitioner than any other provisions of the EEC Treaty.

1 EEC Treaty, Part Three, Title I, Chapters 1–3 (arts 85–94, 95–99, 100–102).
2 Ibid, art 100.
3 Ibid, arts 100a, 100b (added by the Single European Act, arts 18, 19).

(A) THE RULES ON COMPETITION

(i) Introduction

152. General. The rules on competition are divided into three sections:
Portugal, is now spent. Measures taken by the Community against the dump­ing of products into the Community from third countries are taken by the Commission and the Council under the provisions relating to the implementa­tion of the Common Commercial Policy.

The rules applying to undertakings follow the traditional pattern established by the Sherman Act 1890 in the United States which prohibits, first, ‘every contract, combination or conspiracy in restraint of trade’, and second, the ‘monopolization of trade and commerce’ — in other words, distortions of free competition which result, in the first case, from the action of two or more operators and, in the second, from the unusual market power of one. Under the Community system, the concern is not simply to prohibit distortions of free competition, but also to prevent the erection or maintenance of barriers to trade within the Community which might otherwise result from the actions of independent operators.

The rules on state aids are designed to complement the rules applying to undertakings by preventing member states from distorting competition by subsidising the activities of domestic operators.

The rules on competition are then further complemented by the rules relating to taxation which prevent member states from adopting the other possible method of giving financial assistance — by taxing imported products more heavily than domestic products.

1 EEC Treaty, Pt Three, Title I, Chapter I, Sections 1–3 (arts 85–90, 91, 92–94).
2 See para 175 below.
3 See para 104 above.

153. Complementarity of the treaty provisions. Just as the Common Rules of the EEC Treaty complement each other, so, together, they reinforce and complement the provisions of Part Two (the Four Freedoms) by ensuring that economic operators in all parts of the Community can compete with each other on equal terms.

1 EEC Treaty, Pt Three, Title I, Chapter I (arts 85–94).
2 See para 152 above.
3 EEC Treaty, Pt Two (arts 9–73); see paras 112 ff above.
4 The Court of Justice has recognised that the competition rules are ‘so essential that without [them] numerous provisions of the Treaty would be pointless’: Case 6/72 Europenballage Corp and Continental Can Co Inc v EC Commission [1973] ECR 215 at 244, [1973] CMLR 199 at 223, ECJ.

154. Sex discrimination. There is one further provision of the EEC Treaty which was introduced for the same purpose — the rule against sex discrimination in article 119. In origin, this was designed to eliminate the unfairness which would have resulted had operators in some states been forced to pay equal wages to men and women while those in other states were not. Obviously the production costs of the former would otherwise have been greater than those of the latter. Although that was the original purpose of article 119, its operation has since been developed for other social reasons.

1 See paras 171, 172, below.
all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

Article 86, unlike the Sherman Act, does not outlaw monopolies as such; it prohibits:

'Any abuse by one or more undertakings of a dominant position',

or (using words which more faithfully reflect the original French text) 'the abusive exploitation of a dominant position'.

1 EEC Treaty, art 85(1). For comment on some of the phrases in this quotation, see para 163 below.
2 Ibid, art 86, 1st para.

156. Undertakings. In both article 85 and article 86 the EEC Treaty is concerned with the activities of 'undertakings'. The word 'undertaking' covers every type of operator from a single individual to a multinational corporation provided he or it has legal capacity and is engaged in economic activity of some sort, whether profit-making or not. Thus, for example, a Scottish advocate is an 'undertaking' for the purposes of the treaty, and a decision of the Faculty of Advocates is a 'decision by an association of undertakings'. A charity such as Oxfam would similarly be an 'undertaking' in so far as it is engaged, through its shops, in economic activity.

157. The prohibitions. Both article 85 and article 86 prohibit certain specific types of restrictive practice:

(1) practices relating to the fixing of purchasing or selling prices or other trading conditions (for example conditions of sale);
(2) practices which limit or control production, markets (outlets) or technical development;
(3) the application of dissimilar conditions to equivalent transactions, thereby placing other trading parties at a competitive disadvantage; and
(4) making the conclusion of contracts subject to acceptance of supplementary and unconnected obligations.

Article 85 further prohibits agreements to share markets or sources of supply. However, in neither article is the list of prohibited practices exhaustive. In both cases the treaty is concerned, as always, with the practical economic effect of what is done.

1 EEC Treaty, art 85(1)(a), (b), (d), (e), art 86, 2nd para (a)–(d).
2 Ibid, art 85(1)(c).

158. Enforcement. Breach of article 85 or 86 is prohibited and may result in 'cease and desist' orders and the imposition of heavy fines by the Commission pursuant to Regulation 17, the principal regulation implementing articles 85 and 86. Further, any agreement or decision which infringes article 85 is 'automatically void' and, unless the offending provision is severable, cannot be enforced by the courts.
agreement can, by authority of article 85(3) and Regulation 17, be ‘exempted’
by the Commission provided the agreement meets certain strict criteria.
Exemption can be granted only by the Commission, and a court which is called
upon to judge a non-exempt agreement may not presume that it would be
exempt because it appears to satisfy the criteria for exemption.

1 See Case T-51/89 Tetrapak Rausing v EC Commission, judgment of 10 July 1990, CFI (not yet
reported).
3 This gives rise to a potential conflict between the Commission’s exclusive power under ibid,
art 9(1), to grant an exemption, and the duty of a national court under the EEC Treaty, art 85(2),
to strike down a prohibited agreement. What is a national court to do when asked to strike down
an agreement which has not been notified to the Commission (see para 161 below) and which
might be granted an exemption in the near future? In Case 48/72 Brasserie de Haecht SA v
Wilkin-Jennsen [1973] ECR 77, [1973] CMLR 287, ECJ, the Court of Justice said that in such
circumstances the best option is for the national court to suspend the proceedings pending the
outcome of the Commission’s deliberations (and the Commission has indicated that it will
proceed with all due haste in such a case); but, if this course is not practicable, then it is the court’s
duty to enforce art 85(1).

160. Conditions for exemption. The conditions for exemption set out in
article 85(3) are both positive and negative. The agreement must both:

(1) positively, contribute to improving the production or distribution of goods
or to promoting technical or economic progress, while allowing consumers
a fair share of the resulting benefit; and

(2) negatively, neither impose on the undertakings concerned restrictions
which are not indispensable to the attainment of these objectives, nor
afford such undertakings the possibility of eliminating competition in
respect of a substantial part of the products in question.

Both sets of conditions must be satisfied before exemption can be granted, and it
will be seen that an assessment of whether they are satisfied will depend on
economic as well as legal considerations.

1 EEC Treaty, art 85(3).

161. Notification. Exemption can be granted only if the agreement has been
‘notified’ to the Commission in accordance with the procedures laid down by
the Council. There is a right to be heard, and a procedure for exercising it,
prior to the Commission’s final decision on exemption. Proper notification
provides immunity from the Commission’s power to impose fines in respect of
any act occurring after notification, the immunity being operative from the date
of notification until the Commission adopts a formal decision refusing to grant
exemption or issues a preliminary notice to that effect. It does not affect the
power and duty of a national court, under article 85(2), to strike down a
prohibited agreement.

Application may also be made, in like manner and on the same forms as an
application for exemption, for ‘negative clearance’, which is a declaration from
the Commission that, in the light of the information available to it, the agreement
in question falls outside the prohibition of article 85 (or of article 86) altogether.
162. 'Block exemptions'. The Commission is empowered by article 85(3) to grant exemptions not only to individual agreements but also to categories of agreements. Such 'block exemptions' constitute an important mechanism for the implementation of Commission policy in the competition field. They are set out in regulations and, like article 85(3) itself, they lay down positive and negative criteria for applicability. An agreement which satisfies all the criteria is, without need for notification, automatically exempt from article 85(1). As at the autumn of 1990 the Commission has adopted block exemptions in the following fields (of which the first two are the most likely to be encountered in practice): exclusive distribution agreements; exclusive purchasing agreements; motor vehicle distribution and servicing agreements; specialisation agreements; research and development agreements; patent licensing agreements; know-how agreements; franchising; and air transport agreements.

5 EC Commission Regulation 418/85 (OJ L53, 22.2.85, p 5).
7 EC Commission Regulation 556/89 (OJ L61, 4.3.89, p 1).

163. Scope of article 85(1). Four further points should be noted in relation to article 85.

First, an agreement which on its face falls within article 85(1) nevertheless falls outside the prohibition where it affects competition only to an extent which is not 'appreciable'. The parameters of this 'de minimis rule' have been clarified to an extent by the Notice on Agreements of Minor Importance, re-issued by the Commission in 1986. Generally, it may be relied upon only in very limited circumstances.

Second, the reference in article 85(1) to 'agreements between undertakings, decisions by associations of undertakings and concerted practices' does not mean that a restrictive practice must be fitted into one of three mutually exclusive categories in order to fall foul of the treaty prohibition. The phrase should rather be taken as a comprehensive description of the ways in which independent undertakings can get together to prevent, restrict or distort competition — by making written or oral agreements, through trade or professional associations, or simply by gentlemen's agreements or informal understandings. All are prohibited, no matter how the objectionable result is achieved.

Third, article 85(1) refers to 'object or effect'. Thus, a restrictive agreement is prohibited if its object is prohibited, even if it has not yet taken effect. Equally, an agreement which has the effect, actual or potential, of preventing, restricting...
to jurisdiction rather than substance. An agreement or practice all of whose actual or potential effects are confined within a single member state falls within the exclusive jurisdiction of the competition authorities (if any) of that state. If its effects are wider, and appreciable, it will fall within the jurisdiction of the national and of the Community authorities. An agreement or practice which is implemented within the common market and has the effect of preventing, restricting or distorting competition there is prohibited even if it is made, and the parties to it are domiciled, outside the Community.


2 Notice on agreements of minor importance which do not fall under Article 85(1) (OJ C231, 12.9.86, p 3). The new notice is a second revision (the first being in 1977) of an original 1970 notice.


164. Abuse of a dominant position. Article 86 of the EEC Treaty prohibits abuse of a dominant position. The concept is, however, difficult to define. It has two components: dominance, which is in itself not prohibited by article 86, and abusive exploitation of that dominance. The approach of the Commission and the Court of Justice is, therefore, to decide first whether the undertaking in question occupies a dominant position in the structure of a particular geographic or other defined market. Essentially, the test is whether, because of its size or other advantages, the presence of the undertaking weakens the structure of competition. If an undertaking is shown to occupy a dominant position in a particular sector, then it can, as a general rule, be said that it ‘abuses’ that position if it acts in such a way as further to diminish or distort the free play of competition. Thus a dominant undertaking has a particular obligation not shared by other undertakings. As the Court of Justice has said:

'A finding that an undertaking has a dominant position is not in itself a [ground of criticism] but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.'

The relevant considerations are economic as much as legal.

1 EEC Treaty, art 86, 1st para.

2 See eg Case 85/76 Hoffmann-La Roche & Co AG v EC Commission [1979] ECR 461, [1979] 3 CMLR 211, ECJ.

3 Case 322/81 Michelin NV v EC Commission [1983] ECR 3461 at 3511, [1985] 1 CMLR 282 at 327, ECJ. ‘Ground of criticism’ is felt to be a better translation of the French reproche than the word ‘reproach’ used in the official (ECR) translation.

165. Mergers and concentrations. It was not clear at first which, if any, of the competition provisions of the EEC Treaty applied to mergers and concen-
position was that article 85 did not apply to mergers, for article 85 prohibits restrictive practices between undertakings, and the effect of a merger, even if it constitutes restriction of competition, is to produce only one undertaking. However in 1987 the court found that certain forms of concentration (in casu a company acquiring an equity interest in a competitor) can in some circumstances fall within the prohibition of article 85. The effect of that judgment has not yet been fully explored; but it, and a flurry of takeover bids with a view to the 1992 internal market, gave new life to a Commission draft regulation on merger control, first proposed in 1973 and finally adopted by the Council in December 1989, to enter into force in September 1990. The regulation, which addresses both mergers and concentrations, imposes a requirement for prior notification to and approval by the Commission before mergers or concentrations ‘with a Community dimension’ as defined in the regulation may be effected. It provides specific means of enforcement appropriate to the field, and seeks more clearly to define the division of jurisdiction between national and Community competition authorities. The regulation and its application by the Commission are likely to assume a high profile in the run-up to 1992 and beyond. Decisions of the Commission are subject to judicial review.

2 See eg the Commission’s Memorandum on the Problem of Concentration in the Common Market Competition Series, Study No 3 (Brussels, 1966), and, more recently, Fifteenth Report on Competition Policy (1986) para 26.
5 Ibid, art 1(2).
6 It is generally assumed, but is not specifically stated in the regulation, that applications for judicial review under art 173 of the EEC Treaty should be made to the Court of First Instance as falling within the scope of EC Council Decision 88/591 (OJ L319, 25.11.88, p 1), art 3(1)(c).

166. Public undertakings. Public undertakings and other such bodies are in principle subject to the same rules on competition as private undertakings, except in so far as application of those rules would ‘obstruct the performance, in law or in fact, of the particular tasks assigned to them’. The conduct of such undertakings is, moreover, subject to the supervision and control of the Commission in order to ensure that ‘the development of trade [is] not . . . affected to such an extent as would be contrary to the interests of the Community’. In practice, however, public undertakings have largely escaped the full rigours of the EEC Treaty, especially in the sphere of the rules pertaining to state aids.

1 EEC Treaty, art 90(2).
2 However, for an indication of invigorated resolve, see the Commission’s paper on its approach to acquisition of shareholdings by public authorities and the obligations of member states in the field (Bull EC 9–1984, pp 93 ff).

(iii) State Aids

167. State aids. The chapter of the EEC Treaty on state aids opens with a general prohibition against ‘any aid granted by a Member State or through State
types of aid which may be permissible. It then lays down the procedure by which the Commission may allow or prevent the giving of any particular type of state aid. Perhaps the most important point is that the Commission must be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.

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1 EEC Treaty, Pt Three, Title I, Chapter I, Section 3 (arts 92-94).
2 Ibid, art 92(1) (emphasis added).
3 Eg aid having a social character and granted to individual consumers, and aid to make good damage caused by natural disasters: ibid, art 92(2).
4 Eg aid to assist especially disadvantaged areas or certain economic sectors, and aid to promote important projects of common European interest: ibid, art 92(3).
5 See ibid, art 93.
6 Ibid, art 93(3). Failure to comply with this procedure, and a fortiori failure to notify the Commission at all of proposed aid, will render that aid unlawful and liable to repayment: see Case 120/73 Lorenz GmbH v Germany [1973] ECR 1471; Joined Cases 31, 53/77 EC Commission v United Kingdom [1977] ECR 921, [1977] 2 CMLR 359, EC; Case 177/78 Pigs and Bacon Commission v McCarren & Co Ltd [1979] ECR 2161, [1979] 3 CMLR 389, EC.

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168. Rules as to taxation. The EEC Treaty does not seek to deprive the member states of the power to levy taxes for the purpose of raising public revenues. However, Community trade could clearly be affected if the effect of a national taxation scheme was one which favoured domestic production at the expense of imported goods. The first paragraph of article 95 of the treaty therefore prohibits the imposition 'directly or indirectly, on the products of other Member States, [of] any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'. The second paragraph of article 95 extends this prohibition to taxation which affords 'indirect protection' to domestic production. Notwithstanding the apparent limitation of article 95 by its text to 'products of other Member States', the Court of Justice has extended its application to discriminatory taxes upon all products (including those from outwith the Community) which are in free circulation.

1 Case 193/85 Cooperativa Co-Frutta Srl v Amministrazione delle Finanze dello Stato [1987] ECR 2085, ECR.

169. Application of rules as to taxation. Clearly, there may be argument, in any particular case, whether products are 'similar' or whether a difference in the rate of tax constitutes 'indirect protection'. The products need not be the same, and the best test is probably whether the ordinary consumer, faced with a free choice, might choose one product or the other for the particular purpose he or she has in mind. Thus, for example, British excise duties upon wine were held by the Court of Justice to be unfairly high in comparison with those imposed upon a more typical, and competing, British product (beer) and therefore constituted a breach of the second paragraph of article 95 of the EEC Treaty. Care is also necessary in considering article 95 alongside article 12, application of the two being mutually exclusive. A charge upon an imported good at port of entry may in fact be part of a non-discriminatory (and hence permissible) tax
2 See paras 118, 119, above.
3 See eg Case 105/76 Interzuccheri SpA v Ditta Rezzano e Cavassa [1977] ECR 1029, ECJ.

170. Fiscal barriers to trade. The Cockfield White Paper\(^1\) identified tax disequilibrium and the frontier controls and equalisation charges necessary to deal with it as a fiscal barrier to trade and a serious impediment to the completion of the internal market. The Commission has therefore proposed that by 1992 most national rates of indirect taxation should be harmonised: if not made uniform, they should at least be approximated within bands that will eliminate the need for cross-frontier fiscal controls. However, national rates of indirect taxation are thought to be a particularly important means of implementing national fiscal and other policies and they vary widely. Legislation harmonising taxation cannot be adopted by means of the new qualified majority procedures under the Single European Act\(^2\). It still requires unanimity in the Council\(^3\), so it is not anticipated that there will be an early breakthrough.

1 Completing the Internal Market, White Paper from the Commission to the European Council, COM (85) 310.
2 See para 151 above.
3 EEC Treaty, art 99 (substituted by the Single European Act, art 17).

(c) SEX DISCRIMINATION

171. Application of treaty rules. The EEC Treaty rule against discrimination between the sexes is not unlimited in scope. The principle is that men and women should receive ‘equal pay for equal work’\(^1\). ‘Pay’ is defined as meaning ‘the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer’\(^2\). ‘Consideration’ is perhaps an inadequate translation of the original language texts which use words meaning ‘advantage’ or ‘recompense’. Thus, favourable rates for family travel for railway employees have been held to be ‘pay’\(^3\). On the other hand, the ‘pay’ must (1) be received ‘in respect of his employment’, and (2) be received from the employer. Thus, pensions and other benefits received under general state schemes are not ‘pay’, even if the employer makes a compulsory contribution to a state fund\(^4\). But ‘pay’ does embrace pensions paid under a contracted-out private occupational scheme and any benefits paid by an employer to a worker in connection with his compulsory redundancy\(^5\).

1 EEC Treaty, art 119, 1st para.
2 Ibid, art 119, 2nd para.
5 Case C-262/88 Barber v Guardian Royal Exchange Assurance Group [1990] 2 CMLR 513, ECJ.

172. Implementing legislation. The basic rule of the EEC Treaty has been developed in directives\(^1\), the details of which fall outside the scope of this title\(^2\). Since directives cannot confer horizontal direct effect\(^3\), a pursuer seeking to invoke rights against a private employer cannot rely upon the directives themselves; rather he must rely upon the implementing national legislation\(^4\). How-
172. Para 172


2 See, however, EMPLOYMENT, vol 9, para 392 (equal pay).

3 See para 93, text and notes 7, 8 above.


5 See para 93 above.

(D) OTHER COMMON POLICIES

173. Economic policy. As an aid in securing the long-term goal of economic union, the EEC Treaty lays down provisions which address the problems of diverging ‘conjunctural policies’ (short-term economic policies)1 and the need for co-ordination of balance of payments, exchange rates and economic policies generally2. However, in these areas the member states undertake to do little more than to ‘regard them as a matter of common concern’3. Beyond the abolition of restrictions on current payments connected specifically with the movement of goods, persons or services4, there is no compulsion and certainly no direct effect in the treaty. The implementation of these goals was left to future political negotiation. Whilst there has been one notable achievement in the establishment of the European Monetary System5, generally there has been little progress in the area, and these provisions are unlikely to be of direct interest to the practitioners.

1 See the EEC Treaty, Part Three, Title II, Chapter 2 (art 103).

2 See ibid, Part Three, Title II, Chapter 3 (arts 104–109).

3 Ibid, arts 103(1), 107(1).

4 Ibid, art 106. See para 149 above.

5 See para 20 above.

174. Social policy. The EEC Treaty considers the harmonisation of social systems so as to promote improved working conditions and an improved standard of living for workers1 as a necessary component of the common market. It is in this context that the directly effective safeguards against sex discrimination were included in the treaty2. But the treaty also charges the Commission, in concert with the Economic and Social Committee3, with the task of promoting ‘close cooperation between Member States’4 and implementing ‘common measures’5 in the field6, and provides for the establishment of a European Social Fund to assist in these ends7. Much of the work undertaken under these provisions emerges in legislation enacted pursuant to other treaty articles8. In 1989 the Commission published its Draft Community Charter of Fundamental Social Rights9 as a framework for legislation in the social field in the run-up to 1992 and beyond.

1 EEC Treaty, art 117, 1st para.

2 See paras 171, 172, above.

3 EEC Treaty, art 118, 3rd para.
175. **Commercial policy.** The creation of a single, coherent market requires not only a Common Customs Tariff\(^1\) but also a common commercial policy in trade with third states. The Common Commercial Policy\(^2\) is to be based upon 'uniform principles' in external Community trade\(^3\). It has been implemented both in relation to trade in particular goods\(^4\) and in relation to all trade with particular third countries\(^5\). In these cases the Community now enjoys exclusive competence in the field. However, residual competence remains with the member states in those areas where the Common Commercial Policy has not yet been fully implemented. Such competence can be exercised only in accordance with a regulation concerning common rules for imports\(^6\).

1. As to the Common Customs Tariff, see para 129 above.
2. See the EEC Treaty, Pt Three, Title II, Chapter 4 (arts 110–116).
3. Ibid, art 113(1).
4. Eg textiles and steel.
5. Eg the EFTA states (see para 74, note 8, above), states party to the Fourth ACP–EEC Convention of Lomé (Lomé, 15 December 1989; The Courier no. 120, March–April 1990) and various states party to individual agreements with the Community. Association agreements with third states are entered into in accordance with and by authority of the provisions of the EEC Treaty, art 238.

176. **Safeguard measures (anti-dumping).** The safeguard and retaliatory measures taken against imports from third countries which benefit from unfair subsidies or are dumped on the Community market are governed by regulations adopted by the Council under article 113 of the EEC Treaty\(^1\). These measures form part of the Common Commercial Policy. They are of ever-increasing importance in the context of international trade and give rise to a considerable volume of cases before the Court of Justice. However, the details are beyond the scope of this title\(^2\).

1. The basic rules are laid down in EC Council Regulation 2423/88 (OJ L209, 2.8.88, p I).
2. See also TRADE REGULATION vol 23, para 599.

177. **The Single European Act.** As a result of amendments introduced by the Single European Act the EEC Treaty now contains provisions relating to Co-operation in Economic and Monetary Policy (Economic and Monetary Union)\(^1\), Social Policy\(^2\), Economic and Social Cohesion\(^3\), Research and Technological Development\(^4\) and the Environment\(^5\). None of these new provisions is phrased in such a way as to have direct effect. They are important in that they formally establish a legal basis for Community competence in these areas.

1. See the EEC Treaty, art 102a (added by the Single European Act, art 20(1)).
2. See the EEC Treaty, arts 108a, 108b (added by the Single European Act, arts 21, 22).
3. See the EEC Treaty, arts 130a–130e (added by the Single European Act, art 23).
4. See the EEC Treaty, arts 130f–130q (added by the Single European Act, art 24).
5. See the EEC Treaty, arts 130r–130t (added by the Single European Act, art 25).
The Community shall have legal personality.

The treaty explicitly accords to the Community the authority to enter into treaties with third states, groups of states or other international organisations with a view to creating association agreements with the Community\(^1\), as well as the authority to conclude tariff and trade agreements as a function of the Common Commercial Policy\(^2\). The Community has therefore displaced the member states in these areas. In 1971 the Court of Justice held that the Community enjoys the authority to enter into international agreements with third states not only in commercial or association matters but also in any area in which it enjoys rule-making competences within the Community\(^3\). The Community therefore now enjoys international competences in the areas of, for example, agriculture, transport, environment, social policy, and research and development. In some areas Community competence may be exclusive\(^4\). The Court of Justice has held that an international agreement into which the Community has entered can of itself be relied upon before national courts provided that its provisions are such as to confer direct effect\(^5\). If the provisions of an international agreement are not capable of conferring direct effect they must be implemented by appropriate Community legislation.

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1 EEC Treaty, art 238.
2 Ibid, art 113: see para 175 above.
5 Case 104/81 Hauptzollamt Mainz v CA Kupferberg & Cie KG [1982] ECR 3641, [1983] 1 CMLR 1 ECJ. As to direct effect, see para 73 above.

179. Contractual liability of the Community. The non-contractual liability of the Community was discussed above\(^1\). The EEC Treaty provides that the contractual liability of the Community is to be governed by the law applicable to the contract in question\(^2\).

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1 See para 67 above.
2 EEC Treaty, art 215, 1st para.

180. Extraordinary derogations from the EEC Treaty. Member states are permitted to adopt measures derogating from EEC Treaty rules which are necessary for the protection of the essential interests of their security connected with production and trade in arms, munitions and war materials\(^1\), in the event of serious internal disturbance affecting the maintenance of law and order or of serious international tension constituting a threat of war\(^2\) or in the event of a sudden balance of payments crisis\(^3\). In each such case a member state is required to co-operate closely with the Community institutions so as to ensure that it cannot make improper use of these powers.

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1 EEC Treaty, art 223(1).
2 Ibid, art 224.
3 Ibid, art 109(1).
mon accord’ appropriate amendments to be made to the treaty. If the conference is successful in reaching unanimity, the proposals are submitted to the member states to be ratified in accordance with their own constitutional procedures and requirements. The amendments enter into force following deposit of ratification of all member states. The EEC Treaty has been amended by authority of article 236 on seven occasions, most recently (and significantly) by the Single European Act. At the time of writing it is anticipated that an intergovernmental conference will be convened in late 1990 in order to reach agreement upon treaty amendments addressing monetary union and further institutional reform.

I

Certain 'housekeeping' provisions in the EEC Treaty can be amended by the relatively simple process of unanimous Council decision, eg adjustment to the transitional period (arts 8(5), 14(7), 33(8)), alteration of the composition of the Commission (Merger Treaty, art 10(1), 2nd para, and art 14, 2nd para (added by the Act of Accession (1985), art 16)), and alteration of the composition of the Court of Justice (EEC Treaty, art 165, 4th para, and art 166, 3rd para).

2 Ibid, art 236, 1st para.
3 Ibid, art 236, 2nd para.

182. Accession to the Community. Accession to the Community is governed by the provisions of article 237 of the EEC Treaty. Any European state may apply for membership of the Community. An application must be approved by a unanimous Council and an absolute majority vote in the Parliament, after which the existing member states and the applicant state or states agree the conditions of accession and the necessary adjustments to the treaty. This agreement or treaty is then submitted for parliamentary ratification by all member states and the applicant state or states. There have been three accession treaties, accommodating the enlargements of 1973 (Denmark, Ireland and the United Kingdom), 1981 (Greece) and 1986 (Spain and Portugal). The 'accession' to the Community of the former German Democratic Republic — or rather, of its constituent Länder — will not, it is claimed, require any procedure under article 237 or, indeed, any immediate amendment of the EEC Treaty. The theory is that the German Democratic Republic will cease to exist as a state and that its constituent Länder will revert to the German state of which they formed part and of which the Federal Republic is the legal successor. It is a corollary of this theory that the Federal Republic, although by far the most populous member state of the Community, will gain no additional seats in the European Parliament nor any great weight in voting in the Council.

1 EEC Treaty, art 237, 1st para.
2 Ibid, art 237, 2nd para.

183. Secession from the Community. The EEC Treaty does not address secession of a member state. Most treaties establishing international organisations include provisions for withdrawal or denunciation, usually requiring only a given period of notice. The EEC and Euratom Treaties do not; rather they are concluded for ‘an unlimited period’. Secession of Greenland was brought about in 1985 by formal amendment to the EEC Treaty in accordance with the procedures of article 236. It was universally accepted at the time that treaty amendment was necessary to implement the secession of Greenland and its Constitution. In this context, therefore, the question presented is whether an EEC Treaty amendment is required to implement the secession of a member state in the manner envisaged by the theory that the Federal Republic, although by far the most populous member state of the Community, will gain no additional seats in the European Parliament nor any great weight in voting in the Council.

1 EEC Treaty, art 237, 1st para.
2 Ibid, art 237, 2nd para.
of the supremacy of Parliament. Whether or not United Kingdom courts would give effect to an Act of Parliament purporting to amend or repeal the European Communities Act 1972 (c 68) in order unilaterally to take the United Kingdom out of the Community remains and now seems likely to remain untested.

1. EEC Treaty, art 240; Euratom Treaty, art 208. The ECSC Treaty provides that it is concluded for a period of fifty years: art 97.
2. See para 181 above.
3. See para 84 above.

2. THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

The Author and General Editors record with gratitude the advice and assistance given by The Hon Lord Mackenzie Stuart of Dean in the preparation of this part of the title, and the Author also expresses his thanks to Marie Kelly for her help.

(i) ESTABLISHMENT AND ORGANISATION OF THE COURT

(a) Establishment of the Court

184. Establishment and competence under the founding treaties. The origins of the Court of Justice of the European Communities lie in the Treaty establishing The European Coal and Steel Community signed at Paris on 18 April 1951 by the original six member states of that Community. The treaty (the ECSC Treaty) provided in Chapter IV of Title Two thereof for the establishment of a Court of Justice, and the court duly came into being in December 1952, delivering its first judgment on 21 December 1954. The subsequent Treaty establishing The European Economic Community (the EEC Treaty) and the Treaty establishing The European Atomic Energy Community (the Euratom Treaty), both signed at Rome by the same original member states on 25 March 1957, made similar provision for the institution of a Court of Justice in respect of each Community. It was, however, intended from the outset of the negotiations leading to the EEC and the Euratom Treaties that there should be a single Court of Justice which should act as the court for those two Communities and as the court for the European Coal and Steel Community, and effect was given to that intention by the Convention on Certain Institutions Common to the European Communities, also signed at Rome on 25 March 1957. While that Convention established the single Court of Justice of the European Communities, it also makes plain that in exercising its jurisdiction the court must do so in accordance with the provisions of the particular treaty relevant to the matter before it. Accordingly, the powers and competence of the Court of Justice may vary according to whether the case before it falls under the ECSC Treaty, the EEC Treaty or the Euratom Treaty, but if the question in issue before the Court of Justice is one affecting all three treaties, it is sufficient that the court has jurisdiction under one of them. In practice very few