The Role of the Court of the European Communities in the Antitrust Structure of the Common Market

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THE Treaty of Paris¹ establishing the European Coal and Steel Community, signed on April 18, 1951 by the six Member countries,² instituted four community organs: a High Authority, a Common Assembly, a Special Council of Ministers and a Court of Justice. By the Treaties of Rome,³ signed by the same States on March 25, 1957, two of these four organs, the Assembly and the Court of Justice, were declared institutions common to all three European Communities: the European Coal and Steel Community or ECSC, the European Economic Community known as the EEC or Common Market, and the European Atomic Energy Community, known as EURATOM.⁴

The seven judges and the two advocates-general,⁵ who had formed the Court of the European Coal and Steel Community at Luxembourg, became judges and advocates-general respectively of the three European Communities.⁶ A new executive organ of the EEC was set up at Brussels, the Commission, consisting of nine members who, like the members

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². The six Member States were: Belgium, Federal Republic of Germany, France, Italy, Luxembourg and Netherlands.


⁵. The two advocates-general are a kind of permanent amici curiae who publicly state at the end of debates their opinion on each case coming before the Court. The Convention provides that the two advocates-general are "to present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court, with a view to assisting the latter in the performance of its duties..." Convention Relating to Certain Institutions Common to the European Communities, March 25, 1957, ¶ 2, art. 4(2)(a), 298 U.N.T.S. 272, CCH Common Market Rep. ¶ 6461.

⁶. For a comprehensive treatise dealing with the Court (with extensive bibliography) see Bebr, Judicial Control of the European Communities (1962).
of the High Authority of Luxembourg, "shall perform their duties in the
geneneral interest of the Community with complete independence." The
Paris Treaty expressly describes the character of the functions of the
High Authority as "supranational." The supranationality applies to
the organs of the EEC to an even greater extent than to those of the
ECSC. The so-called general decisions of the High Authority, occasionally
described by the Court as quasi-legislative acts, are directly binding on
the coal and steel enterprises which are defined by the nature of their
operations and are comparatively limited in number. On the other hand,
the regulations of the Council of the EEC, as well as the decisions of its
Commission, can concern an indefinite number of corporations and
individuals within the Common Market. The latter can also concern
enterprises outside the Market if they are involved in trade with Common
Market countries. The very fact that the decisions both of the High
Authority and of the Council and Commission of the EEC and EURATOM are binding not only on Member States, but also on their
citizens, distinguishes the European Communities from other common
institutions established by treaties between different countries. The
same direct binding force applies to the decisions of the Court, and
Advocate-General Lagrange could therefore rightly say in the early
days of the existence of the European Coal and Steel Community that
"the Court is not an international jurisdiction, but rather a jurisdiction of a community formed by six States, which is much more akin to a
Federation than to an international organization." In conformity with
Articles 187 and 192 of the EEC Treaty, the Court's decisions are

Market Rep. § 6067.
la jurisprudence de la Cour 89, 113.
Rep. § 6175.
Rep. § 6187.
Rep. § 6164.
15. Fédération Charbonnière de Belgique v. Haute Autorité, Cour de Justice de la
C.E.C.A., July 16, 1956, 2 Rec. de la jurisprudence de la Cour 199, 263.
16. Article 187 provides that: "The judgment of the Court of Justice shall be enforceable
under the conditions laid down in Article 192." 298 U.N.T.S. 78, CCH Common Market
Rep. § 6164.
17. Article 192 provides in part that: "Decisions of the Council or of the Commission
enforceable against persons other than States. As regards States, article 171 provides that whenever the Court “finds that a Member State has failed to fulfill any of its obligations under [the] . . . Treaty, such State shall take the measures required for the implementation of the judgment of the Court.”

According to the Treaties of Paris and Rome, the function of the Court of Justice is to “ensure observance of law and justice in the interpretation and application of [the] . . . Treaty.” As the Court is primarily competent to interpret the Treaties and the regulations giving effect to them it has multiple functions. In accordance with my subject, I shall limit myself to a summary of the functions entrusted to the Court by the EEC Treaty, and I shall only incidentally refer to the corresponding provisions of the Treaty of Paris and to Court decisions arising under it.

As the Assembly is limited for the most part only to consultative functions under article 173, the main function of the Court is the control of the lawfulness of the acts of the Council and the Commission. Secondly, under article 175, if the Council or Commission fails to act and this failure constitutes a violation of the Treaty, redress may be had in the Court. A third important function is the preliminary decision (à titre préjudiciel) upon the request of a national court on questions concerning “(a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the interpretation of the statutes of any bodies set up by an act of the Council where such statutes so provide.”

Before dealing in detail with these three functions which have an impact on the antitrust laws of the Common Market, I should mention briefly those functions of the Court which do not directly concern our subject.

which contain a pecuniary obligation on persons other than States shall be enforceable.” 293 U.N.T.S. 79, CCH Common Market Rep. ¶ 6187.


21. “In the event of the Council or the Commission in violation of this Treaty failing to act, the Member States and the other institutions of the Community may refer the matter to the Court of Justice with a view to establishing such violation.” EEC Treaty, pt. 5, tit. 1, ch. 1, § 4, art. 175, 298 U.N.T.S. 76, CCH Common Market Rep. ¶ 6124.

While the aforementioned articles 173 and 175 provide a procedure for actions by Member States against unlawful acts or failure to act by the Council or Commission and by the Council against such acts of the Commission and vice-versa, article 169 gives to the Commission a right to lodge an action with the Court against a State which in the opinion of the Commission has failed to fulfill any of its obligations under the Treaty. It is bound, before doing so, to invite the State concerned to state its case. It may be added that the Court of Justice has in two instances rendered a judgment under article 169 against a particular State which complied on both occasions.

Article 170 gives a similar right to any Member State to maintain an action against another Member State for violation of the Treaty. However, in order to avoid unnecessary lawsuits between Member States, no State may start proceedings against another Member State relating to an alleged infringement of Treaty obligations until it has referred the matter to the Commission. According to article 182, any other dispute between Member States in connection with the objects of the Treaty may be submitted by them to the Court by stipulation.

The Court of Justice is competent to decide controversies submitted to it pursuant to any arbitration clause contained in a contract concluded by the Community, which contract may be with individuals or corporations within or without the Common Market area, with Member States or even with non-Member States. The Court is also competent to render

27. “Any Member State which considers that another Member State has failed to fulfill any of its obligations under this Treaty may refer the matter to the Court of Justice. Before a Member State institutes, against another Member State, proceedings relating to an alleged infringement of the obligations under this Treaty, it shall refer the matter to the Commission.” EEC Treaty, pt. 5, tit. 1, ch. 1, § 4, art. 170, 298 U.N.T.S. 75, CCH Common Market Rep. ¶ 6107.
28. “The Court of Justice shall be competent to decide in any dispute between Member States in connection with the object of this Treaty, where such dispute is submitted to it under the terms of a compromise.” EEC Treaty, pt. 5, tit. 1, ch. 1, § 4, art. 182, 298 U.N.T.S. 78, CCH Common Market Rep. ¶ 6147.
29. “The Court of Justice shall be competent to make a decision pursuant to any
decisions upon complaints regarding tort liability of the Community for any damage caused by its organs or by its employees in the performance of their duties. The Court is further empowered by article 179 to decide controversies between the Community and its employees.

The Council, the Commission or a Member State may ask the Court for an advisory opinion on whether or not a proposed agreement of the Community with one or more States or with an international body is compatible with the provisions of the EEC Treaty. Should the Court conclude that the proposed agreement is not compatible with the Treaty, such agreement cannot become valid unless the Treaty is amended in accordance with article 236.

As previously mentioned, the main function of the Court is to control the lawfulness of the acts of the Council and Commission. Article 173 also provides for judicial review of all acts which have legal relevance if an action is lodged with the Court within a period of two months after publication or notification of the act. The review of acts of the Council may be initiated by the Commission and vice-versa. A petition may also be lodged by any Member State, but private persons or corporations may only address a petition to the Court against a decision of the Council or Commission which concerns them directly and specifically. No matter who initiates the review, it can only be based on one or more of the four following grounds: (1) lack of jurisdiction; (2) disregard of essential formalities; (3) infringement of the Treaty or of any rule of law relating to its application; and (4) abuse of power. These are the four classical grounds of judicial review developed by the French Council of State which is the highest administrative court in France.


35. Ibid.

36. Ibid.

37. Ibid.
in France, judicial review is not possible against acts of the legislature. Under the Treaty, legislative acts emanate from the Council and, in less important cases, from the Commission. They are called "Regulations" because it was thought that this term would express their relationship to the overriding Treaty. But in view of their content, the Regulations issued by the Council should be regarded as statutes. The judicial review of Regulations can, therefore, be best compared to the control of the constitutionality of legislative acts as it exists in the United States, Germany and Italy. Unlike the United States practice, an abstract petition for annulment of a legislative act may be made according to article 173, but only by a Member State, the Council or the Commission. An individual, however, will be in the same position as he would be in the United States. According to article 184, he can claim in the course of legal proceedings that the legislative act is invalid on any of the four classical grounds.

As regards the first ground, lack of jurisdiction, the review of the Court may in all instances—whether applied to legislative acts or to acts of an administrative nature—be compared with the control of constitutionality by United States Federal Courts. The Court will in the first place have to decide whether the act of the Council or of the Commission was within the competence of the Community as such. In other words, the Court will have to determine the limitations of Community powers as against the powers left to the Member States, both in the legislative and in the administrative sphere. Only if the Court finds that the act, as such, falls within the jurisdiction of the Community, may a decision, concerning whether the Council or the Commission was competent, be made. For both kinds of finding the Court will have to interpret the Treaty and will be required to examine the facts of the case.

The second ground, namely the disregard of essential formalities, refers (1) to the correct procedure in making a Regulation or reaching an administrative decision, and (2) to the way in which the decision reached has been formulated:

A. As regards procedure, the Council often needs a particular majority

for valid decisions and sometimes unanimity. The Commission decides by simple majority but always as a body with the quorum as set out in its own rules of procedure; in some cases other bodies such as the Assembly have to be consulted. If the Court should, as it certainly will, consider these procedural rules as substantial, it will have to annul upon petition within two months after their publication, the decisions disregarding these rules of procedure.

B. As regards formulation, the decisions of both Council and Commission must state the reasons therefore. This means first that they must state that the required procedure has been complied with, and second, that they must contain the relevant facts and considerations on which they are based. It would seem that in the case of Regulations it will be impracticable to expect the same degree of detailed reasoning as will be required in the case of administrative decisions. For the latter, which will mainly be decisions of the Commission, the Court can surely be expected to follow the practice which it has set down for the High Authority of the ECSC, namely, that the decision in order to be valid has to contain the essential facts which legally justify it and the arguments which led to it in sufficient detail to enable the Court to exercise judicial review properly. The Court has expressly stated that the requirement for giving the reasons falls within the category of conditions which, like that of jurisdiction over the subject matter, are considered by the Court on its own motion.

In the third instance, an act may not infringe upon the Treaty or "any rule of law relating to its application." The same words are used in Article 33 of the ECSC Treaty where the French text was the only official
With respect to the EEC Treaty, the Dutch, French, German and Italian texts are all of equal validity. The Dutch text of article 173 is more restrictive than the other three, as it speaks of infringement of the Treaty or of any Regulations made for its implementation. There is an unfortunate difference between the expression "Regulations" for implementation of the Treaty in the Dutch text and "rules of law" in the three other texts.

In an address which the President of the Court of Justice of the European Communities, Judge Donner, delivered in 1960 in London, he said:

What are those rules of law—are the sole regulations in execution of the Treaties to be understood by this term or are we to suppose that by those words the authors had in mind the general principles of law, common to the Member States? Those principles, as evolved by the various domestic administrative tribunals, especially the French Conseil d'État, contain some very interesting principles about the limits of executive and administrative powers.

Indeed, the French Council of State has repeatedly referred to general principles of law and in particular to the Declaration of Human Rights of 1789 in order to quash not only administrative acts, but also legislative decrees emanating from the Executive by delegated legislation. Mr. Donner himself said in 1953, when he was professor of administrative law, that "the term infringement of the law must be taken in a wide sense, namely to embrace not only written rules, but unwritten rules as well."

It is true, that wherever by a treaty stipulation, a State renounces part of its power, the accepted rules of interpretation of international treaties demand a restrictive interpretation in cases where there are different versions. But article 173 has to do with the powers of the Court in controlling those of the Council and Commission, and does not in any way deal with what power the Member States may or may not have renounced.

With regard to the Treaty of Paris, the Court has in various judgments relied on general principles of law such as implied powers, equality

50. ECSC Treaty, tit. 2, ch. 4, art. 33, 261 U.N.T.S. 167 ("ou toute règle de droit relative à son application").
55. Fédération Charbonnière de Belgique v. Haute Autorité, Cour de Justice de la C.E.C.A., July 16, 1956, 2 Rec. de la jurisprudence de la Cour 199, at 305; Gouvernement de la
under the law and certainty of the law. Indeed, in our opinion, it seems impossible to interpret a treaty without having recourse to general principles of law.

The Court sometimes just speaks of general principles; but more often makes a comparative study of the principles recognized by statutes, authoritative writers and Court decisions of the Member States, and then applies those general principles of law which are recognized by all Member States in common. This reasoning, applied by the Court in cases which arose under the ECSC Treaty, is strongly supported as regards the EEC Treaty by article 215, which lays down the rule that the Community shall be liable for torts of its institutions “in accordance with the general principles common to the laws of Member States . . . .”

However, we feel that the standard of the general principles applied in at least some Member States should, within the context of article 173 and, perhaps, even in the context of article 215, be applied by the Community even if one or more of the Member States do not follow it. Otherwise, the European standard would be reduced to the lowest common denominator.

A French author has rightly observed that it may be more difficult to amend the EEC Treaty than a constitution because of the requirement of unanimous ratification of amendments by the Member States, and he submits that the Court should, therefore, develop a creative mind.

The Court has certainly been correct when it declared that provisions of the German Constitution for the protection of individual rights were not in themselves applicable to its jurisdiction. But it would be a very doubtful step to conclude from this that only such general principles known to national legal systems were admissible as have found recognition in all Member States. The development of Community law would be held back if the Court could never go beyond the development common to all Member States. I am not blind to the limitation of the doctrine of implied powers (in interpreting the Treaty) which article 235 ordains by specifically reserving the use of implied powers to the Council acting unanimously upon proposals of the Commission. But we should nonetheless insist that the Court should not hesitate to draw on worthwhile


principles even if they are not accepted in all Member States, where these principles enable the Court to maintain individual liberties in the face of administrative powers far surpassing those customary in individual States. We must not forget that the Preamble to the Treaty concludes with the solemn affirmation that the contracting parties agree by this pooling of their economic potential to preserve and "to strengthen the safeguards of peace and liberty . . . " For who will be the guardian of individual liberties if not the Court? Neither the Parliaments of the six Member States nor the Assembly of the Community need to ratify the legislative acts of the Council. Meeting at Strasbourg, under the ambitious name of European Parliamentary Assembly, the representatives of the people have only advisory powers in the law-making process. They must be consulted in cases where important legislation is proposed by the Commission to the Council. However, if they disapprove of such proposals, the Commission is in no way bound to alter them, and the Council is not free to choose between the proposals of the Commission and those of the Assembly, i.e., unless the Council is unanimous it cannot disregard the proposals of the Commission and cannot take into account the resolutions taken by the Assembly after public debate. In all democratic countries, and not only in the common-law world, it has been the traditional function of the parliament and the courts to protect the liberties of the individual against encroachment by the government; in the European Communities the full responsibility for guarding these liberties is enshrined in the Court of Justice. It is submitted that an infringement of individual liberties which is not sanctioned by the Treaty, even if not clearly ultra vires in light of the Treaty, is nevertheless a violation of general principles of law forming an intrinsic part of the Treaty.

The fourth ground for quashing legislative and administrative decisions is the abuse of power. Actually the term used is the French term, détournement de pouvoir, or misdirection of power, found both in Article 33 of the ECSC and in Article 173 of the EEC Treaty. This is a term of art in French law which denotes the use by an administrative authority of its powers for purposes other than those for which they were conferred. The Court adopted this definition in its early decisions on Article

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64. See note 45 supra.
The German text of article 33 would seem to go further in speaking of abuse of discretionary power using Ermessensmishrauchs, a technical term in German administrative law which has entered into the official text of the EEC Treaty. The French definition requires that the administrative authority should have intended to exercise its power beyond the purpose in view of which it was granted, whereas in the German definition no such intention needs to be proved, since the mere fact of a wrong application of power is sufficient. The Court, up to now, has not gone beyond the narrower French interpretation, with the result that not a single decision has so far been quashed on this ground. Most decisions of the Court reported up to now were based on the ECSC Treaty for which the French text is the only authentic source. Under the EEC Treaty where all four languages are of equal value, there seems to be no reason why the Court should not reconsider its approach and, in lieu of the narrower French term, détourlement de pouvoir, which embraces only subjective abuse of power, accept the somewhat wider term of subjective and objective abuse which seems to be supported both by the German and Dutch texts. Such a wider interpretation would be in conformity with a general trend in European administrative law which demands that in view of the ever increasing administrative activity of the State, the scope of judicial review be extended.

Article 173 of the EEC Treaty deals with the power of the Court to quash legislative or administrative acts of the Council or Commission, and it should, perhaps, be added all other legally relevant acts; in particular, directives addressed by the Council to the Member States. Article 175 of the Treaty gives to the institutions of the Community, to the Member States and to individual persons or corporations a remedy before the Court if either the Council or Commission fail to act in cases where it would be their duty under the Treaty to do so, and where a period of two months has elapsed since the petitioner requested the authority to act. Although article 175 speaks only of violation of the Treaty, it is clear that, as in article 173, a violation of any rules of law, including general principles and regulations, will be sufficient.

It is essential to the good functioning of the Common Market that the Treaty, itself, and the law of the Community should be uniformly interpreted and applied throughout the six Member States. Theoretically, this 67. Fédération Charbonnière de Belgique v. Haute Autorité, Cour de Justice de la C.E.C.A., July 16, 1956, 2 Rec. de la jurisprudence de la Cour 199, 309-10.
could have been achieved in a manner similar to federal states, by granting an appeal from the court of last resort of each country to the Court of the European Communities with respect to all decisions involving Community law. But such a procedure would have meant a clear submission of the highest national courts to the European Court of Luxembourg. It was not desirable for political reasons to establish such a hierarchy. Therefore, article 177\(^{70}\) provides that whenever a national court of a Member State must base its judgment on a preliminary decision either about the interpretation of the Treaty or about the validity and interpretation of acts of the institutions of the Community, a lower court may, and the national court of last resort must, request the Court of the European Communities to give a ruling which the national court will have to follow.\(^{71}\)

In the United States the courts of appeal have power to certify to the Supreme Court questions of law concerning which they desire the instructions of that Court for their own decision. In the Common Market, such certification becomes compulsory for any court of last resort needing a decision on questions of Community law. But the European Court of Justice is not at liberty to take the whole procedure in its own hands for final decision such as the United States Supreme Court may do. Its function is limited to giving a ruling upon which the case will be resumed in the national court. If this obligation is taken literally and with the extension of Community law in the antitrust field and other fields, the Luxembourg Court may within a few years be overwhelmed with cases "certified up." When this stage is reached, the national courts of last resort ought to be permitted to follow precedents contained in earlier rulings of the Court of Justice of the European Communities, on the condition that none of the parties to the lawsuit raise an objection. You will realize that if such a rule were adopted, an objection raised by a party would in effect amount to an appeal against a decision of the highest national court to apply the precedent.

Turning to the role of the Court in the antitrust structure, it is apparent that it will have to interpret articles 85\(^{72}\) and 86\(^{73}\) of the Treaty as well as the Regulations implementing these articles. You will recall that a claimant, if he is of the opinion that a provision contained in a Regulation (on the strength of which measures are being applied against

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71. Ibid.
him) infringes upon the Treaty, may question its validity upon any of the four grounds for annulment contained in article 173.74

Of the three ways in which a private person or a corporation (hereinafter referred to as "enterprises") may invoke the help of the Court, the remedy provided in article 17575 against unlawful inactivity of Council or Commission is likely to play only a minor role. A claim lies only if the Commission was clearly bound to act. The claim would probably not be available upon a request to obtain an exemption under section 3 of article 8576 for a restrictive agreement reported to the Commission. The reporting parties may be greatly interested in a speedy decision, but since no time limit is placed on the Commission for rendering its decision, the parties will only be able to go to Court if the delay of the Commission in making a decision is quite unreasonable. It would be difficult to say that the failure to make a decision is unlawful as long as the Commission can justify the delay on reasonable grounds, for instance the need for further investigation.

For enterprises, the most important action before the Court is likely to be under article 17377 against a decision of the Commission with which they disagree. The petitioners may attack the Commission's decision addressed to them or concerning them on any of the four grounds of invalidity mentioned in article 173. As regards the first ground, lack of jurisdiction, you and I, who live in a federal state, will easily recognize, when reading section 1 of article 8578 and article 86,79 that they contain a provision restricting the competence of the EEC to a clearly

74. See note 68 supra.
75. See note 69 supra.
77. See note 68 supra.
78. Article 85(1) provides: "The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in: (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions; (b) the limitation or control of production, markets, technical development or investment; (c) market-sharing or the sharing of sources of supply; (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract." EEC Treaty, pt. 3, tit. 1, ch. 1, § 1, art. 85, 293 U.N.T.S. 47-48, CCH Common Market Rep. ¶ 2005.
defined set of circumstances. Both paragraphs contain a provision showing that they apply to restrictive practices only if trade between Member States is liable to be adversely affected. This means that such restrictive practices as are not apt to have an adverse affect upon trade between Member States are of no concern to the legislative and executive organs of the Community. They lie outside their scope of action. Indeed, only unreasonable restraints of competition are apt to cause an adverse effect upon trade, and it is submitted that all restraints on competition which are acceptable, within the meaning of the rule of reason, should therefore be deemed outside the jurisdiction of the European Communities. Consequently, the Court of Justice has to disallow the competence of the Commission to deal with such restrictive practices as in the opinion of the Court are not unreasonable and, therefore, incapable of adversely affecting trade between Member States. The interpretation submitted here has, of course, not yet been tested before the Court. But it is apparent that unless the rule of reason is adopted, the antitrust laws of the Common Market will fail in their primary objects. Unless these laws command the confidence and respect of the governed, which in this case means the industrial and commercial community, they cannot hope to succeed. The purpose of articles 85 and 86 is to set a new standard for industry and commerce which bears in mind the public interest to an extent seldom previously achieved. This cannot be done by a number of doctrinaire rules; it demands a realistic and reasonable approach.  

Under the second ground, substantial disregard of essential formalities, the Court will have to determine whether a decision of the Commission has been reached under the prescribed procedure and whether it is justified by the stated reasons. The provisions in Regulation 17 regarding the procedure for giving negative clearance to a submitted agreement, for granting or denying an exemption under section 3 of article 85 to a reported agreement, for any decision under article 86, for the imposition of sanctions and other related problems are extremely scanty.

In this respect article 19 of Regulation 17 provides that before rendering a decision the Commission has to give to the enterprises or associations of enterprises concerned an opportunity to express their views on objections which the Commission wishes to advance. It is not stated whether an oral hearing has to be granted by the Commission.

80. The author's thoughts about the rule of reason under article 85 are further developed in an article published in the forthcoming issue of the American Journal of Comparative Law. — Am. J. Comp. L. — (1963).
81. See note 68 supra.
82. See, e.g., articles 2 and 5 of Regulation 17. CCH Common Market Rep. ¶¶ 2411, 2441.
83. CCH Common Market Rep. ¶ 2581.
The Commission may also decide to hear third parties, and where it proposes to grant negative clearance or an exemption under section 3 of article 85, it has to publish beforehand the main contents of the claim for clearance or exemption, and it must invite third parties to express their views if they wish.

While the right of the directly aggrieved enterprises to express their point of view is dealt with in one single sentence, the Council took more care, in the six paragraphs of article 10 of Regulation 17, to establish rules for the consultation of Member States upon any decisions. If no further Regulations ensuring the right of the parties to impartial procedure were issued, it would be the duty of the Court of Justice to safeguard the observance of the general principles of law regarding judicial or quasi-judicial decisions. It is obvious that the Commission, when making the decisions referred to above, is acting partly as prosecutor and partly as judge. It seems, therefore, essential for the observance of the rule of law that all documents and other evidence used by agents of the Commission in their capacity as investigators or prosecutors should be made available to the party concerned, that the party be present or represented when witnesses are heard and that it may in writing and orally present its observations—if not to the Commission, at least to an agent or agency charged by the Commission to prepare the decision upon an impartial hearing of both sides.

If these essentials of rendering justice were not complied with, the Court of Justice would have to quash the decision made by the Commission for lack of proper procedure. In accordance with existing practice, the Court would also have to annul for lack of substantial form, any decision which did not in its explanation clearly indicate the facts and circumstances taken into account by the Commission and their impact on the decision.

As regards the third ground of annulment, violation of the Treaty or of any rule of law relative to its implementation, the Court will have to examine the findings of the Commission as far as the application of legal rules and principles is involved. This necessarily implies an examination of the factual situation and evidence considered, or perhaps wrongfully not considered, by the Commission in its findings.

Article 33 of the ECSC Treaty had limited the right of the Court to evaluate the situation resulting from economic facts and circumstances, in the light of which the High Authority reached its decision, to the

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84. CCH Common Market Rep. § 2491.
86. See note 85 supra.
case of a patent disregard of the Treaty or rules of law. Although this limitation on the Court is not expressed in the EEC Treaty, various authors hold that it also applies because in their view factual evaluation is not part of judicial review as such.\textsuperscript{88} We think that this theory is wrong, particularly in the antitrust field, where the correct evaluation of economic facts and circumstances is of basic importance. It would be very hard for the Court to state whether the law has been properly applied without evaluating the underlying economic facts.

With regard to the fourth ground, abuse of power,\textsuperscript{89} judicial review will presumably have a limited scope if the present practice is maintained, according to which the Court interferes with the legitimate power of the executive of the Community only if its use was arbitrary or outside its prescribed function. Since in the antitrust field the principles laid down by law are very uncertain and vague, the Court might claim for itself the control of the use of the Commission's power under the third ground, \textit{i.e.}, violation of the Treaty or of any rule of law relative to its implementation when interpreting these vague principles of antitrust law. The antitrust lawyer would hope that in this way the Court might control the appropriateness of the decisions made by the Commission, for in antitrust matters it seems an attempt at the impossible to separate the legal evaluation from the factual evaluation of a concrete economic situation.

The problem of scope of jurisdiction does not arise in regard to the fines and penalties which the Commission may impose according to articles 15 and 16 of Regulation 17.\textsuperscript{90} Availing itself of a power given to the Commission by article 172\textsuperscript{91} of the Treaty, the Council decreed in article 17 of Regulation 17\textsuperscript{92} that the Court of Justice shall have full jurisdiction to review any fines and penalties imposed by the Commission. This means that the Court may review the decision of the Commission on its merits and may cancel, reduce or (within the limits prescribed in the Regulation) increase the fine or the penalty imposed. Prima facie, it appears that the Council has respected that fundamental principle of law that fines or penalties imposed by an administrative authority should be subject to full review by an independent tribunal. But unfortunately the Council has only partly observed that rule. The

\textsuperscript{88} Jeantet, op. cit. supra note 60, 2e cahier, n. 74; Catalano, Manuale di Diritto delle Comunità Europee 80 (1962).
\textsuperscript{89} See note 85 supra.
\textsuperscript{90} CCH Common Market Rep. \S\S 2541, 2551.
\textsuperscript{92} CCH Common Market Rep. \S 2561.
rule demands that the Court be free to examine all the facts and evidence which led to the imposition of a sanction. It is to be presumed that in many cases the Commission will only impose a sanction if a prior administrative decision was infringed by the party to which it was addressed. In this case, the Court can only fully evaluate all the facts which led to the imposition of a sanction if it is free to examine, without any restrictions, the prior administrative decision on which the sanction is based. But this is not provided for in article 17 of Regulation 17. Some authors believe that the right of the Court to examine the prior decision is implied. However, in view of the fact that the Court, when interpreting the provisions of Article 36 of the ECSC Treaty, which corresponds exactly to article 17 of Regulation 17, has declared that no such implication is permitted, the opinion of the authors mentioned has not much chance of acceptance by the Court.

The limitation on the Court which results from Regulation 17 is unsatisfactory. Under article 87 of the Treaty, the Council has, with respect to the implementation of articles 85 and 86, to define the respective powers of the Commission and the Court. The Council would therefore in our view be free, in a future regulation, to give to the Court full jurisdiction not only to examine the prior decisions which led to a sanction—this authority is already contained in article 172—but also full jurisdiction in the judicial review of all decisions of the Commission under articles 85 and 86. This would be most desirable.

We now come to the last point—the request of a national court for guidance from the European Court on the interpretation of the Treaty or other Community law which leads to a ruling according to article 177 of the Treaty. The purpose of this procedure, as we have seen, is the clarification and uniform application of Community law. In antitrust matters, where points of fact and points of law are always closely interrelated, this method is not very satisfactory. Without appreciating or even knowing all the facts, the Court will necessarily be led to give cryptic answers. In the only case under articles 85 and 86 which the Court of Justice has so far decided, the \textit{Bosch} decision, the Court of

93. Article 17 of Regulation 17 merely gives the Court full jurisdiction to review decisions of the Commission which impose a fine or penalty. Ibid.
96. See note 91 supra.
Appeal of The Hague desired to know whether the prohibition on export, which the Bosch Corporation in Germany had stipulated in its contracts with its exclusive dealers, had become void under Article 85 of the EEC Treaty. In its ruling, the Luxembourg Court gave the following answer:

[T]his question cannot be considered as purely a question of interpretation of the Treaty, because [the full text of the contract] . . . in which the interdiction was stipulated was not communicated to the Court and therefore a decision on that point would not be possible without prior investigation; that such investigation is not within the power of the Court of Justice when it decides according to art. 177 of the Treaty; that under this condition, the Court must limit itself to state that it is not excluded that the prohibition to export about which the Court of Appeal was enquiring may come under the definition of art. 85 § 1.99

As you see, the answer of the Court was neither yes nor no, because it did not have knowledge of the underlying facts. This example shows again how necessary it is not to limit the Court under article 173100 in the evaluation of facts. In the procedure for ruling under article 177,101 the national courts ought to give to the European Court of Justice all the facts of the case, otherwise the rulings given by it may share the proverbial characteristics of the Delphic Oracle. This is an unfortunate result, and I am glad to say that in the cases now under consideration by the Court it has obtained the records of the facts, so that it will be in a position to give a more useful judgment.

With this I hope to have given you a short and not too baffling survey of the role of the Court of the European Communities in the antitrust structure. We arrive at the conclusion that the Court has an important part to play in the interpretation and application of the antitrust rules of the Common Market. We have seen that its powers are sometimes limited by the fact that it is mainly a Court of judicial review of legislative and quasi-judicial decisions of an administrative authority. It possesses withal ample powers to ensure law and justice if, in living up to its responsibility, it uses its powers with courage and imagination.

99. Id. at 106, CCH Common Market Rep. ¶ 8003, at 6538. (Translation is that of author.)
100. See note 85 supra.
101. See note 97 supra.