1

The Exceptions to the Four Freedoms: The Historical Context

DAVID EDWARD

THIS BOOK IS concerned with the exceptions to the Treaty rules governing the four freedoms, discussing the question: What restrictions or limits can be placed on the right of freedom of movement for goods, persons, services and capital? The relevant provisions, now contained in Part 3, Titles I, II and IV of the Treaty on the Functioning of the European Union (TFEU), remain largely unchanged since they were written almost 60 years ago. Yet they were written for a very different world—a world of slow communication (largely by post) and slow travel (largely by land or sea) where state frontiers were, in every respect, seen and unseen, barriers to freedom of movement. They were conditioned by the political, social and economic context of the time and by the international agreements that were already in place or under negotiation.

Use of the expression 'four freedoms' in the Treaty context was inspired by President Roosevelt's State of the Union message on 6 January 1941, where he spoke of the four fundamental freedoms: freedom of speech and expression; freedom of worship; freedom from want; and freedom from fear. As a way of summarising the aims and ideals of the Treaty, 'the four freedoms' was excellent. From a legal point of view, it has been misleading in so far as it suggests that the Treaty provisions on each of the four topics (goods, persons, services and capital) are of the same character and follow parallel tracks. In fact they deal with different forms of economic activity, and were conceived in different ways and for different reasons.

Development of the law has been beset by four problems:

— the absence of the implementing legislation envisaged in the Treaty;
— changes in public preoccupations and priorities over the years;
— the limits of the procedural scheme within which the European Court of Justice (ECJ) (now the Court of Justice) has to operate; and
— tracing an acceptable line of demarcation between the functions of the judiciary and those of the legislature.

The following chapters discuss these and other issues. The aim of this chapter is to provide the historical context which is often overlooked: the Treaty-makers in 1956–57 did not start from scratch.

The contracting Member States of the Treaty establishing the European Economic Community (EEC) were already signatory States of the General Agreement on Tariffs and Trade (GATT 1947) and of the Organisation for European Economic Co-operation (OEEC 1948). The GATT was the forerunner of the World Trade Organisation but, at that stage, dealt only with trade in goods, being 'directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce'.[1]

The OEEC (forerunner of the Organisation for Economic Co-operation and Development (OECD)) was originally set up in 1948 to administer the Marshall Plan. Robert Marjolin, who led the French delegation in the negotiations for the EEC Treaty and was one of the first commissioners, was its first Secretary General. The interests of the OEEC were wider than those of the GATT and included matters that fall within the scope of the Treaty chapters on capital, establishment and services. A Code of Trade Liberalisation, adopted in 1950, was extended in 1951 to include invisible current account operations, especially those related to economic activities and international trade. Negotiations went on during the 1950s for a Code of Liberalisation of Capital Movements, eventually realised in 1959.

In addition, there were the precedents of the Belgium–Luxembourg Economic Union dating back to 1921, and the Benelux Customs Union, originally devised by the governments in exile in London, which came into force in 1948. The Belgian government in exile included Paul-Henri Spaak, who later chaired the Committee whose report formed the basis of the drafting convention for the new EEC Treaty (the Spaak Report).[2]

All the negotiators of the new EEC Treaty were conscious that its terms must, as regards goods, be compatible with the GATT and, as regards goods and capital, be consonant with the direction of travel of the OEEC. The programme set out in the Spaak Report envisaged the creation of a Common Market based on a customs union with no internal tariffs and a common external tariff.

The significance of the customs union as the economic bedrock of the EU tends, at this distance of time, to be overlooked. But it was only within the context of a functioning customs union that the complete fusion of markets implied in a Common Market could be achieved. Since the creation of a customs union necessarily involved a difference of treatment as between goods of internal and external origin, Article XXIV of the GATT required that any new customs union be completed (a) according to a plan or schedule submitted for consideration to the other Contracting Parties and (b) within a reasonable time.[3]

[1] Preamble to the GATT 1947.

[2] *Rapport des Chefs de Délégation aux Ministres des Affaires Étrangères*, Brussels, 21 April 1956. A shorter English text was published as *The Brussels Report on The General Common Market* in June 1956.

[3] Article XXIV 7(b).

The rules of the Treaty therefore constituted the required 'plan or schedule', while Article 8(7) EEC provided that 31 December 1969 (the end of the transitional period) was to 'constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented'. This explains why Pierre Pescatore, who had been one of the Luxembourg negotiating team and was later a Judge of the ECJ, denounced the Single European Act, with its legislative programme for completion in 1992 (23 years late), as inconsistent with the Community's obligations under the GATT.[4]

In 1956–57, the most contentious issues in the course of the negotiations concerned the conditions for creation of the customs union, the progressive elimination of internal quotas, and the conditions of trade in agricultural products. These were the subject of detailed provisions—mainly programmatic—which have now disappeared from the Treaty, leaving the general rules set out in Articles 30, 34–37 and 110 TFEU. (Agriculture has always been dealt with separately.)

The basic rules on free movement of goods within the customs union were taken directly from the GATT. Article XI.1 (General Elimination of Quantitative Restrictions) stated the general rule:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XX of the GATT (General Exceptions) provided, so far as relevant for present purposes:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> (c) …
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
> (e) …
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value; …

[4] P Pescatore, 'Some Critical Remarks on the Single European Act' (1987) 24 *CML Rev* 9.

Article XXI provided for exceptions on grounds of national security.

The aim of the Treaty-makers was to establish a code, compliant with the GATT, setting out the basic rules and limited exceptions. Comparison of the Treaty texts with those of the GATT helps to explain two points where the more telegraphic wording of the Treaty has given rise to perplexity.

First, the expression 'quantitative restrictions … and all measures having equivalent effect', used in Articles 34 and 35 TFEU (30 and 34 EEC), seems to imply that it is only measures having effect equivalent to *quantitative* restrictions that are struck at. By contrast, Article XI.1 of the GATT clearly strikes at *all* restrictions *made effective* through quotas, licences *or* other measures. This explains the wide interpretation given to 'measures of equivalent effect' in *Dassonville*.[5]

Second, Article 36 TFEU (36 EEC), having stated in the first sentence that certain prohibitions or restrictions on imports, exports or goods in transit are permitted, goes on in the second sentence to say that they 'shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. It is not obvious how these sentences fit together. Article XX of the GATT makes it clear that the distinction to be drawn is between the adoption and enforcement of the permitted prohibitions and restrictions and the *manner of applying* them. It is the latter which may constitute an 'arbitrary or unjustifiable discrimination' or 'disguised restriction on trade'.

The Spaak Report envisaged that the customs union and the single internal market in goods would be part of a Common Market covering all aspects of economic activity. But apart from trade in tangible goods, there was no code, such as the GATT, to be followed. An obvious distinction could be drawn between the economic activities of human beings, those of entities such as companies which have legal personality, 'invisible' monetary transactions, and the provision of 'services' considered in the abstract. But there was no particular sanctity about any method of classification nor any firm precedent.

In the Spaak Report, free movement of the liberal professions was treated, first, as an aspect of services, but later, as regards the professionals themselves (and almost as an afterthought), as analogous to free movement of wage- and salary-earners ('workers'). The financial and non-personal aspects of establishment, such as the acquisition of premises, opening factories and offices, and moving fixed plants were mentioned under the general heading of free movement of capital.

In the Treaty, the various forms of economic activity are classified, in the heading of Title III, under the three heads of Persons, Services and Capital, but the operative provisions are arranged, confusingly, under four heads: Workers, Establishment, Services and Capital. There is no particular problem about treating free movement of workers and capital as distinct categories, but this is less so as regards establishment and services which cover the activities of natural persons (human beings), legal persons (companies, partnerships, etc.) and 'invisible' services. However, as

[5] Case 8/74 *Procureur du Roi v Dassonville* EU:C:1974:82.

noted at the beginning, the Treaty was written in an era of slow travel and slow communication. In the 1950s moving from one country to another to establish a business would normally involve physically uprooting oneself from one's country of origin, and even the temporary provision of services would normally require the physical movement of the provider to the recipient or *vice versa.*

The Chapter on capital was programmatic, rather than prescriptive, with the exception of Article 67(2) EEC on 'current payments', which followed the existing approach of the OEEC. The provisions of this Chapter are now very different from those originally enacted.

By contrast, the Chapters on workers, establishment and services remain very much the same. There is a degree of uniformity in approach, providing for (a) a general rule of freedom of movement to be achieved by the end of the transitional period, (b) a standstill clause prohibiting the introduction of *new* restrictions, and (c) the adoption of regulations or directives to remove any *existing* obstacles by the end of the transitional period. In outline, this scheme was similar to that for free movement of goods, and the Article 36 exceptions on grounds of public policy, public security and public health were adapted for workers, establishment and services by Articles 48(3), 56(1) and 66 (applying Article 56 to services). But the subject matter, and the method of dealing with it, was substantially different in detail.

As we now know, the programme for completion by the end of 1969 was hopelessly optimistic. Quite apart from the legislative stalemate created by the Luxembourg Compromise, the Treaty-makers had gravely underestimated the nature and extent of the task involved in drawing up the necessary 'rules' and 'measures'—a task that became all the greater with the accession of the UK, Ireland and Denmark. (In 1985, the Cockfield White Paper estimated that over 300 new legislative measures would still be necessary to complete the internal market.)

As far as goods were concerned, the Commission sought to clarify the (as yet) uncertain scope of 'measures of equivalent effect' by adopting Directive 70/50/EEC on 22 December 1969 (that is, just before expiry of the transitional period). The Directive was 'based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty'.[6] Its compatibility with the peremptory terms of Article 30 was later questioned by Advocate General Capotorti in his Opinion in *Cassis de Dijon*.[7] But in any event, the Directive very soon lost its importance when the Court provided its wide-ranging and all-inclusive definition in *Dassonville*[8] (albeit the Court has

[6] Commission Directive 70/50 [1970] OJ L13/29. See also Commission Directives 66/682/EEC and 66/683/EEC [1966] OJ P220/3745.

[7] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:3, paras 669–71.

[8] Case 8/74 *Dassonville* (n 5). It is instructive to read the report of the Commission's submissions at pages 846–47. If that wording had been more closely followed in the judgment, some of the problems that led to *Keck* might have been avoided.

complicated matters by adopting a narrower approach to restrictions on exports as compared with imports).[9]

The legislative vacuum resulting from the failure to put all the legislation in place by the end of the transitional period (or stages of it) was, to some extent, overcome by the Court's decisions in *Alfons Lütticke*[10] and *Salgoil*[11] that, on the expiry of the time limit, the basic rules guaranteeing free movement must have direct effect. The logic of this approach, later followed in *Reyners*[12] and *Van Binsbergen*,[13] is explained by the need to stick to the Treaty schedule in order to comply with Article XX of the GATT.

That did not mean, however, that all national restrictions on free movement—other than those expressly provided for in Articles 36, 48, 56 and 66—were thereby rendered unenforceable. Article 57 EEC had provided for a programme of directives to deal with problems specific to establishment and services generally, such as mutual recognition of qualifications, and especially those of the medical, allied and pharmaceutical professions. As the Court explained in *Thieffry*,

> [Article 57] is … directed towards reconciling freedom of establishment with the application of national professional rules justified by the general good, in particular rules relating to organization, qualifications, professional ethics, supervision and liability, provided that such application is effected without discrimination.[14]

A similar formula, adapted to the very different character of the market in goods, was used three years later in *Cassis de Dijon*:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements (*exigences impératives*) relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[15]

The same point was made, perhaps even more clearly, a year later in *Gilli and Andres*:

> In the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade.
>
> It is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative

[9] Case 15/79 *Groenveld v Produktschaap voor Vee en Vlees* EU:C:1979:253.
[10] Case 48/65 *Alfons Lütticke v Hauptzollamt Saarlouis* EU:C:1966:8.
[11] Case 13/68 *Salgoil v Italian Ministry for Foreign Trade* EU:C:1968:54.
[12] Case 2/74 *Reyners v Belgium* EU:C:1974:68.
[13] Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor Metaalnijverheid* EU:C:1974:131.
[14] Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* EU:C:1977:65, para 12.
[15] Case 120/78 *Rewe* (n 7), para 8.

> requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30.[16]

A sub-theme of all these judgments was the idea that was gradually developed as the principle of proportionality (discussed below).

Following the judgments in *Cassis de Dijon* and *Gilli and Andres*, the Commission issued a Communication which summarised the consequences for application of the free movement rules:

> Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter.
>
> This principle implies that Member States, when drawing up commercial or technical rules liable to affect the free movement of goods, may not take an exclusively national viewpoint and take account only of requirements confined to domestic products. The proper functioning of the common market demands that each Member State also give consideration to the legitimate requirements of the other Member States.
>
> Only under very strict conditions does the Court accept exceptions to this principle; barriers to trade resulting from differences between commercial and technical rules are only admissible:
>
> — if the rules are necessary, that is appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.);
> — if the rules serve a purpose in the general interest which is compelling enough to justify an exception to a fundamental rule of the Treaty such as the free movement of goods;
> — if the rules are essential for such a purpose to be attained, i.e. are the means which are the most appropriate and at the same time least hinder trade.[17]

It is significant that the Commission put into the same category 'protection of consumers or the environment and the fairness of commercial transactions', none of which figured in the Treaty as permissible limits on free movement, and 'public health', which did. Moreover, the addition of 'etc.' was a tacit indication that other concerns might justify exceptions to the four freedoms.

Environmental protection was explicitly recognised as 'one of the Community's essential objectives' (and therefore a 'mandatory requirement')[18] in '*ADBHU*'.[19] By

[16] Case 788/79 *Gilli and Andres* EU:C:1980:171, paras 5–6.

[17] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon') [1980] OJ C256/2.

[18] It is regrettable that this absurd expression became part of the vocabulary of Community law rather than 'imperative requirements', which was used in *Gilli and Andres*.

[19] Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* EU:C:1985:59, para 13.

the time of *Danish Bottles*[20] three years later, the Single European Act had added 'Environment' to the Treaty as a 'Policy of the Community'.

Since that time, the Treaty-makers have added greatly to the list of 'policies', 'objectives' and 'aims' that must be taken into account. Although some parts of the Treaty have begun to look like a politically correct wish-list rather than a legal text, it is inevitable that, over the 60 years since the EEC Treaty was drafted, public and political priorities and preoccupations have changed and developed, especially as the Union has grown from six to 28 Member States.

Yet it is regrettable that the Treaty-makers have made no attempt to tell us which of their new policies, objectives and aims are to be regarded as *exigences impératives*; nor, if they are, whether they justify restrictions across the whole range of free movement rights or only some of them; nor how they are to be reconciled with the practical exercise of the four freedoms; nor, in cases where they may conflict, which of these political desiderata is to take priority. So it is important, when considering the case law on the exceptions to the rules of free movement, to recognise that the Court has, from the beginning, been forced to map out uncharted territory with inadequate and increasingly confusing navigational aids.

The task has not been made easier by the procedural scheme within which the Court has to operate. By far the largest number of cases on the exceptions to free movement has come before the Court under the preliminary reference procedure (now Article 267 TFEU). This procedure presupposes that issues of fact are for the national court making the reference and not for the Court of Justice. In many cases the questions(s) referred cannot be answered without making assumptions as to the underlying facts, or making some attempt to find them by putting questions to the parties or interveners. Neither method is entirely satisfactory. Quite often, the party with the closest knowledge of the facts may not be represented at the oral hearing; and because of the language régime, the representative of the Commission presenting the case may not be as familiar with the underlying facts as the official in charge of the file.

Fact-finding is only marginally easier in direct actions under Article 258 TFEU where the Commission alleges that a Member State has unlawfully restricted free movement rights. The exchange of pleadings may consist of little more than charge and counter-charge, and the accuracy of the facts in issue depends on the assiduity and impartiality of the Commission's investigations and the honesty of the defendant State.[21]

[20] Case 302/86 *Commission v Denmark* EU:C:1988:421.

[21] Case C-65/91 *Commission v Greece* EU:C:1992:388 is a particularly egregious example, where the damning appearance of the letter Delta on application forms (mentioned in paragraph 9 of the judgment) went unnoticed until the oral hearing.

Moreover, the fact/law distinction, so familiar to common lawyers, is less marked in other legal systems, and in any event is easier to draw in theory than in practice.[22] This is perhaps particularly so when it comes to applying the principle of proportionality which has drawn attention to profound differences in legal culture.

As Jürgen Schwarze explains in his magisterial survey of European Administrative Law, the principle of proportionality was well developed in German jurisprudence and academic writing going back to the end of the nineteenth century. He identifies three factors that govern the applicability of the proportionality principle in German law:

1) First, the state measures concerned must be *suitable* for the purpose of facilitating or achieving the objective pursued.
2) Second, the suitable measure must also be *necessary*, in the sense that the authority concerned has no other mechanism at its disposal which is less restrictive of freedom. … [I]t is not the method used which has to be necessary, but 'the excessive restriction of freedom involved in the choice of method.'
3) Finally, the measure concerned may not be *disproportionate* to the restrictions which it involves (proportionality *in stricto sensu*).[23]

This is broadly the approach that has been adopted in EU law, though not always under the general heading of proportionality. In *Kraus*, the Court of Justice formulated the principle to be applied in this way:

> Articles 48 and 52 preclude any national measure … where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals … of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest. … It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose.[24]

In *Gebhard*, the Court adopted a briefer, all-purpose formulation:

> National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[25]

[22] See D Edward, 'Article 177—The Problem of Fact-finding' in Henry G Schermers, TMC Asser Institute (eds), *Article 177 EEC: Experiences and Problems* (Amsterdam, North-Holland, 1987) 216–20.

[23] Jürgen Schwarze, *European Administrative Law* (London, Office for Official Publications and Sweet & Maxwell, 1992, revised 2006) 685–92, especially 687.

[24] Case C-19/92 *Kraus v Land Baden Württemburg* EU:C:1993:125, para 32.

[25] Case C-55/94 *Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* EU:C:1995:411, para 6 of the Operative Part.

In *Commission v Spain*, Advocate General Sharpston summarised the case law together with an indication of the sort of evidence that must be adduced to justify a derogation from a fundamental freedom:

> [W]here a restriction results from a measure which does discriminate on grounds of nationality, Article 46(1) EC allows it to be justified on grounds of public policy, public security or public health. Where there is no such discrimination, the restriction may also be justified by overriding requirements relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. The reasons invoked by a Member State in order to justify a derogation from the principle of freedom of establishment must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State, and by precise evidence enabling its arguments to be substantiated.[26]

Commission v Spain was, of course, a direct action where the Court of Justice has jurisdiction to assess the analysis and the evidence. The position is different in references, where the national court is the judge of fact. As a way of overcoming the problem of fact/law jurisdiction, the Court resorts fairly frequently to the pretext of 'providing a useful/helpful answer' to justify performing the assessment of proportionality itself. This technique has been questioned as an illegitimate overreach of jurisdiction, and it is certainly not helpful or useful if the Court turns out to have given the wrong answer to the wrong question.

On the other hand, protracted judicial ping-pong between the Court of Justice and national courts serves no good purpose, and critics should bear in mind the old maxim, *interest reipublicae ut sit finis litium*—it is in the public interest that there be an end to litigation. The procedures of the Court of Justice are already criticised as unduly lengthy and, as a wise Scottish judge observed, 'the Courts are neither a debating club nor an advisory bureau'.[27] In general, litigants expect the courts to provide them with answers without undue delay or unnecessary expense, and it is reasonable that the Court of Justice should attempt to do this where possible.

A more fundamental and important issue was raised by Mr Justice (later Lord) Hoffmann in the ill-starred Sunday Trading cases in 1991, where he questioned whether—or at least, to what extent—the assessment of proportionality could properly be the province of the judiciary:

> In my judgment it is not my function to carry out the balancing exercise or to form my own view on whether the legislative objective could be achieved by other means. These questions involve compromises between competing interests which in a democratic society must be resolved by the legislature. The duty of the court is only to inquire whether the compromise adopted by the United Kingdom Parliament, so far as it affects community trade, is one which a reasonable legislature could have reached. The function of the court is to review the acts of the legislature but not to substitute its own policies or values.

[26] Case C-400/08 *Commission v Spain* EU:C:2011:172, para 36.
[27] Lord Justice Clerk Thomson in *Macnaughton v Macnaughton's Trustees* 1953 SC 387, 392.

> This is not an abdication of judicial responsibility. The primacy of the democratic process is far more important than the question of whether our Sunday trading laws could or could not be improved.[28]

It is true that judicial attitudes and practice in the United Kingdom have changed and developed in the intervening years—accelerated by incorporation of the European Convention on Human Rights in the Human Rights Act 1998. Nevertheless, there remains an underlying tension between asserting as a matter of principle that restrictions to the four freedoms must be shown to be legitimate and proportionate and the practical exercise of deciding *how and by whom* that principle is to be applied in the concrete case.

That is only one of the many problems and uncertainties that are discussed in this book. Essentially, they centre upon the role of one of the institutions—the Court of Justice—and its case law. The reason for stressing the historical context is to show that the dominant role of that institution has been due to the failure of the others to fulfil the obligations assigned to them by the Treaty. So it is important, not only to consider the merits and defects of the Court's case law, but also to ask whether the original scheme of the Treaty was really workable, and what might have been the result if the Court had been less 'active'.

[28] *Stoke-on-Trent City Council v B & Q plc* [1991] Ch 48, 69.