

Europe After 1992: The Legal Challenge

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KEYNOTE ADDRESS

Europe After 1992: The Legal Challenge

Francis G. Jacobs†

It is a great pleasure for me to give this address, on an occasion which expresses dramatically the great American interest regarding European Community ("EC" or "Community") developments. I think it best to concentrate mainly on the themes of the three panel discussions, advancing some views of my own but not in any way preempting those discussions. Accordingly, I shall consider issues of competition and antitrust, the environment, and the role of the European Court of Justice ("ECJ"). I will try to raise some broader questions about the future of the ECJ's role and, thus, about the future of the Community itself.

In the course of this introduction, I shall mention some points of comparison between the situation in the European Community and in the United States. However, such comparisons are inherently difficult, indeed dangerous, and the points of difference are often more significant than the similarities. There is in fact structurally little in common, at least as yet, between a federal system of the type exemplified by the United States and the European model. The recent debate in Europe on the use of the term "federal" seems to me to miss the point. For example, a federal system

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such as that in the United States implies a certain degree of stability, in which the division of the powers between the central authority and the component States is reasonably settled. The Community system, by contrast, is an evolutionary one, although the great difficulties of the process necessarily render that evolution spasmodic. Moreover, the Community is evolving on two different planes, as the Community both enlarges progressively and develops policies internally. While a contrast is often drawn between the processes of enlargement and what is sometimes called "deepening," the distinction is not straightforward. In fact, the two processes interact: for example, the Internal Market Programme¹ introduced under the Single European Act ("SEA") appears to have intensified the interest of many European states in joining the Community.

The institutions and membership of the Community have developed in several stages, beginning with the six countries of the European Coal and Steel Community in 1952. The Treaty Establishing the European Economic Community ("EEC Treaty") then extended the Coal and Steel Community's activities to the economy at large in 1957, and the EEC Treaty remains the basic charter of the Community. The 1960s and 1970s were a quiescent period, during which the basic legal doctrines of the Community were developed, most notably the fundamental principle of the direct effect of Community law.² The Community was enlarged in 1973 to include Denmark, Ireland, and the United Kingdom.³ Significant institutional developments took place at the end of the 1970s, with the introduction of direct elections to the European Parliament⁴ and the introduction of the European Monetary System.⁵ The Community was enlarged further in 1981 and 1986 to include first Greece,⁶ then Spain and Portugal.⁷ Also in the 1980s, the grand design of the European Parliament led to the draft Treaty on Eu-

¹ Treaty Est the Eur Eco Comm, Art 8A (as amended by the Single European Act ("SEA"), Art 13 (1987)).

² Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* (Netherlands Inland Revenue Administration) ("*Van Gend en Loos*"), 1963 ECR 1, 1963 CMLR 105.

³ Treaty of Accession, January 22, 1972.

⁴ Council Dec 76/787, 1976 OJ L278:5 (concerning the election of representatives of the Assembly by direct universal suffrage).

⁵ Resolution of March 22, 1971 (concerning the attainment by stages of economic and monetary unity in the Community).

⁶ Treaty Concerning the Accession of the Hellenic Republic.

⁷ Treaty of Accession of the Kingdom of Spain and the Portuguese Republic.

ropean Union, adopted in February 1984.⁸ In 1986 and 1987, the Member States responded by adopting the SEA,⁹ the first significant reshaping of the Community Treaties since their origin.

While providing for the completion of the internal market by the end of 1992, the SEA also included provisions for new or additional Community policies in the fields of monetary policy, social policy, social and economic cohesion, research and technology, and the environment.¹⁰ The SEA also significantly facilitated legislative action by replacing the requirement of unanimity in the Council of Ministers with majority voting in certain areas¹¹ and granting the European Parliament certain powers of co-decision with the Council.¹² Moreover, the SEA introduced a new cooperative procedure between the Council and the European Parliament, strengthening the Parliament's previously purely consultative role.¹³

Recently, Member State leaders agreed to far-reaching amendments to the Community structure at the Conference on Political Union and the Conference on Economic and Monetary Union held in Maastricht, Netherlands in December 1991.¹⁴ The resulting Treaty on European Union, if ratified by the Member States, will establish a European Union founded on the European Communities and based on the *acquis communautaire*, the Community's heritage. The draft Treaty also covers, among other things, implementation of a common foreign and security policy, cooperation in the spheres of justice and home affairs, and adoption of a single currency. Of these initiatives, the creation of a unified currency would transform the Community more fundamentally than any other into a genuine Union. Finally, the Maastricht Treaty will amend the EEC Treaty by introducing changes in legislative procedure as well as new provisions relating to several Community policies.¹⁵

⁸ Resolution on the Draft Treaty Establishing the European Union, 1984 OJ C77:33.

⁹ SEA.

¹⁰ Id, Arts 20, 21, 23, 24, and 25 respectively.

¹¹ See, for example, id, Art 18.

¹² Id, Arts 8 and 9.

¹³ SEA, Art 6.

¹⁴ The resulting Treaty on European Union was signed in Maastricht on February 7, 1992, 31 ILM 247 (1992).

¹⁵ See Treaty on European Union, draft Articles 189A, 189B, and 189C, and the new Part Three, respectively, 31 ILM at 296-98.

I. COMPETITION LAW

Against this broadly sketched background, let me turn now to the subject of competition and antitrust. A comparison of EC and U.S. enforcement schemes casts a good deal of light on the differences in the rules themselves and in the policy goals which underlie those rules.

Enforcement of the competition rules in the European Community is still largely centralized, unlike the United States. When enforcing competition law, the European Commission performs the functions of several discrete U.S. agencies, including the Justice Department and the Federal Trade Commission. The European Commission's various roles include studying and investigating different sectors of the economy, formulating competition policy, initiating legislation, and adopting implementing legislation. Additionally, the Commission makes formal decisions through a procedure which combines the roles of prosecutor, investigator, judge, and executioner. Finally, the Commission presides over informal adjudications or settlements.

The centrality of the Commission's role is underscored by the procedure of notification and exemption under Article 85(3) of the EEC Treaty. Through this system, which has no analogue in the United States, the Commission keeps itself informed of agreements and practices throughout the Community and plays a central role in granting or refusing exemptions from the competition rules under Article 85(1).

Similarly, the role of the ECJ also reflects the centralized implementation of the competition rules. Although the recently established Court of First Instance¹⁶ has already contributed substantially to the review of Commission decisions, two factors have preserved centralized administration of Community competition law. First, the Court of First Instance and, on appeal, the ECJ have exclusive jurisdiction to review decisions of the Commission. Second, Article 177 of the EEC Treaty gives the ECJ a central role in cases referred from national courts applying the competition rules.¹⁷

Finally, in contrast with the practice in the United States, enforcement actions are rarely brought by way of private litigation in the national courts. Even when such suits are brought, the ECJ retains the right to issue preliminary rulings for national courts.

¹⁶ Authorized by EEC, Art 168A (as amended by SEA, Art 11).

¹⁷ EEC, Art 177.

Courts of last resort in the Member States are obliged to refer all questions of interpretation of the competition rules, as with all other questions of Community law, to the ECJ.¹⁸

The relative novelty of the Community system provides a partial explanation for this remarkable degree of centralization in enforcement. As the Community continues to evolve, enforcement undoubtedly will become less centralized. There are, however, other reasons in the Community system which may justify maintaining a more centralized enforcement scheme: 1) from a legal perspective, the need for uniform application of the law; 2) from an economic perspective, the objective of securing equal conditions of competition throughout the Community (the so-called "level playing field"); and 3) the requirements of the Internal Market.

The centralization of enforcement in the Community has profoundly influenced the policy goals of antitrust law. In the first place, those goals are easier to define, especially given the Commission and the ECJ's acceptance of market integration as a general goal of the competition rules. Furthermore, the Commission and the ECJ both recognize that competition rules function as a counterpart to the elimination of national barriers to the free movement of goods. Therefore, the competition rules supplement EEC Treaty rules on the free movement of goods.

The emphasis on market integration and on the elimination of trade barriers between Member States could displace even purely competitive considerations. Both export bans between Member States and measures designed to discourage parallel imports have been treated severely, even though parallel imports may make little sense from a strictly economic viewpoint. Consider, also, vertical restraints: in contrast to the rule of reason analysis that characterizes U.S. antitrust jurisprudence,¹⁹ exclusive territorial agreements using Member State boundaries often have been viewed as impermissible, with little or no analysis of their anticompetitive effects. On the other hand, horizontal restraints have been viewed with some indulgence in the Community, especially those involving firms from different Member States. Joint ventures and specialization agreements which might not be permitted in the United States have been approved in the Community, on the basis that such agreements are likely to encourage cooperation and integration among firms across Member State boundaries.

¹⁸ Id.

¹⁹ *Continental T.V., Inc. v GTE Sylvania, Inc.*, 433 US 36 (1977).

However, this emphasis on integration may well change as a result of the Single Market itself. The elimination of barriers between Member States may reduce the need to emphasize the integrationist goals of Community competition law, and the emergence of normal market conditions throughout the Community may make the U.S. experience more directly relevant. In that event, the evolution of Community competition law might mirror more closely developments in U.S. antitrust law. Corporations operating in different jurisdictions, for example, might welcome the possibility of greater convergence. At present, corporations face conflicting, sometimes irreconcilable, requirements. To take perhaps an extreme example, a pricing requirement imposed in one jurisdiction might result in price discrimination prohibited by another jurisdiction.

Ultimately, the United States and the European Community might achieve some formal harmonization of antitrust policy. While informal cooperation has existed for many years, the European Commission recently concluded an agreement with the U.S. authorities—an agreement which France has now challenged in the ECJ. Practical cooperation between the enforcement authorities on both sides of the Atlantic will no doubt continue.

A favorite topic in antitrust enforcement is, of course, the private antitrust action. Here there is a familiar irony: within the Community, there is much interest in the development of private enforcement; however, this interest has never really taken root, despite the Commission's encouragement. On the other hand, private enforcement faces increasing criticism in the U.S. due to its enormous expense, sometimes vexatious aspects, and, especially given the vagaries of the jury system, unpredictability. The fact that Americans are unable to understand why Europeans are content to rely almost exclusively on a system of public regulation, while Europeans, by contrast, delight in telling stories of what they regard as the improbable extremes of American litigation suggests a serious cultural gap.

On a more serious note, differences in the role of the public sector account for a large gap between the U.S. and the European experience. Despite recent trends in privatization, a substantial proportion of the European economy remains in the hands of either the public sector or licensed monopolies. An interesting development in ECJ case law concerns the possible application of Article 86 of the EEC Treaty, which prohibits abuse of a dominant position, to the public and licensed monopoly sectors. In one re-

cent case, arrangements outlawing private head-hunting agencies in Germany were held unlawful under Article 86.²⁰

Similarly, much of the enforcement effort in Europe is concerned with policing state subsidies to industry, which have no immediate counterpart in the U.S. The coexistence of public and private activities requires stringent constraints in the field of public subsidy. Indeed, the European Commission has increasingly focused on more rigorous enforcement of the Treaty provisions on State aid.²¹ The Commission's powers in this field have been the subject of much recent litigation, in which the ECJ has recognized the importance of making the Commission's powers more effective.²² The advent of the Single Market will inevitably emphasize the need to monitor state aid, and attention will focus increasingly on issues such as the transparency of the Member States' financial involvement in the public sector of their economies.

This brief survey leads me to suggest that there may be three particular developments in the competition field. First, the application of the competition rules will increasingly emphasize competition itself, rather than market integration. Second, enforcement of the competition laws is likely to become decentralized in certain sectors, although areas having a truly Community dimension, such as merger control, may be expected to remain centralized. Finally, there will probably be a move toward more equal treatment of the public and the private sectors.

II. ENVIRONMENT

I now turn to the subject of the environment. I note first that it is an excellent idea on the part of the organizers of this gathering to have chosen to address environmental issues. Although Community environmental law is still in its infancy, environmental issues are certain to play a leading role in the developments of the next decade.

I say that the subject is still in its infancy in Community law because, in part, there was no place for environmental concerns in the EEC Treaty as originally drafted. However, in the 1970s, a far-

²⁰ Case C-41/90, *Höfner v Macrotron GmbH*, 1991 ECR I-1979.

²¹ Commission of the European Communities, *XXth Report on Competition Policy* ¶ 169 (Brussels/Luxembourg, 1991).

²² See, for example, Case C-142/87, *Re Tubemeuse: Belgium v Commission*, 1991:3 CMLR 213 (1990).

reaching program of legislation²³ was initiated on the basis of Article 235 of the EEC Treaty. Article 235 enables the Council, acting unanimously, to act in cases where Community measures "prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers."²⁴ Reliance on Article 235, however, was not without its difficulties. First, the Community could act only by unanimous agreement of the twelve Member States. Second, every Community initiative had to be shown to be necessary to attain one of the Community's objectives. Third, the Treaty itself offered no guidance as to the purposes of Community action in the environmental field.

The situation was to some extent remedied by the Single European Act. The SEA devoted specific attention to the environment in a new Title VII headed "Environment," and set forth the environmental objectives of the Community in a new Article 130R. These objectives are:

- (1) to preserve, protect and improve the quality of the environment;
- (2) to contribute towards protecting human health;
- (3) to ensure a prudent and rational utilization of natural resources.²⁵

Paragraph 2 of Article 130R further provided that:

Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.²⁶

Paragraph 4 of Article 130R added the qualification that the Community should only take action relating to the environment when measures at the Community level, rather than at the level of the individual Member States, would better achieve those environmental objectives.²⁷ This qualification constituted a specific refer-

²³ See Ludwig Kramer, *EEC Treaty and Environmental Protection* ch 1 (Sweet & Maxwell, 1990).

²⁴ EEC, Art 235.

²⁵ EEC, Art 130R(1) (as amended by SEA, Art 25).

²⁶ EEC, Art 130R(2) (as amended by SEA, Art 25). This language was particularly important in relation to the much maligned common agricultural policy.

²⁷ EEC, Art 130R(4) (as amended by SEA, Art 25).

ence to the new doctrine (new at least in terms of express recognition) of subsidiarity.

However, the SEA did not wholly remove the difficulties facing environmental legislation, as there still was no agreement on moving away from the unanimity requirement towards decision by qualified majority. Article 130S introduced a compromise: the Council acting unanimously should decide what action was to be taken by the Community; but the Council might also define, again on the basis of unanimity, those matters on which decisions were to be taken by qualified majority.²⁸

Article 130T acknowledged the fact that environmental standards differed significantly among the Member States²⁹ and, therefore, provided that any protective measures adopted in common, pursuant to Article 130S, should not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty.³⁰

As the EEC Treaty has evolved to address environmental concerns, the ECJ also has faced a number of environmental issues. The court has had to address questions concerning the potential conflict between the Treaty provisions on the free movement of goods and the needs of environmental protection,³¹ questions involving the legal basis of Community environmental measures, and disputes concerning the role of the ECJ in proceedings brought against Member States for failure to comply with obligations arising under environmental directives.

The impact of the free movement of goods on the environment has raised some difficult questions for the ECJ, primarily because the free movement of goods represents the cornerstone of the common market. Accordingly, the ECJ has narrowly interpreted those exceptions to the free movement of goods allowed under Article 36 of the Treaty. For instance, in some cases, the "human health" exception may permit restrictions where there is a danger to health.³² In contrast, where the danger is rather to "the quality of life," an

²⁸ EEC, Art 130S (as amended by SEA, Art 25).

²⁹ EEC, Art 130T.

³⁰ Substantial amendments to the EEC Treaty were implemented by the Treaty on European Union. Time and space scarcely permit a full account of the amendments. See Treaty on European Union, Arts 130R, 130S, and 130T. 31 ILM 247 (1992).

³¹ The leading case on this question is the Danish case on non-returnable bottles. Case 302/86, *Re Disposable Beer Cans: Commission v Denmark*, 1988 ECR 4607, 1989:1 CMLR 619.

³² See EEC, Art 36.

expansive interpretation seems excluded.³³ However, the ECJ has developed a doctrine outside Article 36 of the Treaty permitting certain exceptions to the free movement of goods which are necessary to serve "mandatory requirements."³⁴ In *Commission v Denmark*,³⁵ the Danish bottle case, those requirements were held to include environmental protection. Those exceptions may be invoked, however, only for non-discriminatory measures.³⁶

The difficulty then is that free trade may override sensitive environmental measures, a difficulty reflected in the current debate in the United States over the GATT negotiations. I note, for example, a resolution recently considered by the U.S. House of Representatives expressing the fear that "national sovereignty to set domestic environmental, health, safety and labor standards will be given away to foreign countries" as a result of GATT.³⁷ In Community terms, the challenge is, therefore, to raise environmental standards throughout the Community so as to combine free trade with the required level of environmental protection.

The issue of balancing free trade and environmental concerns arose again in *Commission v Belgium*.³⁸ In that case, the Commission brought proceedings against Belgium regarding a law adopted by the Walloon region of Belgium which prohibited the storage or dumping of waste from other countries or from other regions of Belgium, namely Flanders and Brussels. Although the Walloon region complained that it was becoming the "dustbin of Europe," the Commission considered the law contrary to two Council Directives on waste,³⁹ as well as to Articles 30 and 36 of the Treaty. In defense of the regional measure, the Belgian Government argued that the law was compatible with emerging principles of waste disposal reflected in the Basel Convention of 22 March 1989, an international agreement on the control of transboundary movements and disposal of hazardous wastes. According to the Belgian Government, the Walloon measure was in accordance with both the principle of self-sufficiency in waste disposal and the principle of prox-

³³ Id.

³⁴ See Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"), 1979 ECR 649, 1979:3 CMLR 494.

³⁵ Case 302/86, 1988 ECR at 4630.

³⁶ See Case 120/78, *Cassis de Dijon*, 1979 ECR 649.

³⁷ See Nancy Dunne, *Fears Over Gattzilla the Trade Monster*, Financial Times (Jan 30, 1992).

³⁸ Case C-2/90, *Commission v Belgium*, 1990 OJ C28:6.

³⁹ Council Dir 75/442, 1975 OJ L194:39 (on waste); Council Dir 84/631, 1984 OJ L326:31 (on the supervision and control within the European Community of the transfrontier shipment of hazardous waste).

imity, which provides that waste should be disposed of near the place of production in order to minimize the transportation of waste. As Advocate General in this case, I reached the conclusion that the measure could not be regarded as non-discriminatory and, therefore, did not fall within the permissible exceptions to Article 30. However, the question is by no means closed. Indeed, the proceedings have been reopened twice already, and the issue clearly perplexes the ECJ.⁴⁰

Environmental organizations also have devoted considerable attention to international trade in waste. For example, Greenpeace has been critical of the EC's approach. According to Greenpeace, the European Community runs the risk of creating, not a Single European Market, but a "Single European Dump." Inevitably, the issue will be at the forefront of developments in the coming years.

The second major environmental issue to face the ECJ has been the constitutional debate in the Community on the legal basis of environmental measures; the resolution of this issue will determine whether measures can be adopted by majority vote in the Council rather than by unanimous decision. As noted earlier, Article 130S requires Council unanimity in deciding what action is to be taken by the Community and in defining those matters on which decisions may be taken by a qualified majority. However, Article 100A of the Treaty, introduced by the Single European Act, permits the Council to act by a qualified majority when adopting measures for the harmonization of national law "which have as their object the establishment and functioning of the internal market."⁴¹ Therefore, debate and, sometimes, litigation⁴² ensue on the question whether a particular environmental measure can be justified as a harmonization measure under Article 100A, or whether it should be adopted under Article 130S.

I should add that, if a harmonization measure is adopted by a qualified majority, then a Member State may, under paragraph 4 of Article 100A, continue to apply national provisions "on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment"⁴³ However,

⁴⁰ Of some interest, if not directly relevant, is the decision of the U.S. Supreme Court in *City of Philadelphia v New Jersey*, 437 US 617 (1978), in which the Supreme Court held that a New Jersey statute prohibiting the importation of most solid or liquid waste into the state violated the Commerce Clause of the U.S. Constitution. *Id.* at 626-27.

⁴¹ EEC, Art 100A(1) (as amended by SEA, Art 25).

⁴² See, for example, Case C-300/89, *Commission v Council* ("Titanium Dioxide"), 1991 ECR I-2867.

⁴³ EEC, Art 100A, ¶ 4.

there are various safeguards. A Member State applying such provisions must notify the Commission, which must verify that the provisions are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. Moreover, the Commission or any Member State may bring the matter directly before the ECJ if it considers that another Member State is making improper use of the powers contained in Article 100A.

The third environmental topic which I mention is the role of the ECJ in proceedings brought against the Member States under Article 169 of the Treaty for failure to comply with obligations arising under environmental directives. There have been many such cases in recent years, relating to such matters as standards for bathing⁴⁴ and drinking water.⁴⁵ In fact, these cases have been brought against all the Member States of the Community except Portugal, which still benefits from transitional provisions. The cases illustrate that, even where the directives in question have been adopted unanimously, Member States with both advanced environmental standards and developed economies have found it difficult to comply fully with the detailed requirements of the directives. This raises considerable questions about the adjustments which may be necessary if some of the states of Central and Eastern Europe, which have recently emerged from years of environmental neglect and despoliation, join the Community.

Finally, the next generation of environmental issues in Europe may well be what I describe as liability issues. In the first place, this topic relates directly to the Article 169 procedures which I have just mentioned. The Treaty at present provides no sanctions for default by Member States. However, the Maastricht Treaty, if ratified, will empower the ECJ to impose penalties for failing to comply with its judgments.⁴⁶

Second, such judgments may provide the basis for damages claims in the national courts. In a recent case concerning the use of surface water to produce drinking water, the ECJ appeared to recognize the availability of such claims to anyone whose health might be endangered by infringement of the directive.⁴⁷

Finally, there is the potential liability of the private sector. It is widely reported that industry and, indeed, financial institutions increasingly fear the costs which may be imposed by environmen-

⁴⁴ Case C-56/90, *Commission v United Kingdom*, 1990 ECR I-2821.

⁴⁵ Case C-42/89, *Re Drinking Water: Commission v Belgium*, 1992:1 CMLR 22 (1990).

⁴⁶ Treaty on European Union, Art 171, 31 ILM at 292.

⁴⁷ Case C-58/89, *Commission v Federal Republic of Germany*, 1991 OJ C294:12.

tal liability provisions currently proposed by the Commission.⁴⁸ These proposals would implement the principle stated in Article 130R that the polluter should pay. More broadly, the proposals are an attempt—no doubt based on the U.S. experience—to stimulate corporate self-regulation through the development of new liability regimes. The proposals have also raised the prospect that not only industrial polluters, but also lending institutions, could be liable for “clean-up costs.” Recent press reports in England, for example, have noted that banks are being forced to conduct “environmental audits” in order to avoid joint liability for clean-up costs. The *Times* reported that after one U.S. lender foreclosed on a manufacturer in the United States, the court ordered the lender to pay asbestos clean-up costs amounting to nearly \$500,000.⁴⁹ Such developments may prompt financial institutions in Europe to review their lending policies and, ultimately, may stimulate environmental improvement.

III. THE ROLE OF THE COURT

In conclusion, I shall be rash enough to venture some thoughts about the future of the ECJ in the European Community system. The basic structure of the Community’s judicial system has been modified only once since the origin of the Community. In 1989, the Court of First Instance was created to hear certain types of cases, subject to an appeal on a point of law to the ECJ.⁵⁰ The jurisdiction of the Court of First Instance is presently confined to competition cases, cases brought by officials of the Community, and certain coal and steel cases.⁵¹ Hopefully, the jurisdiction of the Court of First Instance will be progressively enlarged. The ECJ itself has already put forward proposals to that effect, and further developments are envisaged by the Maastricht Treaty. Nevertheless, it seems likely that for some time all cases referred from national courts for rulings on questions of Community law, cases which in the past have given rise to some of the most significant developments in the Community legal system, will continue to be heard by the ECJ alone. How the ECJ will be able to cope with the likely

⁴⁸ See 1989 OJ C251:3, as amended by 1991 OJ C192:6.

⁴⁹ Neil Bennett, *Clean-Up Costs Force Banks to Rethink Lending*, *Times*, Business Section, 19 (Jan 14, 1992). See also *United States v Fleet Factors Corp.*, 901 F2d 1550, 1557-78 (11th Cir 1990).

⁵⁰ 1988 OJ L319:1.

⁵¹ See Timothy Millett, *The Court of First Instance of the European Communities* (Butterworths, 1990).

increase in the number of references is a subject in need of urgent debate.

I would like to offer one suggestion in a different direction, a suggestion which may surprise those familiar with the workings of the ECJ much more than it would surprise U.S. lawyers. It seems to me that thought might be given, on a limited basis initially, to allowing some form of *amicus curiae* brief in certain types of cases before the ECJ. Although commonplace in the U.S., the *amicus* brief is rare in Europe, and in the context of the ECJ may seem unnecessary, for two reasons. First, there is already often a plethora of parties before the ECJ. Second, some suggest that the European Commission or the Advocate General or both already perform the function of *amicus curiae*.

In response to the first point, there is admittedly often some overcrowding at the Bar. In an Article 177 case, the parties in the national court appear, as well as the Commission, the Council, and, occasionally, even the European Parliament. Furthermore, the Member States also have the right, which they frequently exercise, to take part. However, rather than providing disinterested advice to the ECJ, the Member States very often are seeking to defend a particular interest.

Nor is there really any functional equivalent to the *amicus* in the present system. The Commission, of course, is a party in most direct actions before the ECJ. Even in Article 177 proceedings, where it comes closest to fulfilling the role of an *amicus*, the Commission may often have to defend a particular position on the validity of Community measures at issue. Moreover, I suspect that the Commission's own perception of its role may have changed. In the 1970s, at a time of political vacuum, the Commission may well have seen an important part of its task as guiding the ECJ in the development of the case law, which at that time was the only real area of development. With the increased political responsibilities that have followed from the Single European Act, the Commission's responsibilities understandably have become more divided.

Nor can the Advocate General be regarded as an *amicus*. The Advocate General delivers an Opinion after the parties have presented their arguments, and that Opinion may guide both the ECJ's holding and the development of the law. Also, by virtue of being included in the ECJ's published opinions, the Advocate General's opinion may be instructive in other, related cases. But, precisely because of this privileged position in presenting views to the ECJ after the close of the hearing, the Advocate General is unable

to introduce wholly new material on which the parties have not had the opportunity to comment.

The process could be facilitated if the ECJ had the power (as English courts in some circumstances do) to seek, either on its own motion or at the suggestion of a party or an interested organization, advice from some informed body which does not have a direct interest in the proceedings. Such advice would be particularly useful in areas such as the environment or in certain aspects of competition or commercial policy law, where the ECJ does not have as full a picture of the issues as may be desirable. As the fields of activity of the Community develop, the ECJ will find it increasingly difficult to feel fully competent in the absence of such disinterested guidance.

I turn, finally, to some broader issues about the role of the European Court of Justice, if only to ask some basic questions. Frequently, the ECJ is considered to have largely determined the way in which the European Community developed, at least in the early stages of the Community. At a time when there was a political vacuum and the legislature was at least partially paralysed, the ECJ attempted to fill the void by developing constitution-like doctrines that gave the Treaty effective force in the Member States, despite the absence of either Community or national measures of implementation. Some would even say, with Federico Mancini, that the ECJ "sought to 'constitutionalize' the Treaty, to fashion a constitutional framework for a quasi-federal structure in Europe."⁶² That approach by the ECJ has been regarded by some as a political role. I myself would reject that criticism, which I think comes from those who are largely unfamiliar with the type of judicial function that the treaties confer on the ECJ. The ECJ's function is, in some respects, essentially constitutional, since the ECJ is required to adjudicate disputes between institutions as well as between Member States and is required to review the legality of both Member State and institutional measures.

The question remains, however, whether the ECJ will continue this activist role in a system where the legislative machinery functions normally and the Community institutions are capable of making political decisions. It seems to me that, in this new situation, the role of the ECJ may be different but no less significant:

⁶² G. Federico Mancini, *The Making of a Constitution for Europe*, in Robert O. Keohane and Stanley Hoffman, eds, *The New European Community* 178 (Westview Press, 1991).

the greater the Community's powers, the more important it is that such powers be exercised in accordance with the rule of law.

The ECJ has proved very effective in reviewing measures of the Community institutions and perhaps even more effective in reviewing measures taken by the Member States. Given the relatively weak center, review of Member State action may have proved more important than review of the institutions. One is irresistibly reminded of the remark of Oliver Wendell Holmes, Jr., who said that he did not think the United States would have come to an end if the Supreme Court lost its power to declare an Act of Congress void, but that the Union would be imperilled if the Court could not declare the laws of the several States void.⁵³

The logical question, then, is whether the ECJ's role may change in that respect. As powers are increasingly transferred to the center—and here, at last, the analogy with a federal system may begin to come into its own—will the emphasis of the ECJ's role also shift? Will the ECJ's function become that of protecting the rights of the Member States against alleged encroachments by the Community Institutions?

And finally, what kind of Community will the ECJ help to fashion? Will it be a liberal, outward-looking Community, or will it be, as some fear, an inward-looking protectionist bloc? Ultimately, the primary responsibility on such matters lies with the political institutions, but a court, required to ensure the observance of the law in the application of the Treaty and entrusted with wide powers of review, cannot fail to have some impact also on issues of economic and commercial policy. Although we cannot be certain of the ECJ's direction, recent decisions of the ECJ in the field of commercial policy measures suggest that it is prepared to subject Community action in international trade to proper scrutiny.⁵⁴

⁵³ Oliver Wendell Holmes Jr., *Law and the Courts*, in *Collected Legal Papers* 295-6 (Peter Smith, 1952).

⁵⁴ See Marc Maresceau, ed, *The European Community's Commercial Policy After 1992: The Legal Dimension* (Nijhoff, forthcoming).