

SOVEREIGNTY IN THE UNITED KINGDOM AFTER JOINING THE EUROPEAN ECONOMIC COMMUNITY

By

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Introduction

Opportunities are increasing for Australian corporations to export to Europe and to carry on business there. Until recently, there has been very little federal power in the European Community — legislation was adopted by the Council of Ministers from member states only on the basis of unanimity achieved by package deals. That is now changing, and a uniform internal market embracing a population of 320 million is only just over the horizon. There is much to be done, however, before that becomes a reality.

Accordingly, the methods of developing Community law should be of interest. Those concerned with the concept of half sovereign states and federal constitutions might also be interested in the way that a constitution said to be incapable of entrenchment has become subject to Community law.

The European Economic Community (EEC) was established under the Treaty of Rome 1957 (hereafter called “the Treaty”). Although it was intended to fall short of a federal state, the governments were expected to co-operate in ways that go beyond normal international treaties.¹ Community law was to be created by acts adopted by the Council of Ministers, irrespective of the monist or dualist character of the municipal legal order of the member states. Nevertheless, member states would have a hand in such law making, since the ministers in the Council were those appointed by them.

1. Three Ways of Making Community Law Effective

(a) Legislation

In the early days of the Community, little legislation was adopted on important matters. Under the transitional provisions of the Treaty, unanimity was required in the Council of Ministers and General de Gaulle, the political leader in France, did not believe in the federation of Europe. The Community is a very loose federation. The Treaty provided a framework under which it was hoped that the people of Europe would come together. It provided for policies to be developed and for legislation to be enacted, but did not include very many directly applicable provisions. By 1966, powers had been conferred on the Commission by the Council in Regulation 17/62 to enforce the competition laws, and most of the common agricultural policy was set up between 1962 and 1968, much of it by 1964,² but there were virtually no other common policies in 1966.

The principal legislative organ of the Community is not the European Parliament but the Council of Ministers, to which the Commission may propose legislation. The Council consists of national ministers. If, for instance, agriculture is to be discussed each member state sends a representative for agriculture and so on. If the matter is political, the minister of agriculture is likely to go himself, if it is more technical a junior minister will be sent.

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1. See Joseph Weiler ‘The Community System: the Dual Character of Supranationalism’ (1981) *Yearbook of European Law* 267.

2. See Francis Snyder *Law of the Common Agricultural Policy* 1985 at 8-10.

One might expect each to have the interests of his own member state uppermost in mind when reconciling conflicting interests in order to adopt a measure. The Treaty required most decisions to be taken by unanimous vote during the transitional period but, thereafter, it provided for many kinds of decision to be taken by a qualified majority, and a few less important matters could be decided by simple majority.

In 1965, a year before unanimous voting would be necessary for far fewer items, the Commission proposed a package deal that would have greatly increased the powers of the Community institutions. A source of taxation for the Community's own resources was attached to an agricultural measure. France reacted strongly and from June of that year French representatives ceased to attend the Council or meetings of the Committee of Permanent Representatives, which helps to prepare the political aspects of proposed legislation for the Council. France participated only in technical administrative meetings for carrying out policies that had already been agreed in principle. Even where unanimity was not required by the Treaty, the other five member states hesitated to make important decisions without French participation, so new legislative measures ceased. This was particularly serious, as the Treaty creates little federal law — rather a mechanism for the Council to create it.

It proved comparatively easy to resolve the immediate problems of the budget and the common agricultural policy, so the French returned to the Council eight months later but, as a condition of renewed participation, they obtained the agreement of the other members of the Council that where decisions can be taken by majority vote on a proposal of the Commission, and very important interests of one or more partners are at stake, the members of the Council would endeavour, within a reasonable time, to reach solutions that could be accepted by all members, while respecting their mutual interests and those of the Community.

Although this procedure, colloquially known as the agreement to disagree, has been formally invoked only about a dozen times, the so-called Luxembourg accords were extremely important since, for almost twenty years thereafter, the Council rarely passed any important measure unless there was a consensus. This forced the Council to operate through package deals.³

(b) The direct effect and applicability of Community Law in national courts

While at a political level the European Community made little progress in the early days, at a normative level the Community Court did much to make effective those provisions of the Treaty that required no legislative or administrative action.

The EEC Treaty provides for free trade between member states — the free movement of persons, goods, services and capital within the territory of all the members. It also provides a customs union. The basic idea is that goods are subject to a common commercial tariff on entering any part of the Community and thereafter can circulate throughout the common market without paying further customs duty. Initially, however, tariffs had to be brought into line and, meanwhile, Article 12 provided that

Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

Later such duties were progressively abolished in advance of the timetable laid down under Article 13.

3. Weiler *supra* n.1 at 286.

The question arose in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*⁴ whether these provisions bound member states under their national laws as well as under public international law and whether rights were also conferred directly by the Treaty on citizens in national courts. Under the Benelux International Treaty, customs classifications were harmonised and, as a result of a Dutch law adopted in July 1958 giving effect to this, ureaformaldehyde came under a different heading, for which customs duties were higher. This had the result, during the transitional period of the EEC, that ureaformaldehyde coming into the Netherlands from another member state attracted higher duty than it would have done at the beginning of 1958 when the EEC Treaty came into force.

The importer claimed before a Dutch tribunal that the increase in duty was contrary to Community law and the Tariefcommissie asked the Community Court to rule whether Article 12 of the Treaty had immediate effect on internal law, in the sense that nationals of the member states could, on the basis of the Article, claim rights which a national judge must safeguard. In some member states, international treaties do automatically alter domestic law, but this is not so in all member states, and both the reclassification of customs duties and the establishment of the European Community were accomplished in pursuance of an international treaty. The court did not go far into these questions but, in a very broad and important judgment, it said:

The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to co-operate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community Law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is 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 a limited field, 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. These rights arise not only where they are expressly granted by

4. Case 26/62 [1963] ECR 1. See generally J. Usher *European Community Law and National Law: The Irreversible Transfer* 1981.

the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12.

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation. ...

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of Member States [in petitioning the Court to restrain Member States from infringing the Treaty].

It follows from the foregoing considerations that, according to the spirit, the general scheme and wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

The doctrine of the direct effect of Community law in the courts of member states has been developed over the years by numerous judgments. In *Costa v. ENEL*,⁵ the Court stated clearly that member states have limited their sovereignty in a limited field, and stressed the priority of Community law:

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.

The Court repeated the reference made in *Van Gend en Loos* to a new legal order with the significant omission of the words "of international law". The doctrine is very different from the international law concept that Treaties bind states toward each other, but rarely confer rights on their citizens.

Not all Community law is of direct effect. A distinction should be made between those provisions of Community law that individuals may invoke directly in national courts and the others. Provisions that have direct effect require no further intervention by the national or Community legislature or administration. Other provisions can come into effect only after legislative decisions are taken by the Council. Directives may require member states to modify the law, but give them some discretion as to how this is to be done. Many of the provisions provide only a framework for further decision making. Provisions that do

5. Case 6/64 [1964] ECR 585; the Court made the priority of directly effective provisions of the Treaty even more clear.

require such intervention are said to be “directly applicable, but not of direct effect”.⁶

Nevertheless, the direct effect in national law of those provisions that are clear, precise and not conditional is of the greatest importance. Citizens’ rights are not dependent on the good will and competence of their governments. States that fail to fulfil their obligations can be brought before the Community Court by the Commission under Article 169 and by other member states under Article 170, but more Community law has been established by national courts invoking Article 177 and asking the Community Court in Luxembourg to interpret the Community provisions. Such rulings by the Community Court are then effective in declaring the interpretation of directly enforceable Community obligations throughout the common market. Even if there are reasons why a state might not want to comply with Community law, individuals and firms may bring an action in their local courts, and persuade the judge to ask the Community Court at Luxembourg to rule on the interpretation of Community law or the validity of subordinate legislation. Slowly the supreme courts of the various member states have come to recognise both the direct effect and supremacy of Community law.⁷ This has enabled Community law to develop even when little legislation was being adopted by the Council of Ministers.

(c) Pre-emption

A third way of incorporating Community law into national law is the doctrine of pre-emption,⁸ which the Court developed for fields in which the Community has competence to make policy, such as agriculture.⁹ Originally, it merely ruled that Community regulations should not be re-enacted in member states. Their authority derives from accession and the direct effect of Community law. Later it went on to rule that member states are sometimes precluded from taking any action at all. It has been careful, however, not to prevent state action where the decision making of the Council was so difficult that no progress could be made at the Community level.

In the ERTA case,¹⁰ the question arose whether member states were entitled to negotiate separately in the GATT. The Treaty did not expressly provide for Community competence to engage in international agreements, so it was argued that member states should continue to negotiate separately or collectively. The Court ruled to the contrary:

... each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such rules come into being the Community alone is in a position to assume and carry out contractual obligations [of the member states] towards third countries affecting the whole sphere of application of the Community Legal System.

In the *International Rubber* case,¹¹ however, the Court accepted the concurrent jurisdiction of member states in a field occupied by the Community. The Court stated that [as]:

6. See Winter ‘Direct applicability and direct effect: two distinct and different concepts in Community Law’ (1972) 9 CML Rev. 425

* 7. See Weiler *supra* n.1 at 277.

8. See Micheal Waelbroeck ‘The Emergent Doctrine of Community Pre-emption — Consent and Re-delegation’ in Terrance Sandalow and Eric Stein *Courts and Free Markets — Perspectives from the United States and Europe*, vol 2 Oxford 1982. He discusses pre-emption mainly in relation to foreign commerce and price regulation of agricultural products for which there is no common organisation.

9. Case 220/70 *Commission v. Council* [1971] ECR 273.

10. The *International Rubber Agreement* opinion 1/78 [1979] ECR 2871.

11. *Ibid.*

... no formal decision has been taken on the question [as to whether the Community of Member States should finance the agreement, and as] there is no certainty as regards the attitude of the various Member States ... the exclusive competence of the Community could not be envisaged in such a case.

This pragmatic retreat from the pure doctrine of pre-emption adopted in the *ERTA* case enables progress to be made by member states even if, for political reasons, the Council of Ministers cannot act. It may be merely transitory, and the doctrine of pre-emption does apply in fields where political progress has been made, such as fisheries and agriculture.¹²

2. Sovereignty and Accession to the EEC Treaty

When the European Communities Bill, 1972 was being debated, it should have been clear that accession to the Communities would limit the sovereignty of the Queen in Parliament over the United Kingdom in the areas affected by the EEC Treaty.¹³ Quite apart from the case law establishing the direct effect of Community law, the Bill expressly provided for sovereignty to pass to the Community in limited fields. Article 2(1) provided in more explicit terms than the legislation of any other member state:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

It was recognised that section 2(1) incorporated into United Kingdom law existing Community Law and subsequent accretions thereto including the doctrine of direct effect, but section 2(4) went further and provided for the invalidity of subsequent Acts of the United Kingdom Parliament in so far as they were inconsistent with Community law. Hidden away in the second limb of the sub-section were words that are quite clear, but were generally not noticed when the Bill was in Committee. The Bill had an unusual passage through the House of Commons — no amendments were accepted during the Committee stage, so there was no Report stage. The Act was identical with the Bill as drafted for first reading. The opposition was not given very long to discover the niceties of a very complex bill. Sub-section (4) provides:

... any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section

In other words, if a later enactment of the Queen in Parliament were possibly inconsistent with Community law, not only should United Kingdom courts endeavour to interpret it so as to avoid any inconsistency, but if they were unable to do so, Community law should prevail to the extent of the inconsistency.

It used to be claimed that one element of Parliamentary sovereignty was its power to overrule its earlier enactments, and that such an entrenched provision would not be effective.¹⁴

12. See e.g. Weiler *supra* n.1 at 274.

13. J.D.B. Mitchell 'What happened to the constitution on 1st January 1973?' [1980] *Cambrian L.Rev* 69; and J.W. Bridge 'Abstract Law and Political Reality in the Post-European-Accession British Constitution', [1987] *Denning LJ* 23.

14. E.g. Lord Dilhorne, L.C. in 1962:- 'An Act of Parliament would be required to apply these Treaties ... That Act of Parliament, like any other, could be repealed by a subsequent Act; and if that happened the Treaties would cease to be the law in this country ... Parliament could repeal the Act applying these Treaties; it cannot be prevented from doing so' *House of Lords Debates* 5th series 1961-2 vol 243 cols. 421-2.

Sub-section (4) is, however, beautifully drafted to arouse the minimum of opposition. First, the courts are told to construe the subsequent legislation so as not to infringe the Treaty: only if this is not possible is the court required to ignore subsequent United Kingdom legislation to the extent of the incompatibility. Had the referendum held in 1975 been adverse to the United Kingdom remaining within the common market, no doubt legislation repealing the Communities Act would have been upheld. Nevertheless, s.2(4) enables a court to obviate the effect of provisions that accidentally infringe Community law.

It has, since, become quite clear that British measures that are inconsistent with Community law cannot prevail, and the British government paid 3½ million pounds to some French growers for the damage caused by maintaining sanitary legislation keeping French turkeys out of the United Kingdom, which the Community Court found were not justified as protecting Britain from infection by Newcastle disease, but merely protected the British Christmas trade in turkeys.¹⁵ The illegal English legislation was effective only for a limited period.

Community law can also be enforced by the Commission or member states asking the Community Court to declare that a member state has failed to perform its Community obligations by enacting required legislation. The case law in the Community Court goes far in requiring member states to comply with Community law. In *Commission v. Belgium*,¹⁶ the Commission petitioned against Belgium whose indirect taxation of timber discriminated against timber which was not home grown. The Government's defence was that it had introduced legislation to remedy the matter two years previously, but that the Chamber of Representatives had not yet passed it. It could not do more. Nevertheless, this was held to be no defence. Obligations bind the member state as a whole, including its legislature, and not just the Government:

The obligations arising from Article 95 of the Treaty devolve upon States as such and the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.

This development, too, has been of the utmost importance. Often the Italians have had no government, and the governments are not always avid to adopt measures that may hinder their return to power. Without the doctrine that Community obligations bind national legislatures little Community law would apply.

15. In *Bourgoine v. MAFF* [1986] 1 CMLR 267 the Government won in the Court of Appeal, which has often been loathe to apply Community law, but must have expected to lose heavily in the House of Lords. The settlement was published in [1987] 1 CMLR 169.

Lawrence Gormley commented on the attitude of English courts towards community law in 'The application of Community Law in the United Kingdom 1976 — 1985' (1986) CML Rev 287.

Prior statutes were held to give way to Community law in *Garland v. British Rail Engineering* [1981] 2 CMLR 542.

16. Case 77/69 [1970] ECR 237. In case 311/85 *Belgian Travel Agents* [1987] ECR the Court went so far as to say that government persuasion is not merely no defence for a firm alleged to have infringed Article 85: the legislation is itself illegal. It ruled that:

for a Member State by legislative or administrative measure to require travel agents to charge the rates imposed by tour operators and to forbid the agents to share their commission with customers or to give them a discount is incompatible with the obligations of Member States imposed by Article 5 of the EEC Treaty, in conjunction with articles 3(f) and 85 of the same treaty, if the national measure has the object or effect of reinforcing the effects of agreements prohibited by Article 85.

Not only was ministerial encouragement no defence, the legislation reinforcing the agreement contrary to Community law was itself illegal and ineffective in the national court.

3. Direct effect of Articles 30-36

There is no Community patent,¹⁷ trademark, design or copyright law. Intellectual property rights are national. Intellectual property rights are limited territorially, so a patentee in state A has to apply also for a patent in other countries if he wants to prevent manufacture, import or sale there. Before the Community was established, one could use patents or trademarks to discriminate between buyers or licensees in different countries. There was no generally accepted concept of international exhaustion whereby once the goods have been sold by or with the consent of the holder, his right to restrain the marketing of genuine goods is exhausted.¹⁸ Consequently, a holder might grant licences in each country and restrain the products of one licensee coming into the territory of another by suing for patent or trademark infringement. He might even manufacture himself and sell in different countries at very different prices and use intellectual property rights in the high priced areas to keep out goods produced and sold where prices were lower.

The Community still lacks a common currency. Price differences between member states of the Community did not level out once customs duties and quotas were abolished as was hoped. People in some countries are better off than in others. Until recently, the French imposed maximum price control on many products, and still do for pharmaceuticals. There has also been price control in the United Kingdom, Italy and Belgium at different periods, some such controls being illegal under Article 30 of the Treaty as they bore more heavily on importers than domestic producers who could more easily give the prior notice of increase required. Italy used not to grant patents for drugs for treating human beings, since health was so important. Only in 1978 was this rule reversed by the Italian Constitutional Court on the ground that it deprived innovators of the fruits of their research and removed the incentive to invest in it. No transitional provisions were enacted, so drugs discovered and patented elsewhere before that judgment was delivered were no longer novel and could not be protected by patents in Italy. Patent protection still differs between member states — some, such as the United Kingdom, weaken patents by compulsory licences, others, such as Greece, allow only process and not product patents, other countries, such as France, maintain maximum price controls which make it illegal for a patentee to earn the full reward that the market would otherwise bear.

The illegality under Article 85 of contractual provisions that deter parallel exports makes it difficult to give adequate incentives to induce licensees to tool up and establish a market in the high priced countries or for dealers there to invest in promotion.

(a) *Consten & Grundig*¹⁹

When Grundig decided to distribute dictaphones and similar apparatus outside Germany it appointed exclusive distributors, each to cover a considerable area. Consten had entered into such a contract for France and its overseas territories. As was usual before the creation of the common market, Grundig agreed to supply only Consten in its territory and, to make

17. A Community Patent Convention was signed in Luxembourg in 1976. Thereunder, inventors would have been able to apply for a Community patent, but the Convention has been ratified by only some of the parties and has not come into force. The Danes need either a referendum or a two-thirds majority in Parliament. The common market is not now popular there, so a referendum would probably be negative and the government does not control two-thirds of the votes. The Irish also have constitutional problems, although they might be ignored if the Danes were able to ratify. We do have a European patent office, not confined to Community countries, but although an international search is made and patents issued under the European Patent Convention, they operate as national patents in those European countries requested in the application.

18. Save for trademarks in the Federal Republic of Germany.

19. Cases 56 & 58/64 [1966] ECR 299.

the exclusivity effective, it also restrained its wholesalers in the Federal Republic of Germany and distributors in other member states from exporting into Consten's territory. It strengthened this protection by permitting Consten to register in France the trademark GINT — Grundig international. This was marked on all Grundig products of the period, and would enable each exclusive distributor to sue for trademark infringement anyone buying Grundig apparatus where it was cheaper for sale within its territory.

Consten did, indeed, sue for unfair competition and trademark infringement UNEF and Liesener, two chains of supermarkets that were buying from the German wholesalers and selling in Alsace. Their defence was that the agreement between Grundig and its German wholesalers restraining exports was contrary to Article 85. Article 85(1) prohibits, as incompatible with the common market, collusion between firms that may affect trade between member states and that has the object or effect of restricting competition within the common market. Article 85(3) provides for exemptions to be granted from the prohibition, and Article 85(2) renders void any agreement that infringes the Article. The parallel importers argued that the absolute territorial protection conferred on Consten was void and Consten and Grundig replied that Article 222 provides that: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

The Advocate General — a member of the Court, of equal status with the judges and a little like a judge of first instance — said that this use of the mark GINT was abusive. The mark Grundig indicated the origin of the goods, and the additional mark was intended merely to divide markets. The Court went further than in 1966 — the crisis period for the Council of Ministers — and distinguished the existence or grant of the mark, which by virtue of Article 222 is not affected by the Treaty, and its use, which is. This gave the Court a powerful weapon for altering the law, at a time when the Community legislature had proved inadequate. The existence of a right may be defined by reference to all the ways it may be exercised. When no exercise remains possible, then no right can usefully be said to exist, but save at this extreme there is no way of distinguishing between exercise and existence by logical analysis. The distinction marks a very important difference — the Treaty overrides national law or does not — but the line cannot be drawn analytically. This leaves the Community Court, from which there is no appeal and which acts like a supreme or constitutional court, with very considerable power. If it likes the use being made of national law, it can rule that it relates to the existence of the right, if not, to its exercise.²⁰ In *Consten & Grundig* the Court confirmed the Commission's decision that absolute territorial protection went too far. List prices in France were some 40% higher than in the Federal Republic of Germany, and even after allowing for discounts, which might decrease if Consten succeeded in the French courts, were 25% higher. Neither Court nor Commission considered how much protection Consten might require to promote the goods.²¹ Shortly afterwards, Grundig acquired Consten, thereby making Article 85 irrelevant to its agreement with Consten.

(b) *Centrafarm v Sterling*²²

Eight years later, the Court developed the distinction between the existence and exercise of a right. *Sterling* held the patents for a drug and its subsidiaries in various countries held

20. *V. Korah* case note (1972) 35 MLR 634.

21. The agreement was made in 1957, before the common market was established and when quotas restrained the import of apparatus into France. Consten would have to incur the expense of setting up a retail network and making the produce of a recent enemy popular at a time when it could not expect an unlimited turnover over which to spread the overheads. The free rider argument applied particularly strongly in the case. Just when quotas were opened to infinity, the two supermarket chains started to sell Grundig apparatus in quantity, taking advantage of Consten's investment in making the mark popular.

22. Case 15/74 [1974] ECR 1147.

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the exclusivity effective, it also restrained its wholesalers in the Federal Republic of Germany and distributors in other member states from exporting into Consten's territory. It strengthened this protection by permitting Consten to register in France the trademark GINT — Grundig international. This was marked on all Grundig products of the period, and would enable each exclusive distributor to sue for trademark infringement anyone buying Grundig apparatus where it was cheaper for sale within its territory.

Consten did, indeed, sue for unfair competition and trademark infringement UNEF and Liesener, two chains of supermarkets that were buying from the German wholesalers and selling in Alsace. Their defence was that the agreement between Grundig and its German wholesalers restraining exports was contrary to Article 85. Article 85(1) prohibits, as incompatible with the common market, collusion between firms that may affect trade between member states and that has the object or effect or restricting competition within the common market. Article 85(3) provides for exemptions to be granted from the prohibition, and Article 85(2) renders void any agreement that infringes the Article. The parallel importers argued that the absolute territorial protection conferred on Consten was void and Consten and Grundig replied that Article 222 provides that: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

The Advocate General — a member of the Court, of equal status with the judges and a little like a judge of first instance — said that this use of the mark GINT was abusive. The mark Grundig indicated the origin of the goods, and the additional mark was intended merely to divide markets. The Court went further than in 1966 — the crisis period for the Council of Ministers — and distinguished the existence or grant of the mark, which by virtue of Article 222 is not affected by the Treaty, and its use, which is. This gave the Court a powerful weapon for altering the law, at a time when the Community legislature had proved inadequate. The existence of a right may be defined by reference to all the ways it may be exercised. When no exercise remains possible, then no right can usefully be said to exist, but save at this extreme there is no way of distinguishing between exercise and existence by logical analysis. The distinction marks a very important difference — the Treaty overrides national law or does not — but the line cannot be drawn analytically. This leaves the Community Court, from which there is no appeal and which acts like a supreme or constitutional court, with very considerable power. If it likes the use being made of national law, it can rule that it relates to the existence of the right, if not, to its exercise.²⁰ In *Consten & Grundig* the Court confirmed the Commission's decision that absolute territorial protection went too far. List prices in France were some 40% higher than in the Federal Republic of Germany, and even after allowing for discounts, which might decrease if Consten succeeded in the French courts, were 25% higher. Neither Court nor Commission considered how much protection Consten might require to promote the goods.²¹ Shortly afterwards, Grundig acquired Consten, thereby making Article 85 irrelevant to its agreement with Consten.

(b) *Centrafarm v Sterling*²²

Eight years later, the Court developed the distinction between the existence and exercise of a right. *Sterling* held the patents for a drug and its subsidiaries in various countries held

20. *V. Korah* case note (1972) 35 MLR 634.

21. The agreement was made in 1957, before the common market was established and when quotas restrained the import of apparatus into France. Consten would have to incur the expense of setting up a retail network and making the produce of a recent enemy popular at a time when it could not expect an unlimited turnover over which to spread the overheads. The free rider argument applied particularly strongly in the case. Just when quotas were opened to infinity, the two supermarket chains started to sell Grundig apparatus in quantity, taking advantage of Consten's investment in making the mark popular.

22. Case 15/74 [1974] ECR 1147.

the trademark, Negram. Prices in England were half those in the Netherlands. The difference was due as to one third to the National Health Service being virtually the only payer for drugs in the United Kingdom and having powers to grant compulsory licences if it considered the prices charged were too high. Two-thirds of the difference was due to the guilder having risen and sterling sunk on currency markets. The price difference made it profitable for Centrafarm to buy the drug from an English wholesaler for sale in the Netherlands. Sterling sued Centrafarm in the Netherlands for patent infringement and its Dutch subsidiary, Sterling Winthrop, sued for trademark infringement.

The rules for the free movement of goods include Articles 30 and 36. Article 30 provides that:

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

There is however an exception in Article 36:

The provisions of Articles 30 — 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [*inter alia*] the protection of industrial and commercial property. Such prohibitions or restrictions shall not however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

It is clear that Article 30 was intended to include intellectual property rights. Otherwise there would have been no need to except them in Article 36. Nil quotas are prohibited.

The Court observed that Article 30 gives effect to a principle of the Treaty and not just a rule, so should be construed widely. It added, that since Article 36 derogates from a fundamental principle, it should be narrowly construed. The Court also referred to the distinction it had drawn in *Consten & Grundig* between the existence and exercise of national property rights. It continued:

In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringement.

This may read like a translation from German — it is a translation from the Dutch — and it may not be a first class analysis of a patentee's rights. Nevertheless, it gets over two important ideas — the objective of patent laws, the reward for the inventor — we might say the incentive to investment in innovation — and the means by which that is achieved, the exclusive right of the patentee to restrain others from taking advantage of his innovation.

The Courts seem to have treated as a measure of equivalent effect to a nil quota the rule that the sale in the United Kingdom does not exhaust a Dutch patent, in the way that a sale in the Netherlands might.²³ Once I have sold the protected patent to you, or permitted you to manufacture it, my rights may be exhausted in a single country. That is not quite the position in the United Kingdom, but I would have given you an implied licence to sell the product unless I had specifically limited your rights. The Court went on:

Whereas an obstacle to the free movement of goods of this kind may be justified on the ground of protection of industrial property where such protection is invoked against a product coming from a Member State where it is not patentable and has

23. The judgment is inconsistent as to exactly what amounts to the obstacle to trade between member states. When considering the application of the transitional provisions in the United Kingdom's Act of Accession, the Court implies that it is the injunction, or application for it, since those are the only events that took place after the United Kingdom's accession. See Rene Joliet [1975] *Common Legal Problems* 15.

been manufactured by third parties without the consent of the patentee [In that case the patentee would have obtained no reward for his investment.] and in cases where there exist patents, the original proprietors of which are legally and economically independent [something that often arises in the case of trademarks, but rarely in respect of patents], a derogation from the principle of the free movement of goods is not, however, justified where the product has been put onto the market in a legal manner, by the patentee himself or with his consent, in the Member State from which it has been imported, in particular in the case of a proprietor of parallel patents.

This passage is extremely strict. In the first two instances the use of the patent may be justified, but the Court does not say that it is. There was considerable ground between what may be permitted and what may not that has been filled by the subsequent case law. The Court, however, was concerned that the exercise of the Dutch patent would divide national markets. Before the common market was created, it was not unusual to use the territorial limitation of intellectual property laws to reap the rewards of a discriminating monopolist. That function of patents has been denied by the Court and the reward of a possible monopoly rent limited to what is available to a firm that does not discriminate in price.

(c) Merck

In *Merck v. Stephar*²⁴ the Court went even further. When the invention of Moduretic, a drug for treating human beings, was novel, it was not possible to obtain a patent in Italy, although the law was changed in 1978 by the Italian Constitutional Court. Merck obtained patents in the other member states but could not obtain a patent in Italy. It attempted to use its Dutch patents to keep out of the Netherlands the Moduretic imported from Italy, where it had itself sold the drug. It could not have earned any monopoly profit in Italy, owing to the lack of any exclusive right, but the Court ignored the reference in *Sterling* to the reward for creative effort. It ruled that once the drug had been put on the market in Italy by Merck or with its consent, it must take the consequences of its choice and could not sue to restrain imports in other member states. That is the only reasoning given by the Court but, logically speaking, it is a conclusion not a reason. The case has been criticised.²⁵ The British government argued that there was no reason why the Court should discourage Merck from exploiting its innovation in Italy.

The parallel importer, Stephar, pointed out that prices were very different in different countries: that taking the price in the Federal Republic of Germany as 100, in the Netherlands it was 140, in Belgium 102, in Denmark 76, in the United Kingdom 58, in Italy 56 and in France 51. These figures must have affected the Court. There was a patent in France, yet the price was lower than in Italy where there was none. These differences can, however, be explained by differences in national law. In the Netherlands, patents are strong, with no possibility of compulsory licences. In the United Kingdom the National Health Service has great buying power reinforced by the Crown use provisions, and patents for drugs are not strong. In Italy there was no patent, and in France the patent was undermined by maximum price control.

At first sight the judgment is a travesty of justice. Had the various national governments negotiated to limit the permitted prices of drugs, they would never have selected the lowest price possible anywhere in the Community plus a small margin to enable a parallel importer to work. In effect, the Court extended the former Italian law based on the concept that

24. Case 187/80 [1981] ECR 2063.

25. *E.g.* V. Korah 'The limitation of Copyright and Patents by the Rules for the Free Movement of Goods in the European Common Market' (1982) 14 Case Western Reserve J. of Int'l L 7.

drugs are too valuable to be the subject of an exclusive right to a country that believed in strong incentives to useful innovation. On reflection, however, the judgment may be comprehensible. These differences in national laws were probably not contrary to the Treaty. French price control and the lack of an Italian patent bore as heavily on domestic innovators as on imports. There was nothing the Court could do about them. It appears, however, that the French pharmaceutical companies persuaded the French price authorities to let them raise the price of drugs substantially so that they might export more profitably to other member states. The Italian law had already been reversed by the Constitutional Court. The Community Court deprived Merck of the profits it might have expected when it invested in investigating the properties of Moduretic, but by placing private firms in such a squeeze, the Court forced them to persuade national governments to harmonise their rules somewhat.

In *Keurkoop v. Nancy Keen Gifts*,²⁶ the Court made it plain that if Merck had not sold the drug in Italy, but it had been made there by a third party, Merck could have kept it out of the Netherlands. Nevertheless, there are so many countries within the Communities that reduce the value of patents in one way or another, that it may not pay pharmaceutical companies to supply only those with strong patents and abandon the other countries to their competitors.

(d) Integration by the Court Concluded

The federal powers of the EEC are extremely limited and, even now, there is difficulty getting legislation through the Council that would help to enable firms to operate outside their home state and treat the common market as a single unit. The Court has done much to cut the Gordian knot, by ruling that national law that infringes the principle of the free movement of goods, people and services must give way to the Community principles. This has not sufficed when complex services are involved, since consumers may need protection and each country wants to protect its own.²⁷ Directives to cope with one sector after another have to be agreed in the Council. This takes time and requires political will, and it is not clear whether measures can legally be adopted through the co-operation procedure under Article 100A in relation to the free movement of goods and services.

4. Recent attempts to increase legislative progress

In 1982, the Prime Minister of the United Kingdom, Mrs Thatcher, attempted to invoke the Luxembourg agreement in order to persuade the other member states to grant the United Kingdom a rebate from its budgetary contribution. She refused to support the resolutions on farm pricing that had emerged from discussions in the Council. Nevertheless, on 18 May, the Council passed the resolution by majority vote. This did not mark the end of the Luxembourg accords — they are still respected where there is a link between the member state's important interest and the measure it attempts to block. Nevertheless, the incident marks the end of a period when most important controversial measures were blocked, unless a package deal could be achieved.

Until 1980, the members voted rarely — usually only on matters of the budget and staff and in agricultural Committees.²⁸ In 1980, votes were taken on only 10 occasions, but the number of votes taken has doubled every two years from then until 1986. The number taken is still increasing and voting has become part of the normal procedure in the Council.

26. Case 144/81 [1982] ECR 2853

27. Case 205/84 *Commission v. Federal Republic of Germany* [1987] CMLR 69. See also similar cases against France (220/83), Ireland (206/84) and Denmark (252/83) on which judgment was given at the same time.

28. Weiler *supra* n.1 at 287.

Moreover, sometimes a member state, finding that it is isolated, may give in and let the resolution be passed unanimously, without requiring that a vote be taken.

Nevertheless, the common market is far from complete. We still lack harmonisation of intellectual property law, we enjoy no common currency, lorries queue up at the ports, not to pay customs duties, but to claim a refund of value added tax from the country of export, and account for it in the country of import. The documents that must accompany a lorry load of freight are immensely complex. Lorries are required to have a special licence if they are to move throughout the Community, and a system of quotas has ensured that most can ply only between their home state and a customer or supplier.

The free movement of goods has largely been established through the direct effect given by the Court to directly applicable provisions of the Treaty, although cases still have to be brought against defaulting member states which bar the commercial importation of goods supposedly on grounds of health and safety. Harmonisation directives have taken decades to go through the Council and further years to implement. It has been far more difficult to provide for the free movement of services. Consumer protection may really be necessary in relation to financial services such as banking and insurance where consumers may lack information about a market each may test only once in his lifetime. The Germans want to control insurance offered in the Federal Republic even if, for instance, British insurers with a branch there are already controlled under United Kingdom legislation. Legislation by unanimity in the Council became more and more difficult and protracted as new states joined, often with interests very different from those of the original members.

5. 1992 and the Single European Act

A political initiative was taken in 1985 at Milan to achieve the internal market by 1992. The date is purely arbitrary, but deadlines make it easier to get legislation through. Of course, the internal market, that is the rules for free movement which are an important part of the common market, should have been completed by 1970.²⁹ The Commission's white paper on the internal market³⁰ submitted to the Council at the inter-governmental conference convened under Article 236 of the Treaty at the Summit in Milan lists a large number of measures that should be taken by 1992 to establish the internal market — this means the free movement of goods, workers, services and capital, but does not include other elements of the common market, such as the uniform commercial tariff which is already effective. It requires, *inter alia*, measures to be adopted by providing for control of services such as financial services, on the basis of minimal co-ordination of rules, supplemented by control in the home state, to be recognised as equivalent by the receiving state.

The Single European Act, which was adopted the following Spring, has affected the procedure available for adopting measures to complete the internal market.³¹ The new Article 100A, inserted by Article 18 of the Single European Act, provides for measures for

29. Article 8(7) of the Treaty.

30. *Completing the Internal Market* White Paper from the Commission to the European Council (Milan 28-29 June 1985 Comm (85) final).

31. An inter-governmental conference was convened under Article 236 after the Milan conference in 1985, and the Act was signed by all the member states in February 1986. Article 6(1) of the Single European Act provides for the co-operation procedure in order to complete the internal market. It applies to measures adopted only under specific articles of the EEC Treaty: 7 (discrimination on grounds of nationality); 49 (free movement of workers); 54(2) and 56(2), second sentence and all but second sentence of 56(2) (freedom of establishment); 100 A and B (measures to harmonise the law); 118A (social policy); 130E and Q(2) (social fund). It is not clear how far harmonisation measures apply to the free movement of goods or services. See Nicholas Forwood and Mark Clough 'The Single European Act and Free Movement — Legal Implications of the Provisions for the Completion of the Internal Market' (1986) 11 Eur L Rev 383.

harmonising laws to be taken by the Council in co-operation with the Parliament. Not only does it remove the veto of member states, which had resulted in so few harmonisation directives being adopted, it also provides for measures generally, and not only directives. Strictly speaking, this enables the Commission to persuade a majority of the Council, acting in co-operation with Parliament and after consulting the Economic and Social Committee, to adopt a regulation which may have direct effect and does not require member states to enact implementing legislation. Nevertheless, a declaration was annexed to the final Act at the time it was adopted, requesting the Commission to give preference to using directives rather than regulations. The declaration has, of course, no legal force, but the Commission may not want to antagonise the Council, so it may be important. It is probable that the free movement of goods or services comes within this provision.³²

Legislative instruments are usually required to be adopted by the Council on the proposal of the Commission. The Council sends these automatically to the European Parliament. Article 7 of the Single European Act provides for a co-operation procedure. The Council may take a common position on the Commission's proposal by qualified majority and give its reasons to the Parliament. This position becomes law if the Parliament accepts it, or does nothing for three months.³³ The need to explain its position has increased the influence of the European Parliament. The Council's lawyers draft such explanations.

The Luxembourg accords continue to have some effect. There are enough members of the Council who support them to block a measure where the important interest of a member state is directly affected by a measure.

Where a member state finds itself out-voted in the Council it may challenge the *vires* of Article 100A as the United Kingdom did in relation to substances containing hormones in *United Kingdom v. Council*³⁴ and the minimum standards for the protection of battery hens in *United Kingdom v. Council*.³⁵ Matters that used to be decided through the political process in the Council may now be resolved judicially.

Even with the recent increase in majority voting, it is not easy to get legislation through the Council. There are 12 member states and often interests conflict. The new member states tend to be very poor, and want more resources devoted to the development fund, while the original member states set up the common agricultural policy to protect the produce grown in their countries — the protection for Southern products is far less than for grain, milk, etc, which are produced further North. There are many sources of conflicting interests.

32. Article 100A provides for measures 'for the achievement of the objectives set out in Article 8A'. That provision, inserted by Article 13 of the Single European Act, does not mention the Chapters of the Treaty dealing with the free movement of goods and services, yet it refers to the internal market including free movement. The Act is not drafted particularly clearly.

Fiscal provisions are to be harmonised under the new Article 99 by unanimous vote.

33. If the European Parliament rejects the proposal, the Council may adopt it only by unanimity. Where the European Parliament amends the proposal, it is sent back to the Commission, and if the Commission approves the change, the Council may adopt the amended version by qualified majority, or the original proposal by unanimity.

34. Case 68/86.

35. Case 131/86. In these cases the Court did quash the Act on different procedural grounds. Nevertheless, it held that where legislation had two objectives, for one of which legislation passed by qualified majority was provided by the Treaty, but for the other unanimity is required, the act could be adopted by qualified majority. Often when the Court has declared new law that limits the sovereignty of member states, it has found some exception relevant in the first case, but then narrowed the exception later. One might speculate whether the Court was merely ensuring that the proper procedures are adopted when the Council votes, or whether it is likely to uphold more acts adopted by a qualified majority in the future.

6. Conclusion

It seems clear that within the limited field covered by the EEC, the Queen in Parliament has given up sovereignty over limited, but important, areas of law. Even in some of these areas some control is retained in that some measures still require unanimity in the Council, and where a very important British interest is at stake, the Council would probably not ignore a dissent from the United Kingdom, but there is no exception when the Community Court acts like the Supreme Court it is and declares the law in such a way as to increase integration of the common market faster than governments might be prepared to move. The High Court and Court of Appeal have not been sympathetic to Euro-defences, but the House of Lords has been prepared in doubtful cases to ask the Community Court to rule on the interpretation of Community law, which would not be necessary unless it considered that Community law takes precedence over national law.³⁶

The British constitution remains flexible. There is no provision in the EEC Treaty for terminating accession to the Community, but should a government wish to leave, the British constitution might revert to the earlier position that entrenched clauses have no effect. It is doubted whether the courts would uphold legislation that deliberately flouted the Treaty, unless it was enacted in accordance with a mandate given at a general election or after a referendum or some such unusual expression of public opinion.

36. It is, of course, required by Article 177(3) to make a reference when necessary to interpret Community law in order to decide a case. It has never said that Community law takes precedence over inconsistent law in the United Kingdom, but it implies that it does.