

They Call It ‘Teleological’

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In a judgment in 1977,¹ Lord Denning, speaking of the European Court’s method of interpretation, said:

“Some of us recently spent a couple of days in Luxembourg discussing it with the members of the European Court and our colleagues in the other countries of the Nine. We had a valuable paper on it by the President of the Court (Judge H. Kutscher) which is worth studying: ‘Methods of interpretation as seen by a judge at the Court of Justice, Luxembourg 1976’. They adopt a method which they call in English by strange words – at any rate they were strange to me – the ‘schematic and teleological’ method of interpretation. It is really not so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it was sought to achieve.”

Having recently returned from a spell in Luxembourg myself, I thought that it would be appropriate to take this passage as the starting point for this year’s Royal Bank of Scotland Lecture.

In the years since that judgment, it has become widely thought that the Court of Justice of the European Communities approaches interpretation in a very different way from that in which English courts have traditionally approached statutory interpretation. The latter may be described succinctly as adopting a literal and historical approach to statutory interpretation, above all, a literal approach. The European Court, on the other hand, generally uses the literal

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1. *Buchanan v. Babco* [1977] 2 W.L.R. 107, at p. 112; [1977] 2 C.M.L.R. 455, at p. 458.

method only as a starting point for its interpretation, giving preference to the schematic and teleological methods, and of those two, above all, the teleological method.

“Strange words” they may be to English ears, even now. But the underlying sense is clear and perhaps not unfamiliar. Schematic interpretation means one which places the provision in question in its context in the overall scheme or system to which it belongs (hence it is sometimes also referred to as ‘systematic interpretation’). To my mind “teleological” is synonymous with ‘purposive’, and ‘purposive construction’ is a notion which is familiar to English lawyers. It is for this reason that in my opinion it is wrong to say that English judges apply simply a literal interpretation. In the past they may have done so but for many years there has been a willingness to look at “purpose”. I suspect many judges always were even if some were very strict. But English judges are not as blind as is sometimes suggested: see, for example, the speech of Lord Wilberforce in *Black-Clawson Ltd. v. Papierwerke A.G.*² If the House of Lords were ever to hold that Courts could look at *Hansard* even if in limited circumstances, the awareness of “purpose” would increase even further. At present, however, there is a difference and the difference lies in the predominance of the teleological over all other methods of interpretation and in the degree to which the European Court applies it. That Court may, in application of a teleological interpretation, go so far as to override the clear, ambiguous words of a legal text, which certainly in the past and to a large extent even today would be inconceivable for an English judge.

Let me take the example of *Fellinger*,³ a technical, social security case involving what is known as a “frontier worker”. Mr. Fellinger lived in Germany. After he became unemployed there, he went to work across the border in the Grand Duchy of Luxembourg, while still residing in Germany. Having become unemployed in Luxembourg he claimed unemployment benefit from his local German Employment Office, and a dispute arose as to whether the amount should be based on the wage which he had last earned in Luxembourg or on that which he had last earned in Germany. Mr. Fellinger relied on Article 68(1) of the basic social security regulation, Regulation No. 1408/71, which reads:

“The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State.”

On a literal reading of that provision it was clear that Mr. Fellinger should have received benefit on the basis of the wage he received from his last employment in

2. [1975] A.C. 591, at pp. 629–631, especially at the foot of p. 629.

3. Case 67/79 *Fellinger v. Bundesanstalt für Arbeit* [1980] E.C.R. 535.

Germany, as being "his last employment in the territory of" the Member State of the competent institution. Surprisingly to a common lawyer, the Court did not follow the plain words of Article 68(1) but adopted an interpretation which came to the opposite result in the case. Its approach is interesting.

The Court began by pointing out that frontier workers often move from countries with lower wages to countries with higher wages and that it would thus be unfavourable to them if they could not claim unemployment benefit on the basis of their last employment in the country of employment rather than in the country of residence. (Mr. Fellinger's case is apparently untypical in this respect). The Court held that in such circumstances the rules applicable "must be elicited from Article 68(1) of Regulation No. 1408/71 in the light of the general principle underlying both that provision and the regulation as a whole" (paragraph 7 of the judgment).

It looked at the preamble to the regulation. The Court emphasised the passage in the preamble which stated that "in order to secure mobility of labour under improved conditions" the regulation seeks to ensure the unemployed worker of "the unemployment benefit provided for by the legislation of the Member State to which he was last subject." From this the Court held that "such an objective clearly implies" that unemployment benefit is regarded in Regulation No. 1408/71 in such a way as not to impede the mobility of workers and to that end seeks to ensure that the persons concerned receive unemployment benefit reflecting the conditions of employment, particularly the remuneration, which they enjoyed in the Member State of last employment. It inferred from this that Article 68(1) "is founded on the general principle" that the unemployment benefit should be calculated on the basis of the wage received in the last employment held by the worker immediately before his becoming unemployed (paragraph 8).

The Court found that this result accorded with the basic empowering provision, Article 51 of the E.E.C. Treaty which requires that "The Council shall . . . adopt such measures in the field of social security as are necessary to provide freedom of movement for workers, . . .". The results also accorded with the underlying requirement, based it seems on general principles of equity or fairness, that unemployed workers should receive benefit proportionate to their remuneration at the time of becoming unemployed (paragraph 8 of the judgment).

The Court concluded (paragraph 9 of the judgment) that Article 68(1), "viewed in the light of Article 51 of the Treaty and the objectives which it pursues," must be interpreted as meaning that the unemployment benefit must be calculated on the basis of the wage received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to becoming unemployed. In the case of Mr. Fellinger this meant the wage that he was earning in Luxembourg immediately before becoming unemployed. He was thus entitled to a substantially lower amount of benefit than that which he was claiming, namely that which he received during his last employment in Germany. This was a disappointing result from his point of view, especially as it seemed that he had the

literal wording of Article 68(1) on his side. However, the Court's reasoning is based on the view that his case is untypical and that most frontier workers choose to work abroad because they earn more there. If they were unable to benefit from those higher earnings in the event of becoming unemployed, it might discourage people from becoming frontier workers. That would be contrary to the aim of making possible the free movement of persons, laid down in the E.E.C. Treaty and pursued by Regulation 1408/71. In order to achieve that aim, the literal wording of Article 68(1) should not be followed in the case of frontier workers (last employment in the State of the competent institution) but it should be treated as having a different purport consistent with the overall scheme and purpose of the regulation (last employment in the State in which the worker was engaged immediately prior to becoming unemployed).

It is possible that the judgment could be explained on the basis that Article 68(1) had been drafted with a view to the ordinary case of a worker who lives and works in the same Member State without taking account of the special case of "frontier workers". On that basis, it might be said that the Court had used the teleological method to fill a gap in the legislation. However, even if that is a correct reading of the judgment, an English Court faced with a similarly unambiguous domestic legal text might well have felt bound to follow it even if it might express misgivings or regret about doing so. That would probably have been so in the past. Whether it would still here in the future may be more doubtful.

The methods of interpretation of the European Court have evolved in relation to the particular type of texts coming before it for decision. One characteristic of those texts which sets them apart from English domestic texts is that they exist and are authentic in several languages and not just one. No one language version is predominant. Whereas in some international conventions it is provided that only one language version is authentic and the others rank as translations, the general rule for Community texts is that all language versions are equally authentic. This is so even though the pilot version of the text was drafted in one language and the others were in fact translated from it. At the present time there are nine official Community languages, and as more countries join there may well be more. It follows that, from the outset, the literal method is unsuited to be the decisive criterion for judicial interpretation of such texts and other methods are likely perforce to take on greater prominence.

Thus, for example, in Case C-185/89 *Staatssecretaris van Financien v. Velker International Oil Company*⁴ concerning the interpretation of Article 15 of the Sixth VAT Directive, the Court held that the term "supply of goods for the fuelling and provisioning of vessels" was capable of bearing several literal meanings (paragraph 16 of the judgment). Therefore it held, in order to interpret the term, that recourse must be had "to the context in which it occurs, bearing in mind the purpose and structure of the Sixth Directive." Accordingly, the Court resorted to the

4. [1990] E.C.R. I - 2561.

schematic and teleological methods, rather than to the literal method, in order to resolve the question of interpretation before it.

Community legal texts also differ from domestic English ones in that they fall to be applied in a number of different States (currently 12). Having taken the basic decision that Community law was a single legal order,⁵ the Court was naturally led to adopt methods of interpretation which would ensure its uniform application in all Member States. If Community law were interpreted and applied differently in the various Member states, its unity would be lost and ultimately its existence put at risk.

Thus the Court has held⁶ that "the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve in the light in particular of the versions in all . . . languages."

In purely practical terms it is easier to glean the purpose of a Community text than that of an English domestic one because the Community legislative texts are legally required to state the reasons on which they are based, under Article 190 of the E.E.C. Treaty. They invariably comprise preambles to that end, and the Court in its judgments regularly refers to them precisely for the purpose of defining the object pursued by the measure in question. An example of this practice was seen in the *Fellinger* case to which I have referred.

Ultimately all Community legal texts relate back to the overall aim of the Community. The preamble to the EEC Treaty in particular spells out quite clearly the aim of increasing European unification with a view to maintaining peace and raising living standards. That "grand design" was sketched out in the founding treaties, but many of its details were left to be completed subsequently and the process is a continuing, dynamic one. If the momentum were lost, the overall objective would be at risk. The adoption of a teleological method of interpretation, is particularly well suited to satisfying this basic imperative of the Community legal system. As the former President of the Court, Hans Kutscher, put it in the work referred to by Lord Denning in the opening passage of this paper:

"The principle of the progressive integration of the Member States in order to attain the objectives of the Treaty does not only comprise a political requirement; it amounts rather to a Community legal principle, which the Court of Justice has to bear in mind when interpreting Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets and applies the Treaties. How else should the Court of Justice carry out this function which it has been assigned except by an interpretation

5. See Case 6/64 *Costa v. ENEL* (1964) E.C.R. 585, at p. 593.

6. Case 26/69 *Stauder v. Ulm* (1969) E.C.R. 419; Case 55/87 *Moksel v. BALM* (1988) E.C.R. 3845.

of Community law geared to the aims of the Treaty, that is to say, one which is dynamic and teleological.”⁷

In practice it is very common for two (or more) methods to be used together, one confirming the other. In particular, the schematic and teleological methods are frequently used together. For instance, it may be possible to understand the ‘general scheme’ of a particular set of rules only by relating them to the overriding objectives of the Treaty to which they are meant to contribute. It may be possible to define the precise purpose of a measure only by situating it in its broader scheme. The literal method, although almost never decisive on its own, continues to play an important role in the Court’s interpretation because the Court must necessarily start from the terms brought before it for interpretation. The three methods are complementary and most often fall to be applied together, but among them the teleological method has pride of place.

There are in addition to, or perhaps constituents of, the three main methods of interpretation which have been mentioned, other guiding concepts.⁸ In particular the principle of effectiveness or *effet utile* can play an important role. This principle is derived from international law, and the Court’s use of it has been described by former President Kutscher in the following terms: “the Court, in accordance with the principle of *effet utile* gives preference to the construction which produces the maximum effectiveness and enables its effect to be developed to the greatest possible extent. But what are the criteria by which the effectiveness of a rule is to be judged? The only possible answer to this question is that these criteria must be gathered from the objectives of the Treaty. According to the principle of *effet utile* preference is to be given to the interpretation which is best able to further attainment of the objectives of the Treaty.”⁹ Hence the principle may be seen as an extension of the teleological approach.

As a means of interpretation, the principle can be illustrated by the case of *Antonissen*.¹⁰ Gustaff Desiderius Antonissen, a Belgian national, came to the United Kingdom in October 1984 and remained unemployed until, in March 1987, he was convicted of drug offences by Liverpool Crown Court. The question arose as to whether he could challenge a deportation order on the basis of Community law relating to free movement of workers. While Community provisions clearly provide rights for workers in employment to move freely between Member States, it had long been uncertain whether and to what extent Community law provided similar rights for the unemployed wishing to seek work

7. H. Kutscher, “Methods of Interpretation as seen by a Judge of the Court of Justice”, p. 37, Judicial and Academic Conference, 27-28 September 1976, Court of Justice of the European Communities.

8. See, e.g., Timothy Millett, “Rules of Interpretation of EEC Legislation”, [1989] *Statute L.R.* 163, at pp. 175-181.

9. Kutscher, *supra* n. 8, pp. 41-42.

10. Case C-292/89 *The Queen v. Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] E.C.R. I - 745.

in other member States. Article 48(3)(a) speaks only of a right to free movement "to accept offers of employment actually made" and Article 48(3)(c) only of a right to stay in a Member State "for the purpose of employment". A literal reading of those provisions would have ruled out rights of free movement of the unemployed. Although urged to do so, on the literal wording of the Article the Court expressly refused to adapt such an interpretation,¹¹ holding that it would compromise an unemployed worker's chances of finding employment and thus would deprive Article 48(3) of its effectiveness (*effet utile*). On that basis, the Court gave Article 48(3) an extensive reading and held that it implied a right for Community nationals to visit and stay in other Member States for the purpose of seeking employment there.¹² Though after a period such a person may be required to leave unless there is a likelihood of his obtaining employment.

The principle of *effet utile* had also been used, for example, to reach the conclusion that a Commission decision requiring a Member State to alter or abolish a State aid under Article 93(2) of the E.E.C. Treaty, in order to be "effective", may also include a requirement on the Member State to recover the aid paid out in breach of the Treaty, notwithstanding the fact that Article 93(2) does not expressly confer any such power on the Commission.¹³ Similarly the principle has been used to found a ruling that the Community by necessary implication has the power to carry out functions which are mentioned in the Treaty or in subordinate legislation, for instance in the areas of common commercial policy¹⁴ or fishery conservation,¹⁵ even though the text does not contain any express provision of such powers. This recognition of executive and legislative powers illustrates the consequences which the principle of *effet utile* can have in the practice of the Court. In a *traité-cadre*, where gaps were left to be filled later, it enabled the Court to fill these gaps by a method of interpretation which is sometimes seen as judicial law making. It is not difficult to find illustrations of this. In many of such cases the Court has relied on the principle of *effet utile*. Whatever the grounds relied on, one major difference between them and cases of simple interpretation lies in the degree of predictability of the result. A method of interpretation – even a schematic and teleological one – can usually be relied on to give reasonably predictable results. The teleological method of the European Court may well yield different results from the more literal methods of English domestic law, but both methods can be expected to give relatively predictable results in so far as they stay within the limits of interpretation.

It is sometimes said that in its "creativity" the Court moves to the limits of the judicial function. I think that this can be exaggerated though there is little doubt that the Court is on occasions called upon to, and does, take decisions which in a

11. Paragraph 10 of the judgment, at p. 1 – 776.

12. Paragraphs 12 and 13 of the judgments, at p. 1 – 777.

13. Case 70/72 *Commission v. Germany* [1973] E.C.R. 829.

14. Opinion 1/75 [1975] E.C.R. 1755 (conditions for the grant of export credits).

15. Case 804/79 *Commission v. United Kingdom* [1981] E.C.R. 1045, at p. 1074.

national system would be likely to be dealt with by the legislature or by the exercise of delegated legislative authority. This is not a criticism: it is inherent in the nature of the Treaty and the development of the Community has been much advanced by the Court's willingness to grasp the nettle. It can, however, sometimes lead to difficulties. In the case of *Gaston Schul* there was at issue the importation of a second-hand yacht from France to the Netherlands, an expensive item whose price embodied quite a large amount of residual VAT. Since the purchase (and subsequent importation) was from a private person (not a trader), that VAT element could not be deducted. On the other hand the Dutch authorities, in charging VAT on the importation, based their assessment on the full purchase price, thus in effect charging VAT on VAT. When the matter came before it, the European Court found that there was plainly a lacuna in the Community VAT legislation, which the Community legislature should in due time fill. However, the Court did not leave the matter there. It said: "although the establishment of a system of complete neutrality in the field of competition involving full remission of tax on exportation is indeed a matter for the Community legislature,¹⁶ so long as such a system is not established Article 95 of the Treaty prevents an importing Member State from applying its system of value-added tax to imported products in a manner contrary to the principles embodied in that article."¹⁷ The Court went on to spell out of Article 95 of the Treaty (not the Sixth VAT Directive which, of course, was silent on the point) an obligation on the member State of importation "to take into account . . . the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported."¹⁸

That ruling proved difficult to apply, gave rise to further dispute, and within a short time the Court was seised of a series of further questions designed to elucidate how exactly the national authorities were required to "take into account" the residual amount of value-added tax. VAT rates were different in France and in the Netherlands; the value of the goods had changed between the date of their purchase and the date of their resale in France; the change in value was (unusually) an increase not a depreciation; should an upper limit be placed on any deduction? The complexity of such issues may explain why the legislature had refrained from dealing with the matter at that stage. The Court, however, repeated: "although the establishment of a system of complete competitive neutrality involving full remission of tax on exportation is a matter for the Community legislature,¹⁹ until such a system has been established Article 95 of the Treaty prevents an importing Member State from applying its VAT rules to imported goods in a manner contrary to the principles embodied in that Article."²⁰ It added: "Consequently,

16. My emphasis.

17. Case 15/81 *Schul v. Inspecteur der Invoerrechten en Accijnzen* [1982] E.C.R. 1409, at p. 1433.

18. *Ibid.*, at p. 1436.

19. My emphasis.

20. Case 47/84 *Staatssecretaris van Financiën v. Schul* [1985] E.C.R. 1491, at pp. 1506-1507.

pending the adoption of a legislative solution, in charging VAT on imports account must be taken of the effect of Article 95 of the Treaty. *It is therefore for the Court to lay down guidelines*²¹ compatible with Article 95 of the Treaty, consistent with the general scheme of the Sixth directive and sufficiently simple to be able to be applied in a uniform manner throughout the member States."²² And it went on to elaborate detailed answers as to how the residual VAT element was to be calculated and deducted. The answers are to be found in [1985] E.C.R. 1491, at p. 1512.

Although the Court in the second *Gaston Schul* case maintained its decision to step into the place of the Community legislature, when the Court was expressly invited a few years later to do the same thing in the case of VAT on second-hand goods, it declined to do so. The case was *ORO Amsterdam Beheer*, and the double taxation at issue there was at least as clear as that at issue in *Gaston Schul*. Under Dutch law, where second-hand goods are sold by a private person to a trader (*i.e.*, a taxable person) no VAT is charged, but when the trader re-sells them he has to pay VAT on the full amount of their resale price without being able to deduct the VAT already contained in their purchase price. The question before the Court was whether the failure of the national legislation to eliminate such double taxation was contrary to Community law. In *Gaston Schul*, as has been seen, the Court had laid down new law designed to prevent double taxation. Here, it took the converse approach, saying: "A comprehensive and positive reply to that question cannot be given on the basis of the judgments of the Court alone."²³ It went on to say: "On the whole the Community system of VAT is the result of a gradual harmonisation of national legislation pursuant to Articles 99 and 100 of the Treaty. The Court has consistently held that this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial . . . Nowhere in the common system of value-added tax, as it stands at present, are to be found the necessary bases for determining and laying down detailed rules for applying a common system of taxation enabling double taxation to be avoided in trade in second-hand goods. *Until the Community legislature has taken action*,²⁴ it is therefore necessary to continue to apply Article 32 of the Sixth Directive, which merely authorises Member States that apply a special system of VAT to second-hand goods to retain that system but does not impose on them any obligation to introduce such a system if none exists."²⁵ Thus in the result the Court ruled that the Dutch legislation was compatible with Community law in spite of its element of double taxation of second-hand goods.

Not only is the result the opposite to that in *Gaston Schul*, but the reasoning

21. My emphasis.

22. *Supra* n. 20, at p. 1507.

23. Case 165/88 *ORO Amsterdam Beheer and Concerto v. Inspecteur der Omzetbelasting* [1989] E.C.R. 4081, at p. 4099.

24. My emphasis.

25. *Supra* n. 23, at p. 4100.

leading up to it comprises an elaborate statement of judicial restraint. In the *Schul* cases the Court filled the gap left unfilled by the legislature: in the *ORO Amsterdam* one it declined to alter the situation "until the Community legislature has taken action". Judicial law making must have its limits if only in the interests of legal certainty and on matters of policy and economic or political appreciation the Court is cautious and reluctant to intervene.

Yet examples of the Court's innovative activity can be found in many areas. One particularly well-known example is its case-law conferring direct effect on directives notwithstanding that the wording of Article 189 of the EEC Treaty gave no indication to that effect. Indeed both the wording and structure of Article 189 as well as the scheme of the Treaty as a whole might have led to the view that only regulations should have direct effect and directives not at all, being binding only on the Member States to which they are addressed. In the event of a Member State's failing to implement a directive fully or in time, it might have been supposed that the sanction provided by the system of remedies under the Treaty was confined to an infringement action against that State under Article 169 of the Treaty. However, the Court decided otherwise, and in a long line of decisions²⁶ has maintained that provisions of directives may under certain conditions have direct effect, *i.e.* may be relied on by Community citizens before their national courts even against, or in the absence of, national implementing measures. For the time being, the Court has ruled out "horizontal direct effect" for directives (*i.e.*, between citizen and citizen) and confined it to "vertical direct effect" (*i.e.*, between the citizen and the State),²⁷ but it is increasingly being urged to recognise horizontal direct effect. If the Court were to take that step, little would remain of the distinction drawn in the Treaty between directives and regulations.

One extension has already been made to this line of case-law, as regards the sanctions against a member State for failing to implement a directive. In addition to an infringement action under the Treaty, in addition to the possibility of the provisions of the directive becoming directly enforceable, the Court has held in the *Francovich* case that a Member State may be liable in damages to a citizen who has suffered harm as a result of its failure to implement a Community directive.²⁸ The contours of this new remedy are not yet clearly defined, but the principle is now set for breach of obligation by a Member State and it seems not to be limited to a failure to implement a directive. The consequences of this decision are likely to be far-reaching though there are many questions to be resolved in future cases.

Another well-known area in which the Court has innovated in relation to the express terms of the EEC Treaty is that of free movement of goods. Articles 30 to 34 of the Treaty provide for goods to move freely between Member States: Article

26. See, *e.g.*, Case 8/81 *Becker v. Finanzamt Munster-Inneustadt* [1982] E.C.R. 53.

27. Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] E.C.R. 723.

28. Case C-6/90 *Andrea Francovich v. Italian Republic*, judgment of 19 November 1991.

36 lays down a number of exceptions to this basic rule on grounds including public morality, the protection of health and the protection of industrial property. As drafted, Article 36 appears to lay down an exhaustive, closed list of exceptions. Moreover, the Court's case-law has repeatedly emphasised that exceptions to the Treaty's basic rules, Article 36 among them, must be construed strictly. However, in its judgment in *Cassis de Dijon*²⁹ the Court admitted new grounds for derogating from the basic rules of free movement of goods. Those grounds were the "mandatory requirements" relating to matters such as consumer protection and the fairness of commercial transactions, but the category is not closed and further "mandatory requirements" may potentially be added. Some commentators have had difficulty in reconciling this case-law with the provisions of the Treaty. On the one hand, these "mandatory requirements" appear to have little foundation in Articles 30 and 34 as drafted; on the other, it seems hardly possible to insert them in Article 36 in as much as it comprises a closed list of exceptions subject to restrictive interpretation.³⁰ Yet the Court's decision in that case is of remarkable importance – it opened up trade in the Community, removing the need for the Commission to lay down myriad harmonising regulations, and at the same time recognised that at the then state of Community development Member States must have some powers of control.

Cassis de Dijon has given rise to further litigation, partly seeking clarification of the innovations which it brought to the law on free movement of goods. One such was the case of *Torfaen Borough Council v. B & Q p.l.c.*,³¹ in which the Court was asked to rule on the question whether Britain's Sunday trading rules were affected by Community law. Instead of simply declaring the matter to be outside the ambit of the Treaty rules, which it might well have done,³² the Court added a rider which has caused much uncertainty. It ruled:

“Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.”

Such a ruling in effect leaves the matter entirely to be decided by the national judge. One newspaper reporting the decision, entitled its article: “Britain handed

29. Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649 (the *Cassis de Dijon* case).

30. See, e.g., the discussion and articles cited by L. W. Gormley in *Halsbury's Laws of England* 4th edition, Vol. 52, para. 12.83.

31. Case 145/88 [1989] E.C.R. 3851.

32. It made a ruling of that kind at about the same time in another case on free movement of goods: Case C-23/89 *Quietlynn Ltd. v. Southend Borough Council* [1990] E.C.R. I-3059. The difference in approach between the two cases remains hard to reconcile.

decide-it-yourself Sunday ruling".³² Mr. Justice Hoffman, speaking at the Bar Conference 1991 said:

"Sunday trading is a case in which the supremacy of EC law had produced a complete dog's breakfast. But it is the exception. On the whole the system works."³⁴

The Court has subsequently gone some way towards clarifying the matter in its judgments in *Conforama*³⁵ and *Marchandise*.³⁶ A further reference from the United Kingdom, made by the House of Lords in *Stoke-on-Trent and Norwich City Council v. B & Q p.l.c.*³⁷ is now pending before the European Court. It is to be hoped that it will result in the issue being finally elucidated.

Another area in which the European Court has been active in making new law by way of judicial decision is that of its own jurisdiction and remedies generally. The relevant cases may be grouped for convenience into those concerning preliminary rulings and those concerning direct actions. I give a few illustrations in the field of preliminary rulings, starting with the famous *Defrenne* case in the mid-1970's.³⁸

In that case Gabrielle Defrenne, an air hostess with the Belgian airline Sabena, established her right to equal pay with male employees doing equal work and in so doing led the court to deliver a landmark judgment establishing that Article 119 of the EEC Treaty had direct effect, in other words that it could be relied on by workers before national courts throughout the Community in order to claim equal pay with the opposite sex. That ruling should in principle have applied both to past and future claims, but several member States urged on the Court the high cost which might be entailed by allowing such back claims. As a result, the Court limited the effect of its ruling to pending and future claims only, ruling: "Except as regards those workers who have already brought legal proceedings or made an equivalent claim, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment."³⁹

That part of the ruling produced surprise and criticism in some quarters since Article 177 of the EEC Treaty, the basis of the Court's jurisdiction in preliminary rulings such as *Defrenne*, made no provision for the Court to limit the temporal effect of its rulings in this way. In the judgment the Court did not give any grounds for exercising this power, and confined itself to stating the reasons why it considered a temporal limitation appropriate in the instant case. In a small number

33. *The Times*, 23 November 1989.

34. *Counsel*, September/October 1991, p. 22.

35. Case C-312/89 [1991] E.C.R. I-997.

36. Case C-332/89 [1991] E.C.R. I-1027.

37. Case C-169/91.

38. Case 43/75 *Defrenne v. Sabena* [1976] E.C.R. 455 ("*Defrenne No. 2*").

39. *Ibid.*, at p. 482.

of subsequent preliminary rulings the Court has again limited the effect of its ruling to the future and has indicated that there is an analogy between the power which it has thus granted itself and Article 174 of the E.E.C. Treaty which empowers the Court, where it declares a Community regulation void in a direct action, to state which of the effects of the regulation are definitive.⁴⁰ That reason was not, however, supplied at the time, and it is by some thought a narrow basis for claiming a power, not expressly granted in the Treaty, to deprive persons of a right of action on grounds of financial expediency. It has, however, been often used with major consequences.

Still in the field of preliminary rulings, the Court ruled in a 1988 decision, *Foto-Frost*,⁴¹ that "the national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid."⁴² This exclusivity of jurisdiction for the European Court is not expressly provided for in Article 177 of the Treaty: the Court laid it down by case-law after many years of academic discussion on the point (confirming the generally accepted view). The decision was foreshadowed by a dictum in Joined Cases 239 and 275/82 *Allied Corporation*.⁴³ In *Foto-Frost*, it was at the heart of the case and the decision was fully reasoned. The Court gave three reasons for the decision: first, the purpose of Article 177, uniform application of Community law; second, the coherence of the system of remedies under Articles 173, 177 and 184 (plea of illegality); and third, efficient administration of justice. The judgment has been applied for example by the English High Court in *ex parte FEDESA*,⁴⁴ where it referred the question of the validity of Directive 88/146 to the European Court.

The European Coal and Steel Community (ECSC) Treaty provides for preliminary rulings by the Court but, unlike the EEC Treaty, confines them to the validity of acts of the Commission and the Council, with no mention of interpretation.⁴⁵ In the case of *Busseni*,⁴⁶ the Court was asked to rule on a question precisely of the interpretation of a Commission recommendation under the ECSC Treaty. On a literal reading of that Treaty it might have been concluded that the Court had no jurisdiction, but the Court held on the contrary that it did have jurisdiction to rule on questions of interpretation under the ECSC Treaty notwithstanding the wording of that Treaty. It based that decision on the need for it to ensure the uniform application of Community law. It deduced that it would be contrary to the aim and the coherence of the three founding treaties for it to have the last word on the interpretation of acts under the EEC and Euratom

40. *E.g.*, Case 109/79 *Maiseries do Beauce v. ONIC* [1980] E.C.R. 2883, at p. 2913; *cf.* Case 309/85 *Barra v. Belgian State and City of Liège* [1988] E.C.R. 355.

41. Case 314/85 *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] E.C.R. 4199.

42. *Ibid.*, at p. 4235.

43. [1984] E.C.R. 1005, at p. 1030.

44. [1988] 3 C.M.L.R. 661.

45. See Article 41 of the ECSC Treaty; *cf.* Article 177 of the EEC Treaty.

46. Case 221/88 *ECSC v. Busseni* [1990] E.C.R. I-495.

Treaties whilst acts under the ECSC Treaty remained subject to the sole jurisdiction of a multiplicity of national courts whose interpretations might diverge. Accordingly it declared itself competent and went on to give an interpretation of the ECSC measures in question. It is difficult to see how it could have done otherwise. To decide whether a provision is valid the provision must first be interpreted.

Turning to direct actions, a remarkable development in recent years has been the extension, under the Court's case-law, of rights of action relating to the European Parliament. Article 173 of the EEC Treaty, providing for annulment actions, stipulates that "the Court of Justice shall review the legality of acts of the Council or the Commission other than recommendations or opinions." It does not by its terms provide for the review of any act adopted by the European Parliament. Therefore it might have been thought that the legality of any of the Parliament's measures could not be challenged in the Court. The Court, however, held otherwise. In the 1986 decision in Case 294/83 *Les Verts v. European Parliament*⁴⁷ it ruled that legally binding acts of the European parliament could be the subject of an annulment action under Article 173 even though that Article does not mention them expressly.

The Court's reasoning for that decision is founded on the assertion that the EEC is a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.⁴⁸ The Court inferred therefore that an interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested by means of an action for annulment would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its scheme, which is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects. Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects *vis-a-vis* third parties.⁴⁹

Having thus affirmed its right to entertain annulment actions against the European Parliament, the Court was soon faced with the converse question of whether the Parliament could itself bring such an action. The problem here is that Article 173 again does not mention the Parliament. Its first paragraph states that an annulment action may be brought by a Member State, the Council or the

47. [1986] E.C.R. 1339.

48. *Ibid.*, at p. 1365.

49. *Ibid.*, at p. 1366.

Commission without proof of *locus standi*; its second paragraph provides that a natural or legal person may bring such an action on proof of direct and individual concern; but neither makes any mention of the Parliament. The first time that the question came before it, in the so-called "Comitology" case,⁵⁰ the Court accordingly ruled out any right of action for the European Parliament, on the grounds that it was neither a "privileged applicant" within the terms of the first paragraph of Article 173 nor a "natural or legal person" within the terms of the second paragraph.

This Court thus adhered to a more literal reading of Article 173, rejecting all the arguments put forward in favour of granting the Parliament the right to sue. It was urged on the court that it was difficult to reconcile such a narrow approach with that adopted in *Les Verts* only two years earlier. The Court put forward a number of responses. One of them, particularly interesting for present purposes, was that the prerogatives of the European parliament had only recently been augmented by the Single European Act (1986) but without any changes having been made to Article 173 of the Treaty.⁵¹ Indeed the Member States in adopting the Single European Act had not only had an opportunity to extend the Parliament's powers to the bringing of annulment actions but had specifically rejected a proposal to do so. The Court's reasoning appeared to be that it should not do what the Member States had just refused to do.

It was not long, however, before the question came before the Court again. This time though, in the so-called "Chernobyl" case,⁵² the Court came to a different result. Having categorically stated less than two years earlier that the Treaty contained no power for the Parliament to bring an annulment action, the Court now recognised a qualified right in the Parliament to resort to Article 173. The Court gave its reasons in the following terms:

"The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalise any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which

50. Case 302/87 *European Parliament v. Council* [1988] E.C.R. 5615.

51. At p. 5644.

52. Case 70/88 *European Parliament v. Council* [1990] E.C.R. I-2041.

the Parliament seeks to achieve.

In carrying out the task the Court cannot, of course, include the Parliament among the institutions which may bring an action under Article 173 of the EEC Treaty or Article 146 of the Euratom Treaty without being required to demonstrate an interest in bringing an action. However, it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner. The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities. Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement."⁵³

In *Les Verts*, the Court had used the word "interpretation", although it may be thought that there it was in fact making new law. In *Chernobyl* the Court makes it clear that it is not interpreting any text but is itself recognising a new remedy as being necessary. The origin of its power to do so is: "the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied."⁵⁴ It follows that the power to create the new remedy stems from an inherent power of the Court based on the Treaty provisions but not expressly spelled out in them.

That position, it has been suggested, differs from the long-held view that the Court had only the powers specifically conferred on it by the Treaty, what in French is called "*une compétence d'attribution*". That view was largely based on Article 4 of the Treaty, which provides *inter alia*: "Each institution shall act within the limits of the powers conferred upon it by this Treaty." On the other hand, Article 164 of the Treaty, which supplies the foundation of the Court's jurisdiction, provides that, "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed", and it may be possible to read that provision very broadly as conferring on the Court all powers necessary for ensuring the proper administration of justice, including the power to create new remedies not specifically provided for in the Treaty. Whether or not such a construction is valid is in any event theoretical, since it appears clear from the cases cited that the Court has created new remedies. As a part to the *Chernobyl*

53. At pp. I-2072-I-2073.

54. At p. I-2073.

decision I feel neither regret nor embarrassment about it.⁵⁵ The proposed Maastricht Treaty (except in relation to the *Barber* case) recognises and gives effect to such decisions of the Court.

This development of the Court's function is also illustrated by a recent decision of 1990: Case 2/88 Imm. *Zwartveld*.⁵⁶ In that case an examining magistrate in the Netherlands was investigating alleged frauds against Community fishing quotas in relation to a wholesale fish market within his jurisdiction, and for the purpose sought access to European Commission records of inspections which its staff had carried out. The Commission refused to give him access, relying on its immunities, in particular Article 2 of the Protocol on Privileges and Immunities which provides unconditionally that, "the archives of the Communities shall be inviolable". The Dutch judge asked the Court of Justice to order the Commission to produce the documents to him, notwithstanding that no provision of Community law provided for such a procedure. He referred to Articles 1 and 12 of the Protocol, but they plainly could not found such a procedure, as the Court implicitly recognised. However, it did not dismiss the Dutch judge's request, but declared itself competent to entertain it and indeed granted an order along the lines sought.

The grounds for this decision are to be observed. It is based on an assertion that Article 5 of the EEC Treaty imposes a "duty of sincere co-operation" on the Community institutions. On its terms, however, Article 5 imposes duties exclusively on the Member States as signatories of the Treaty, according to the maxim *pacta sunt servanda*. It provides: "*Member States shall take all appropriate measures . . . to ensure fulfilment of the obligations arising out of this Treaty . . .*",⁵⁷ but makes no mention of the Community institutions.⁵⁸ There is, therefore, a certain creativity in the Court's decision that: "relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere co-operation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law . . . but also imposes on Member States and the Community institutions mutual duties of sincere co-operation."⁵⁹ It has been suggested that even adopting the most teleological interpretation it is arguable that Article 5 does not impose any duty on the Community institutions and that such a duty is of the Court's own creation.

On that basis, however, the Court went on to assert: "It is incumbent upon every Community institution to give its active assistance to such national legal

55. Cf. A. Arnulf, "Does the Court of Justice Have Inherent Jurisdiction?", [1990] *Common Market L.R.*, p. 683.

56. [1990] E.C.R. I-3365.

57. My emphasis.

58. For an interpretation in that sense, see, e.g., Case C-374/89 *Commission v. Belgium* [1991] E.C.R. I-367, at p. 1-379.

59. At p. I-3372.

proceedings, by producing documents to the national court and authorising its officials to give evidence in the national proceedings.”⁶⁰ It then proceeded to found its jurisdiction on the need for it to be able to review whether the Community institutions were complying with the duty which it had just laid down. The relevant passage of its decision is in the following terms:

“The Court, which is responsible under Article 164 of the EEC Treaty for ensuring that in the interpretation and application of the Treaty the law is observed, must have the power to review, at the request of a national judicial authority and by means of a legal procedure appropriate to the objective pursued by that authority, whether the duty of sincere co-operation, incumbent on the Commission in this case, has been complied with.

Consequently, the Court has jurisdiction to examine whether the Community institutions’ reliance on the Protocol in order to justify the refusal to co-operate sincerely with the national authorities is justified in view of the need to avoid any interference with the functioning and independence of the Communities.”⁶¹

This takes matters a step further than *Chernobyl* and preceding cases. There the Court opened up new remedies on the basis that the rule of law required review to be available of acts provided for by the Treaties: in *Zwartveld* the Court bases its jurisdiction on the need to review compliance with a duty which it found to exist.

The Court itself does not appear inclined to set limits to this development, but rather is consolidating the *Zwartveld* line of case law. In a 1991 case relating to the enforcement of Community competition rules before national courts, the Court stated that the Commission is required to give the national court details relevant to pending competition cases.⁶² It based that statement again on the “duty of sincere co-operation” which it says rests on the Commission by virtue of Article 5 of the Treaty. It is probable that such *dicta* will be repeated, and in due course the Court may be able to assert that the “duty of sincere co-operation” results from its “settled case law” (*jurisprudence constante*, in French). From there, further construction will be possible, in the form either of new duties or of new remedies.

The days of the 1960’s and 1970’s are past when the European Court stepped in to keep up the momentum of Community construction in the face of the inactivity of the Community legislature. At the present time, the Community legislature has never been so active: the last of the approximately 300 measures for the Single Market programme are being adopted and placing substantial burdens on the Member States to adopt implementing measures. The Member States for their part adopted the Single European Act in 1986, the Maastricht Treaty this year

60. At p. I-3373.

61. *Ibid.*

62. Case C-234/89 *Stergios Delimitis v. Henninger Brau AG*, judgment of 28 February 1991, para. 53.

(1992) and are likely shortly to adopt the European Economic Area Treaty. In the presence of this intense 'legislative' activity, the need for the judicial body to make up for the inactivity of the legislature may be less great and may be questioned. I do not consider that the 'creative' role of the Court is or should be at an end. There will be times when it goes ahead but there will be times when it holds back as it did in the *BEUC* case of 1991,⁶³ where it held at paragraph 30:

"It is for the Community legislature to consider whether the basic anti-dumping regulation should grant an association representing the interests of consumers the right to consult the non-confidential file."

Whatever happens in the future, the words of Lord Denning, from his 1979 Lord Fletcher Lecture, come to mind:

"All this shows that the flowing tide of Community law is coming in fast. It has not stopped at high water mark. It has broken the dykes and the banks. It has submerged the surrounding land, so much so that we have to learn to be amphibious if we wish to keep our heads above water."

In view of all the intense activity we are witnessing in the making of Community law, those remarks are now truer than ever. In those words, as so often, Lord Denning showed acute vision and great foresight.

63. Case C-170/89 *Bureau Européen des Unions de Consommateurs (BEUC) v. Commission*, judgment of 28 November 1991.