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Between Constraints and Innovation: The Role of the Groupe de Rédaction and the Legal Shape of the EEC Treaty

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Between Constraints and Innovation:
The Role of the *Groupe de Rédaction* and the Legal Shape of the EEC Treaty[1]

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This working paper is a draft chapter from a forthcoming book co-authored with Full Teaching Professor, Dr. Anne Boerger (Campus Saint-Jean, University of Alberta) and tentatively entitled: *The Dual Nature of the European Community: The Making of the Institutional and Legal Dimensions of European Integration, 1950 to 1967.* The book is an archive based, historical exploration of how the institutional and legal dimensions of the European Communities (EC) were developed from 1950 to 1967.[2] The present working paper deals with the famous *Groupe de rédaction*, the committee of legal experts, that negotiated the legal dimension of the Treaties of Rome (1957). The negotiations of the Treaties of Rome were conducted from September 1956 to March 1957 at ministerial, heads of delegation and expert level.[3] The Treaties were then signed in Rome on 25 March 1957 and finally ratified by the parliaments of the six founding states.[4] It was at ministerial level that the key decisions about the political and economic nature of the Treaties and the core functions of the institutions were made. The *Groupe de rédaction*, however, assisted the governments in this task, while also drafting the texts of the two treaties (Treaty of EURATOM and Treaty of the European Economic Community), designing the legal system and the Court of Justice.

[1] I would first and foremost like to thank Anne Boerger for reading many versions of this working paper and for the stimulating exchanges that lay behind this research. I would also like to thank Will Phelan, Bill Davies, Fernando Nicola, Amedeo Arena and Brigitte Leucht for extensive comments to the working paper.
[2] The starting point of the book was the unpublished PhD dissertation by Anne Boerger, *Aux origines de l'Union Européenne: La Genèse des institutions communautaires (C.E.C.A., C.E.D., C.E.E. et EURATOM). Un équilibre fragile entre l'Ideal européen et les intérêts nationaux*, Université de Liege, 1996.
[3] The prehistory of the negotiations dates back to the summit in Messina from 1-3 June 1955 after which the so-called Spaak Committee explored whether the basis existed for launching an intergovernmental conference with the aim to negotiate the foundation of two new Communities, establishing respectively a common market and cooperation on nuclear energy (EURATOM). The European Coal and Steel Community had already been established in 1952.
[4] The founding states were France, Italy, West Germany, Belgium, the Netherlands and Luxembourg.

The book is partly revisionist. In contrast to most existing research, we argue that the Treaties of Rome were based on the common understanding of the founding states that the future development of the EC was to depend on the political will of the member states. The institutional and legal system were designed with the centrality of national governments in mind. The supranational institutions were consequently primarily included for functional reasons and designed to enhance the efficiency of decision-making and the implementation of common decisions. This included the innovative way that the European Commission, through the right of initiative and other techniques, were designed to enhance the European outlook and efficiency of Council of Ministers decision-making. Even if the immediate aim of the Treaties were not to set up an embryo of a future federal government, the existence of a European Assembly did show the continued influence of federalist thinking in states such as Italy, although we should remember that many international organizations in the post-1945-years also had assemblies attached.[5]

Reconstructing the negotiations of the institutional and legal dimensions of the Treaties of Rome (focusing on the EEC Treaty) on basis of comprehensive archival research, the book demonstrates that the founding states *did* produce a relatively clear and coherent blueprint for how the EC was supposed to function institutionally and legally. This was not a system of *integration through law* as often argued retrospectively by legal scholars and the Court of Justice of the European Union. Instead, the system was based on international treaties, where the primary law of the Treaties of Rome set an agenda on basis of which the Council of Ministers, on the initiative of the Commission, would legislate. European legislation would then typically be implemented by national administrations, in the case of directives, and European law would be applied by national courts (both regulations with direct applicability and directives). National constitutional orders were in this way kept intact. The only example of genuine European public law was to the planned common competition policy. Member states were obliged to loyally apply

[5] The book nuances the most comprehensive treatment of the negotiations of the Treaties of Rome in Hanns Jürgen Küsters, *Die Gründung der Europäischen Wirtschaftsgemeinschaft* (Baden-Baden: Nomos, 1982) and it contradicts and refutes the interpretation presented in a recent analysis by Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015). Delfs argues that the negotiations on the Treaties of Rome fully developed the *integration through law* template.

European law (article 5 EEC Treaty) while possible infringements were to be handled through the politicized infringement mechanism (articles 169-171) that did not include penalties for convicted perpetrators. Finally, the innovative and now famous preliminary reference mechanism (article 177 EEC Treaty) allowed for partly voluntary cooperation between national courts and the European Court of Justice to ensure the uniform application of European law across member states.

Analyzing the concrete institutional and legal practice of the EC from 1958 to 1967, the book finally argues that it was not only the Empty Chair Crisis in 1965-1966, with its introduction of the national veto right, that corrupted the original design of the Treaties of Rome. In fact, the legal revolution of the ECJ, with the introduction of direct effect and primacy of European law, in the famous Van Gend en Loos (1963) and Costa v. E.N.E.L. (1964) judgments[6] similarly deviated from the original blueprint negotiated at the Val-Duchesse in Brussels.[7] The result was the unlikely and contradictory dual structure of the EC created by the parallel development of an increasingly important institutional and political practice with important intergovernmental traits and a weakening of the position of the European Commission and the gradual constitutionalizing of European law.[8] This dual structure that is still with us today and continues to have a significant impact on the way the European Union functions.[9]

The current working paper offers the core empirical analysis of how the legal order was designed by the negotiators of the Treaties of Rome. It focuses on the *groupe de rédaction* and as a result does not deliver the full analysis of the political negotiations on the Treaties of Rome, which will be part of the book. Nevertheless, the legal questions negotiated by

[6] Judgment of the Court of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62 and Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., Case 6-64.

[7] For a short treatment of this argument consult: Morten Rasmussen, 'Revolutionizing European Law: A history of the Van Gend en Loos judgement', *International Journal of Constitutional Law 12*, no. 1 (2014): pp. 146–152.

[8] The first scholar to highlight the dual nature of the EC was Joseph H. H. Weiler. See in particular his seminal article Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal 100*, no. 8 (1991): pp. 2403-2483

[9] For an analysis of how the dual structure of the EU impacts the current Polish crisis about the primacy of European law see Morten Rasmussen, A More Complex Union -How will the EU react to the Polish Challenge? A Historical Perspective, *Verfassungsblog, 2021,* https://verfassungsblog.de/author/morten-rasmussen/

the *groupe de rédaction* were crucial to the shape of the Treaties of Rome and continues to this day to be important and relevant to European law. To legal scholars, this working paper may thus provide an interesting read, particularly if read in company with the judgments of the legal revolution.

On 22 November 1956, the heads of delegation decided to ask the *groupe de rédaction* to finally begin its work on the Treaties after the committee had been inactive since its creation in July. The tasks given to the committee included drafting the general principles of the treaties, the texts defining the four institutions of the European Economic Community (EEC), and finally the treaty articles on substantive policy in cooperation with the Committee of the common market. This latter job lasted until March 1957 and indirectly influenced the development of the general principles of the EEC Treaty.[10] The *groupe de rédaction* received a clear brief (Ch. Del. 50[11]) that formulated explicitly the deeper conditions on which the integration process rested, the fundamental nature of the EEC, and outlined the institutional system, even if most of the actual details were yet to be developed. Document Ch. Del. 50 attempted to summarise the tendencies of the discussions held by the heads of delegation since September. The first assertion was that the concrete development of the EEC and the realisation of the common market, at the most fundamental level, depended on the governments of the member states ('*au premier chef des États*'). The second highlighted that the achievement of the common market would require a wide-ranging action programme developed over time, and argued that its effective execution demanded an institutional system able to take the necessary decisions.[12] In that regard, an agreement had gradually emerged at the political level of the negotiations, from September onwards, that the Council of Ministers would have the

[10] Comité des chefs de délégation. 'Projet de procès-verbal de la réunion des Chefs de délégation tenue à Bruxelles, le 22 novembre 1956'. Historical archive of the European Union (HAEU), CM3.NEGO, 112.
[11] 'Note du président sur le système institutionnel dans le Traité sur le marché commun européen' (MAE 524 f/56 — Ch. Del. 50), Brussels, 10 November 1956. HAEU, CM3.NEGO, 259.
[12] 'Note du président sur le système institutionnel dans le traité sur le marché commun européen' (MAE 524 f/56 — Ch. Del. 50), Brussels, 10 November 1956. HAEU, CM3.NEGO, 259.

central role as the main decision-making institution in the EEC. But differences remained regarding the nature of the Council—should it be turned into a communitarian institution, and not merely an intergovernmental forum for governments? —and the precise competences of the European Commission, the Common Assembly and the European Court of Justice (ECJ). Finally, the political leaders had clearly rejected a constitutional approach to the design of the institutional and legal system. The new EEC would consequently be based on an international treaty.

The *groupe de rédaction* thus worked on the basis of a clear mandate when it came to the general institutional and legal nature of the treaty. However, at the same time, the negotiating climate changed after the political breakthrough of the negotiations between the French and German governments in early November after the summit between Prime Minister Guy Mollet and Chancellor Konrad Adenauer. Whereas the French government had initially taken a very hard line on the institutional issues, it negotiated in a more pragmatic spirit from December 1956 to March 1957. The question was to what extent this new French pragmatism offered room for a more ambitious institutional and legal agenda than already outlined at the political level? Was the *groupe de rédaction*, due to its technical expertise, able to enhance the legal nature of the EEC beyond the largely intergovernmental approach outlined in the brief? Views on the impact of the *groupe de rédaction* differ in the research literature. The standard view, best developed in an article by Anne Boerger, is that the committee, although constrained by the overall drift of the negotiations at the political level, managed to discretely insert a limited number of constitutional elements in the treaties that went under the radar of most governments.[13]

[13] Several articles have explored the committee : Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34* no. 1–4 (1981) : pp. 159–180 ; Jérôme Wilson and Corinne Schroeder, 'Europa essem construendam. Pierre Pescatore und die Anfänge des Europäischen Rechtsordnung', *HMRG 18* (2005): pp. 162-174; Morten Rasmussen, 'Constructing and Deconstruction European "Constitutional" European Law. Some reflections on how to study the history of European law', in *Europe. The New Legal Realism*, edited by Henning Koch, Karsten Hagel-Sørensen, Ulrich Haltern and Joseph Weiler (DJØF Publishing: Århus, 2010), pp. 639–660; Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome', *Contemporary European History 21*, no. 3, (2012): pp. 339–356. A number of interviews also discuss the work of the committee: Gaudet, Ehring, Pescatore, Riphagen and Ducci (published in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007) and these available on the HAEU's Oral History Website https ://archives.eui.eu/en/oral_history). The committee has been difficult to explore empirically because it took no minutes.

Some of these constitutional elements would later be used by the ECJ in its famous legal revolution of 1963–1964 with the Van Gend en Loos and Costa v. E.N.E.L. judgements.[14] In contrast, in his recent study Hauke Delfs argues that the breakthrough of the negotiations in November, in combination with the decision to place the Council of Ministers at the centre of decision-making, allowed for a significant shift in the approach to the legal dimension of the EEC Treaty. The latter was originally dealt with from an intergovernmental perspective, combined with the notion of a dualist separation between the primary law of the EEC Treaty and national constitutional orders. Such a separation implied that the European institutions would have to produce secondary law that would then be implemented by national authorities before the policies outlined in the EEC Treaty became a reality in the member states. However, the legal committee adopted a monist approach to status of European primary law that would give it immediate and direct effect in national constitutional orders.[15] To Delfs accordingly, the *groupe de rédaction* did not discretely enhance the constitutional nature of the treaty, but simply executed a broader shift that took place at the political level of the negotiations.[16]

In this working paper, we analyse the work of the *groupe de rédaction*, focusing on four major questions where its role proved decisive for the overall institutional and legal nature of the EEC Treaty and the future EEC. Firstly, the legal committee in close cooperation with the Committee of the heads of delegation worked intensely in December and January to design the four institutions of the EEC and the decision-making system. Here we will only explain how the legal experts phrased the mission statements of each institution. Secondly, from December to January, the *groupe de rédaction* widened and defined the jurisdiction of the European Court of Justice (ECJ) in order to address the need for the enforcement and uniformity of interpretation of European law in the member

[14] Morten Rasmussen, 'Revolutionizing European Law: A history of the Van Gend en Loos judgement', *International Journal of Constitutional Law 12*, no. 1 (2014): pp. 146–152.
[15] This did not mean that all norms of primary law could be drawn upon by private litigants before national courts. Often the primary law of the EEC treaty only outlined only vague policy goals that could not be drawn upon in court cases. Nevertheless, a monist approach did mean that the entire EEC Treaty would be part of domestic law without having to rely on the different constitutional clauses on the member states with regard to the reception of international law. Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext*, (Tübingen: Mohr Siebeck, 2015).
[16] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext*, ((Tübingen: Mohr Siebeck, 2015), pp. 169-170.

states, as well as the judicial protection of individuals vis-à-vis the decisions of the European institutions. The *groupe de rédaction* thus defined a procedure for addressing member state infringement of legal obligations, elaborated a rudimentary system of judicial review to ensure uniformity, and finally provided a limited measure of legal recourse for individuals against decisions of the European institutions. In particular, the first two functions were significant contributions or enhancing the efficiency of the legal system when it came to executing the EEC Treaty. Thirdly, the committee defined the nature of primary and secondary legal norms and designed the legislative system, from January to early March 1957. Finally, the Committee dealt with the general principles of the treaty. This task began in late November 1956, and was accomplished in a period of four months, closely intertwined with the drafting of the entire treaty, and crystallised in February and March 1957. We will focus on the three principles that had the most impact on the broader legal system and thus shaped its nature: the preamble, the definition of the legal personality of the EEC, and finally the principle of member state loyalty.

The Enigmatic *Groupe de Rédaction*

The negotiations of the *groupe de rédaction* took place in the smoking salon of the Château de Val Duchesse on the outskirts of Brussels during the day and at the downtown Hôtel Métropole at night. Abiding to an exhausting schedule of three sessions, from early morning to past midnight, six days a week and two sessions on Sundays, the legal experts worked intensively for four months. In the smoking salon, the German and French representatives sat with their back to the window, whereas the Benelux and the Italian representatives symbolically were grouped together opposite the two great powers. During the coffee breaks and lunch, the committee members walked leisurely in the park around the castle, recuperating from their complex legal discussions, and often socialising with members of the other negotiating committees.

The *groupe de rédaction* was set up in July 1956 with a much more limited task than originally intended by Spaak. Eventually, it would only be in charge of drafting the treaty texts and preparing documents on the most contentious questions to be solved by the heads of delegation. Thus, its role was secondary to the Committee of the heads of

delegation. With the exception of the Italian diplomat, Roberto Ducci, who had been involved in the negotiations since the Messina summit, all members were legal experts.[17] Several jurists were also career diplomats including the three legal councillors of the Benelux countries' Foreign Ministries, respectively the Belgian Yves Devadder, the Dutch Willem Riphagen, and Luxembourg's Pierre Pescatore.[18] Senior legal advisor of the Foreign Ministry and law professor, Georges Vedel, left young legal councillor, Jean-Jacques de Bresson, to defend French interests.[19] The Italian representative, Nicola Catalano, came in contrast from the *Avvocatura dello stato*, but had served at the legal service of the High Authority of the ECSC from 1953 to 1956.[20] The German representation in the committee was more complicated at first and reflected the internal division of competences in the German administration with three representatives: Josef Mühlenhöver from the Foreign Ministry, Ernst Wohlfahrt from the Ministry of Justice, and Hans-Peter von Meibom from the Ministry of the Interior (representing the German Länder). The German Foreign Ministry demanded a representative on the committee because the political importance of the work to be done could not be underestimated, even if the committee were less prominent than Spaak had first imagined. To cement the influence of the Foreign Ministry, Ophüls managed to pull some strings to secure Wohlfahrt as the representative of the Ministry of Justice. Wohlfahrt was allegedly quite sympathetic to the constitutional approach to the Treaties of Rome championed by Ophüls and Hallstein.[21]

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[17] Interview with Roberto Ducci (reference to be completed). Archive of the Italian Foreign Ministry, Papers of Ducci, box 2, Conference di Messina (1955). Although Ducci had a law degree, he considered himself a diplomat in the context of the groupe de rédaction.

[18] HAEU, Interviews, INT517, Willem Riphagen. Spaak himself suggested that Pescatore joined the small informal group a week before the first meeting of the conference. (See Letter of Lambert Schaus to Joseph Bech, 14 June 1956. Archives Nationales du Luxembourg/Affaires étrangères, 7718).

[19] The retrospective reflections of Jean-Jacques de Bresson can be found in Jean-Jacques De Bresson, 'L'évolution des institutions communautaires', in *De Gaulle en son siècle*, vol. 5, L'Europe (Paris : Plon, 1992), pp. 116–118.

[20] Vera Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972)*, (Frankfurt am Main: Vittorio Klostermann, 2018), p. 199.

[21] 'Note Betr : Brüsseler Redaktionsausschuss / Deutsches Mitglied', Bonn, 3 July 1956. Politisches Archiv des Auswärtigen Amts (PAAA), Bestand 10, Band 928. On Wohlfahrt's views, see Interview with Pierre Pescatore by Maria Grazia Melchionni and Roberto Ducci (Luxemburg, 21 May 1984) in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), pp. 73-11 and HAEU, Interviews, INT603 and INT500 Gaudet.

In early January 1957, Ducci reshuffled the composition of the *groupe de rédaction*, possibly at Spaak's request. Ducci now included some of the key experts from his entourage, including Pierre Uri, Michel Gaudet from the legal service of the High Authority and Hubert Ehring who served as director of the legal service of the ECSC Council.[22] In addition, Ducci decided to limit the national representation to one single delegate to avoid the time-consuming internal debates between the three German delegates. In this difficult situation, the German Foreign Ministry insisted Mühlenhöver remain on the committee. However, the latter had in any case to defend the compromise struck between the Foreign Ministry and the Ministry of Economics in late November over the institutional and legal dimensions of the future EEC. The Foreign Ministry had been forced to abandon the last pretensions of a constitutional approach to the EEC Treaty. Instead, the German government would promote pragmatic solutions and make sure that the treaty would live up to the German constitutional requirements for the transfer of competences.[23]

Normally, Ducci would present the intermediary reports to the Committee of the heads of delegation. One cannot but wonder to what extent Ducci, who was a diplomat and not a legal expert, was able to convey the intricacies and theoretical complexity of the legal problems dealt with by his committee. In contrast, the heads of the delegation were all lawyers by education, but it is not clear to what extent legal details and nuances really interested them. Ludovico Benvenuti (Italy), Lambert Schaus (Luxembourg) and Carl-Friedrich Ophüls (Germany) had been part of European negotiations since the Treaty of Paris and probably understood legal details and nuances better than most. The French representative, Maurice Faure, did not have the same experience and also seems to have

[22] If Gaudet officially joined the groupe de rédaction only on 7 January 1957 (see for example Letter from Gaudet to Georges Berthoin, 02 February 1957. Archive of Michel Gaudet, Fondation Jean Monnet pour l'Europe (AMG), Correspondance diverse 1955-1969. D), he worked behind the scenes from June 1956 onwards, in close relationship with Pierre Uri and Jean Monnet. In June 1956, he helped for example draft the first and unofficial treaty dispositions with Uri, Hupperts, Devadder and Guazzugli (see 'Note au dossier 'Conférence Intergouvernementale de Bruxelles', 28 June 1956. Archives Nationales du Luxembourg/Affaires étrangères, 7717. See also 'Note concernant les discussions entre MM. Jean Monnet, Gaudet, van Helmont et Kohnstamm', 03 September 1956. Archive of Jean Monnet, Fondation Jean Monnet pour l'Europe (AJM) 1/2/9. See also 1/2/10).

[23] 'Aufzeichnung. Brüzzeler Integrationskonferenz: Sitzung der Arbeitsgruppe Gemeiner Markt vom 20. und 21. November 1956; Sitzung der Delegationsleiter von 22. November 1956', Bonn, 23 November 1956. PAAA, Bestand 10, Band 929.

taken the institutional and legal details less seriously after the major breakthrough in the negotiations in early November 1956. As he told Vedel, there was no reason to bother too much with the more restrictive approach of the French Foreign Ministry.[24] Few legal assessments exist in the national archives of the six negotiating states, but two seem to demonstrate different degrees of understanding of functions of the *groupe de rédaction*. Very serious debates took place in the West German government and administration, as we shall see below. Due to their experience with federalism, the German government and administration projects much more competence in debating how the legal dimension of the EEC would work and impact the member states. In contrast, there were apparently no serious debates in the French government and administration about what the legal dimension of the EC would mean to France. The relaxed approach of the Mollet government from November 1956 onwards seemed to combine with the assessment of the French Foreign Ministry that the ECJ was not to be feared, since it more resembled the International Court of Justice in The Hague than the ECJ of the ECSC.[25]

When analysing the work of the *groupe de rédaction*, we have been restricted by the very limited number of primary sources that cast light on the internal dynamics of the negotiations in the committee. Due to the lack of detailed minutes of the meetings of the *groupe de rédaction*, it is often not possible to trace the different positions of the various members during the negotiations. In retrospect, interviews and writing, in particular by Pierre Pescatore, emphasised that a unique atmosphere in the committee prompted easy compromises. According to this view, the members of the committee focused on a common purpose: building Europe.[26] However, by carefully reading the numerous

[24] Georges Vedel's testimony in *40 ans des Traités de Rome ou la capacité des Traités d'assurer les avancées de la construction européenne* (Brussels: Bruylant, 1999), p. 48.
[25] MAE/F, Série DECE, 618. Raymond Bousquet to Christian Pineau 'État actuel des travaux de la Conférence de Bruxelles sur le plan Marché commun', Brussels, 10 December 1956 and 'Note. Objet : réflexions sur le rôle de la Cour dans le futur Traité de Marché commun'. Note sent by Alby to Robert Marjolin, Paris, 3 January 1957. Archive of Robert Marjolin, Fondation Jean Monnet Pour L'Europe (ARM), 16/10/15
[26] Interview with Pierre Pescatore by Maria Grazia Melchionni and Roberto Ducci (Luxemburg, 21 May 1984) in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), pp. 73-11. But see also Interview with Ducci by Maria Grazia Melchionni (Rome, 22 October 1984), in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), p. 429. Jérôme Wilson and Corinne Schroeder, 'Europa essem construendam. Pierre

interviews with the committee members and combining them with the available primary sources, the evidence clearly suggests a different and more conflictual picture. In fact, the members of the committee seem to have been split in what might be called a traditional block and supranational/federalist block.[27]

De Bresson, Riphagen, Mühlenhöver and Ehring constituted the traditionalist bloc, with a preference for solutions along the lines of public international law. Let us try to untangle the complex position that each of these jurists held between representing their national government and their own personal legal experience and viewpoints. The simplest case is de Bresson. As French representative and official of the French Foreign Ministry, de Bresson negotiated from a relatively narrow mandate, even when the Mollet's government relaxed its more dogmatic views on the institutions and the legal dimensions. De Bresson's personal views were more or less identical with the conservative French position. He belonged in the Gaullist camp in the French political landscape and did not sympathise with European federalism.[28] De Bresson had no direct experience with European integration. As assistant director to André Francois-Poncet, the High Commissioner of the French occupational zone in Germany, he had worked in West Germany from 1949 to 1952, and was consequently acquainted with German law. However, during the three years preceding the negotiations of the Treaties of Rome, he had been the legal advisor of the Vietnamese government. His experience with European

Pescatore und die Anfänge des Europäischen Rechtsordnung', *HMRG 18* (2005) : pp. 162–174. This article relies overwhelmingly on Pescatore's testimony.

[27] See the following: Interview with Ducci by Maria Grazia Melchionni (Rome, 22 October 1984), in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), Interview with Pescatore by Maria Grazia Melchionni (Rome, 22 October 1984), in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), HAEU, Interviews, INT603 and INT500 Gaudet, INT674 Hubert Ehring and INT517, Willem Riphagen 18 May 1991. Mühlenhöver, 'Aufzeichung, Betr.: Das institutionelle System im Vertrag über die Gründung eines Europäischer Gemeinsamer Markt. Hier : Gerichthof. Sitzung des Sachverständigen-Ausschusses in Brüssel von 11. - 14. Dezember 1956', Bonn, 17 December 1956. PAAA. Abteilung II, Aktenzeichen 225-30-04, 93; and Mühlenhöver, "Aufzeichnung, Betr.: Europäischer Gemeinsamer Markt. Hier : Institutionen (Sitzung der Arbeitsgruppe in Brüssel vom 18. bis 21. Dezember 1956)", Bonn, 5. January 1957. PAAA, Abteilung II, Aktenzeichen 225-30-04, 933.

[28] Note from Riphagen to Verrijn Stuart, 5 March 1956. National Archives of the Netherlands, Ministerie van Buitenlandse Zaken, II, 913-100, dos. 6351 and HAEU, Interviews, INT674 Hubert Ehring (Brussels, 4 June 2004).

law was consequently very limited and he most likely did not play a very active and creative role in the work of the committee.

Riphagen's position was more complex. Riphagen defended the Dutch position over the strong Commission, but according to several oral testimonies including his own[29], he did not belong to the federalist camp. Riphagen had also been in the committee of jurists during the negotiations on the Treaty of Paris, and although he generally supported European integration, he disliked the federalist approach. Instead, he considered European legal integration mainly as another example of international law.[30] This was maybe not surprising given the fact that since joining the Dutch Foreign Ministry as legal advisor in 1947, he had worked not only with European integration but also very extensively with questions of international politics and law.[31]

Mühlenhöver, who represented the German Foreign Ministry, was bound by the compromise position between the Foreign Ministry and the Ministry of Economics in November 1956. However, the evidence we have of the positions he took suggests that the German legal tradition for the dualist approach to the reception of international law pushed his views on important questions of European law in the direction of an approach consistent with international law.[32] This arguably reflected his lack of experience with European integration and his professional background. Since 1944, when he formally joined the Foreign Ministry, Mühlenhöver had worked with international law and international jurisdiction.[33]

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[29] HAEU, Interviews, INT674 Hubert Ehring (Brussels, 4 June 2004) and HAEU, Interviews, INT517, Willem Riphagen (18 May 1991).

[30] See for example his 1955 booklet: Willem Riphagen, *De juridische Structuur der europese Gemeenschap voor Kolen and Staal* (Leiden: University Press, 1955), where he argues that the supranational elements in the ECSC could just as well be categorized as belonging to international law. This publication caused quite a stir among the European federalists in the Dutch parliament, who attacked Foreign Minister Willem Beyen for employing such a conservative legal advisor. HAEU, Interviews, INT674, Hubert Ehring (Brussels, 4 June 2004).

[31] P.E.L. Janssen, *Willem Riphagen 1919–1994* (The Hague: T.M.C. Asser Instituut, 1998) and HAEU, Interviews, INT517, Willem Riphagen (18 May 1991).

[32] See for example his report in Mühlenhöver, 'Aufzeichnung, Betr.: Europäischer Gemeinsamer Markt. Hier : Institutionen (Sitzung der Arbeitsgruppe in Brüssel vom 18. bis 21. Dezember 1956)', Bonn, 5. January 1957. PAAA, Abteilung II, Aktenzeichen 225-30-04, 933.

[33] With a Dr. jur. on medieval legal history from the University of Bonn in 1940, and member of the Nazi party since 1938, Mühlenhöver had joined the German Embassy in occupied France. In 1944, he formally joined the Foreign Ministry where he worked with prisoners of war and interned civilians. Gerhard Keiper

Finally, the legal expert from the ECSC Council, Hubert Ehring, apparently felt a certain familiarity with Riphagen and de Bresson, even if Gaudet allegedly warned him against the Gaullist political views of the latter, when he joined the committee. Gifted with excellent linguistic abilities in French, Ehring joined the German Ministry of Economics in 1952 to work on European integration. This first appointment led, two years later, to a career in the legal service of the Council of the ECSC, where he became director in 1955. Thus, Ehring already had a significant experience working with European law before his work on the Treaties of Rome.[34]

Between the two blocks were arguably find Hans-Peter von Meibom. We have no direct evidence of his positioning during the negotiations. However, by the mid-1960s he supported the primacy of European law even if he respected the structural congruence thesis, which argued that German fundamental rights were untouchable for European law as long as the EC did not take a more convincing democratic form. To von Meibom the lack of fundamental rights at the European level was caused by the need to find a durable compromise in the Treaties of Rome negotiations.[35]

The federalist block was dominated by Gaudet, Catalano and Pescatore, but probably also included Devadder and Wohlfahrt. Gaudet, who was a member of the Conseil d'État before joining the legal service of the High Authority in 1953 and was a close associate of Monnet. His job interview with Monnet in 1952 had actually converted him to the European cause. Gaudet had from early on developed a constitutional interpretation of the Treaty of Paris and, by 1956, was one of the central figures in European law.[36] Since June 1956, he had been loosely attached to the team around Spaak, and occasionally contributed with central drafts.[37] As he only joined the *groupe de rédaction* in January

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and Martin Kröger, eds., *Biographisches Handbuch ds deutschen Auswärtiges Dienstes 1871-1945*, vol. 3, L-R (Paderborn, München, Wien, Zurich: Ferdinand Schöningh, 2008), p. 299.

[34] HAEU, Interviews, INT674, Hubert Ehring (Brussels, 4 June 2004).

[35] See Bill Davies, *Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949-1979*, (Cambridge: Cambridge University Press, 2012), 74-75 and 161-162.

[36] Anne Boerger and Morten Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet', *American Journal of Legal History* 57, no. 1 (2017): pp. 51-82.

[37] In June 1956, Gaudet helped for example draft the first and unofficial treaty dispositions. 'Note au dossier Conférence Intergouvernementale de Bruxelles', 28 June 1956. Archives Nationales du

1957, he missed out on several key debates and decisions. Yet, he made his mark on the work of the committee.[38]

Catalano, who had been a member of the *avvocaturo dello stato* since 1939, had served as official in the legal service of the High Authority from 1953 to 1956, together with Gaudet and was consequently also well versed in European law. He had represented the High Authority in several cases before the ECJ. He was strongly pro-European and shared with Gaudet a constitutional and federal approach to European law.[39]

Pescatore was well experienced in both international and European law. He joined the Luxembourg Foreign Ministry in 1946 and worked several years as representative in the United Nations (UN) and assistant to the Luxembourg ambassador in the United States. He was sorely disappointed with the way the member states of the UN pursued their narrow national interests. In the mid-1950s, Pescatore was also involved in the negotiations over the Benelux economic union, where he negotiated the legal aspects with Devadder and Riphagen. In hindsight, Pescatore dated his strong belief in a federal Europe to working with Gaudet in the *groupe de rédaction*.[40]

Devadder was instructed by Spaak to play a mediating role in the committee, similar to the one Spaak played in the broader negotiations on the Treaties of Rome. Devadder had a doctoral degree from Catholic University of Leuven from 1934, after earning his law

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Luxembourg/Affaires étrangères, 7717. See also 'Note concernant les discussions entre MM. Jean Monnet, Gaudet, van Helmont et Kohnstamm', 3 September 1956. AJM, 1/2/9.

[38] On Gaudet's role in the committee, see also testimonial evidence: Interview with Ducci by Maria Grazia Melchionni (Rome, 22 October 1984), in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), Interview with Pescatore by Maria Grazia Melchionni (Rome, 22 October 1984), in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007), HAEU, Interviews, INT603 and INT500 Gaudet, INT674 Hubert Ehring and INT517, Willem Riphagen 18 May 1991 and Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1–4 (1981): p. 163 and 166.

[39] Vera Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972)* (Frankfurt am Main: Vittorio Klostermann, 2018).

[40] Vera Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972)* (Frankfurt am Main: Vittorio Klostermann, 2018), Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1-4 (1981) : pp. 159–180 and Interview with Pescatore by Maria Grazia Melchionni (Rome, 22 October 1984), in Fondation Jean Monnet pour l'Europe, *La genèse des Traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris : Economica, 2007),

degree at the Faculty of Law in Paris. Interested in administrative law, he entered the Belgium administration as chef de bureau of the Ministry of Internal Affairs in April 1936. During the war, he first stayed in occupied Belgium, but retreated to London in February 1944, where he was immediately put to work by the exiled Belgian government. In October 1944, he climbed the career ladder and was named a legal advisor to the prime minister. He was then transferred to the Foreign Ministry in 1950 to work as *jurisconsulte* and as such he participated as the Belgian legal expert in the various negotiations on European integration throughout the 1950s. It was consequently through experience rather than through his original legal education and research that he became well versed in the legal matters of European integration and international law.[41] Finally, we know relatively little about Wohlfahrt except that he went on from the *groupe de rédaction* to join the legal service of the Council of Ministers from 1958 onwards.

To conclude, although the traditionalist block may have been less experienced in European law compared to the supranational/federalist block, the decisions of the political level of the negotiations regarding the institutional and legal dimension of the Treaties of Rome greatly favoured the conservative approach. This obviously empowered the conservative block when the committee had to make the institutional and legal choices. At the same time, the presence of several experienced experts in European law with a federal and constitutional outlook ultimately did set its mark on the EEC treaty.

The core challenges that the *groupe de rédaction* faced is perhaps best captured by Michel Gaudet's hand-written comments on several working documents of the conference when he entered the committee. He had been personally called by Spaak not so much to reproduce the ECSC model, but to share the experience of that first community, and what could be learned from it.[42] Most revealing of his frame of mind were his notes on Spaak's memorandum on the institutional system (Ch. Del. 50) from 10 November 1956. In it, he

[41] Archives of the Belgian Foreign Ministry Personnel dossier Yves Devadder.

[42] Handwritten notes by Gaudet on document Ch. Del. 165 (MAE 101 f/57) 14 January 1957. Gaudet concluded: '*Je ne la prends [pas] comme un modèle mais comme une expérience*'. This document is part of a larger collection of Michel Gaudet's personnel papers from the Treaties of Rome negotiations identified in the Commission Legal Service archive. They were copied and are on file with the author. Commission Legal Service Archive, Gaudet, Communauté économique européenne, 3 [hereafter LSA, Gaudet, CEE, 3]. Gaudet concluded: '*Je ne la prends [pas] comme un modèle mais comme une expérience*'.

commented on the key dilemma that the central political role of the national governments in the development of the EEC and in the institutional system would detract from the effectiveness of the latter compared to a supranational model where the Commission would be the key decision-making institution. When it came to the design of the legal system, Gaudet clearly favoured effectiveness when he stated in the margin: '*application uniforme, règles communautaires*'.[43] To achieve this, as he jotted down on another document, it was not necessarily a good idea to repeat the model of the ECSC, where the ECJ primarily had been designed to control the HA. This had led to frustrations at firm level and to legal insecurity about the definitive validity of the HA's decisions. Instead, the new court should be part of a broader system of judicial protection.[44] These handwritten traces of his reflections demonstrate very well that Gaudet was taking a constitutional approach to the new EEC Treaty, similar to the one he had developed to interpret the Treaty of Paris. He aspired to create an effective system of European public law, not merely an international treaty stating the mutual obligations of the signatory states.[45] Throughout the negotiations, the question of how to balance the effectiveness of the institutional and legal system in executing the measures of the treaty and the fact that this ultimately rested on member states' support continued to haunt the committee. It was a tension that the negotiators arguably did not manage to fully resolve.

The Mission of the Institutions and the Design of the Court of Justice

It was quite a challenge to formulate the legal nature of the four institutions, when the *groupe de rédaction* sat down to work on the matter on 18 and 21 December 1956. The political battle over the role of the Commission was still raging in the Common Market Groupe and Heads of Delegation Committee, ministers would only be directly involved in January 1957, so the split between France on the one side that wanted to reduce the role of the Commission and the Netherlands on the other side that was still pushing for a

[43] Handwritten notes by Gaudet on 'Note du président sur le système institutionnel dans le traité sur le marché commun européen' (Ch. Del. 50), Brussels, 10 November 1956. HAEU, CM3.NEGO, 259. LSA, Gaudet, CEE, 3.
[44] Handwritten notes by Gaudet on document Ch. Del. 165 (MAE 101 f/57). 14 January 1957. LSA, Gaudet, CEE, 3.
[45] Morten Rasmussen, 'Establishing a Constitutional Practice in European Law: The History of the Legal Service of the European Executive, 1952-65', *Contemporary European History 21*, no. 3 (2012): pp. 375–398.

strong executive re-emerged in committee. At the same time, however, the legal experts took note of the emerging fact that the patchwork of compromises over how to establish the common market that came out of the Committee of the common market created an extremely complex set of tasks to be handled by the future institutions. As a consequence, they realised that it would be impossible to develop the competences of the institutions on the basis of general norms.[46] This was contrary to what was done in the ECSC where the institutional dispositions prominently figured at the beginning of the Treaty of Paris. Instead, they deliberately placed them near the end (in part 5 out of 6) of the new treaty. This structural design reflected the negotiators' will to both highlight the primacy of the substantive rules of the Treaty and downplay the institutional dimension of the EEC.[47] The committee chose to formulate missions for each institution in the shape of programmatic statements in a manner similar to the Treaty of Paris. In line with the consensus at a political level, the central role of the Council was highlighted. The Council would thus ensure 'the achievement of the objectives laid down in this Treaty' (article 145) through coordinating general economic policies and the disposition of a power of decision. This mission differed very substantially from the mission of article 8 of the Treaty of Paris, which only gave the Council a consultative role in order to harmonise the actions of the High Authority with the general economic policies of the member states. The mission of the Commission also changed to reflect its diminished status with this institution compared to the High Authority of the ECSC. In article 8 of the Treaty of Paris, the High Authority, not the Council, had the duty to 'ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof.'[48] To reflect the weakening of the Commission in the institutional design, the first draft of future article

[46] Mühlenhöver, 'Aufzeichnung, Betr.: Europäischer Gemeinsamer Markt. Hier : Institutionen (Sitzung der Arbeitsgruppe in Brüssel vom 18. bis 21. Dezember 1956)', Bonn, 5 January 1957. PAAA, Abteilung II, Aktenzeichen 225-30-04, 933.

[47] « 3e relevé des questions sur lesquelles l'attention du Groupe de rédaction est attirée », s.d., MAE 854/56, p.7 and Note d'information. État du projet de traité instituant le Marché commun », 10 January 1957, p. 2. French National Archive (ANF) -F.60.3105. In July 1956, Emile Noël already mentioned to Spaak that the French delegation would prefer a different treaty structure (for Euratom) than the one adopted for the ECSC and EDC Treaties: the institutional provisions at the end of the treaty to would indicate that they resulted from the objectives rather than standing as a constitutional *a priori*. Spaak agreed. ('Entretien avec P.-H. Spaak. Bruxelles, 3 juillet 1956. Questions de procédure dans la conférence de Bruxelles'). ARM, 12/3/5. And also, Weekverslag n°2).

[48] The missions of all institutions except the Assembly were included in the documents dated 27 December 1956. Groupe de rédaction, 'Projet de rédaction d'articles relatifs à la communauté pour le marché commun' (MAE 838 f/56), 27 December 1956. HAEU, CM3.NEGO, 190.

155 of the EEC Treaty provided that the Commission was merely supposed to "ensure the smooth functioning (of the Community)". [49] As he reviewed this provision on 10 January 1957, Michel Gaudet managed to enhance the role of the Commission by adding that it would also ensure "the development of the common market". [50] Remarkably, the committee, apparently without much discussion, maintained the crucial mission of the Court of Justice from article 31 of the Treaty of Paris, namely that it should 'ensure observance of law and justice in the interpretation and application of this Treaty' in the new article 164 of the EEC Treaty.[51] According to German legal thinking, this sentence implied that the EEC was to be considered a *Rechtgemeinschaft* based on law and justice, and not just an international organisation.[52] Finally, the mission of the Assembly was similar to the one outlined in the Treaty of Paris. In the latter, the Assembly was responsible for exercising 'supervisory power'. However, after the long debate over the role of the Assembly, it was eventually agreed in late January that the new Assembly would 'exercise the powers of deliberation and of control' in the new article 137 of the EEC Treaty.[53]

At the end of the negotiations, the *groupe de rédaction* added to article 4 of the EEC Treaty the general architecture of the institutional setup and clarified that 'each institution shall act within the limits of the powers conferred upon it by the treaty'. This principle had already been introduced in the first draft of the general principles of the treaty from 26 November 1956. Allegedly developed by Pescatore, it stated that the

[49] The missions of all institutions except the Assembly were included in the document dated 27 December 1956. Groupe de rédaction, 'Projet de rédaction d'articles relatifs à la communauté pour le marché commun' (MAE 838 f/56), 27 December 1956. HAEU, CM3.NEGO, 190. See also previous version : Restreint pour le Groupe de rédaction, "Projet de rédaction d'articles relatifs aux institutions de la Communauté pour le marché commun », Brussels, 20 December 1956, MAE 769/56. CM3.NEGO.190.

[50] The revised and definitive first sentence of future article 155 read as "En vue d'assurer le fonctionnement et le développement du Marché commun, la Commisssion ... . See Gaudet's handwritten edits of document MAE 838/56. LSA, Gaudet, CEE, 3.

[51] Mühlenhöver, 'Aufzeichung, Betr.: Das institutionelle System im Vertrag über die Gründung eines Europäischer Gemeinsamer Markt. Hier : Gerichthof. Sitzung des Sachverständigen-Ausschusses in Brüssel von 11. - 14. Dezember 1956', Bonn, 17 December 1956. PAAA. Abteilung II, Aktenzeichen 225-30-04, 93.

[52] Henning Koch, 'A Legal Mission: The Emergence of a European 'Rationalized' Natural Law', in *Paradoxes of European Legal Integration*, edited by Hanne Petersen, Anne Lise Kjær, Helle Krunke and Mikael Rask Madsen (Ashgate: London, 2008), pp. 45–66.

[53] Groupe de rédaction. 'Articles réglant la composition de l'Assemblée et mode de désignation de ses membres', Brussels, le 27 janvier 1957. HAEU, CM3.NEGO, 256.

Community had a legal personality, both internationally and in the member states.[54] When the article on the legal personality was moved to the end of the EEC treaty[55], the principle quoted above was maintained and added to the listing of institutions in article 4.[56] In hindsight, Pierre Pescatore emphasised this article because it could be used to argue that the four core institutions were equal in principle.[57] While Pescatore may be correct that article 4 allowed for such a constitutional interpretation, the changes to the missions of the Council and Commission undoubtedly showed that only the Council had the responsibility to ensure the objectives of the treaties were reached. This clearly reflected the notion that progress towards establishing the EEC depended on the political will of the member states.

Simultaneously to its work on the missions of the Council, the Commission and the Assembly, the *groupe de rédaction* dealt with the Court of Justice. The mandate was strict: the new court was supposed to be similar in status and nature to the ECSC ECJ and not to a European supreme court. The main focus of the court was to judge on infringement of the treaty by the member states and receive 'les recours en annulation' against the decisions of the Community.[58] The first drafts of the articles defining the role and functioning of the court were formulated in various memoranda from 10 December to mid-February and gradually adopted by the heads of delegations from mid-January to mid-February. Given its similarity with the ECSC court, relatively few changes were required apart from a certain rationalising of provision and the eventual revision of the

[54] Groupe de rédaction, 'Projet d'articles... Dispositions générales qui pourraient former le dernier chapitre du traité' (MAE 641 f/56), Brussels, 26 November 1956. Luxembourg National Archive.AMAE.7717.
[55] Article 210 in Part 6 (General and Final Provisions). See below
[56] Comité des chefs de délégation, 'Project de traité instituant la Communauté Économique Européenne' (Ch. Del. 405), Brussels, 5 March 1957. HAEU, CM3.NEGO, 216. In the Treaty of Paris (article 7), the listing of the institutions was not accompanied by a similar statement.
[57] Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34* no. 1–4 (1981): p. 170.
[58] Spaak memorandum from 10 November 1956 (Ch. Del. 50) only mentioned the ECJ very briefly as it assumed that its role could be similar to the one played by the ECSC Court: 'La Cour de Justice sera chargée de statuer sur les plaintes concernant des violations du Traité par les États et sur les recours en annulation contre les décisions des institutions de la Communauté.' Gaudet's handwritten comments focused on the strength of the infringement procedure: '*Mécanisme ? État devient-il un sujet de droit, pouvant être condamné par la Cour, qui annulera les actes nationaux (et ?) donnera des injonctions ou des amendes*'. (Legal Service Archive (LSA). Gaudet. Communauté économique européenne. 3, p. 230).

Statute of the Court of Justice.[59] A systematic review of the changes made is not necessary here, but a few key points ought to be highlighted. The mission of the Court was maintained in the new article 164, namely that the court 'shall ensure observance of law and justice in the interpretation and application of this Treaty'. The Advocate General institution was also maintained. But, at Gaudet's insistence[60], it was included in the actual treaty text rather than in the Statute of the Court as it had been the case for the ECSC due to the fact that the Advocates General had been introduced too late in the negotiations to be mentioned in the Treaty of Paris. The *groupe de rédaction* also raised the question whether dissent should be considered for the court, but the heads of delegation promptly rejected the notion. Finally, the eligibility requirements for the positions of both judge and advocate general were tightened in article 167, which now specified that only individuals qualified for the highest judicial office in their member state or jurists of recognised competence could be appointed.[61]

The real changes to the court system only emerged when the broader legal system in which it would be placed was designed. What would be the mechanisms for ensuring the uniformity of interpretation and application of European law, enforcement and what access would be given to individual legal recourse to the court? To the French Foreign Ministry, the conclusion on the nature of the court was already made by early January and reported to government. The new ECJ would primarily deal with arbitration between the member states, the interpretation of the treaty and cases of abuse. It would be closer to the International Court of Justice in The Hague than to the ECSC ECJ.[62] This evaluation proved premature, but it does demonstrate the lack of understanding and interest at the political level of the French government.

Enforcement, Uniformity and Judicial Protection

[59] Consult D. G. Valentine, *The Court of Justice of the European Communities*, vol. 1, Jurisdiction and procedure (London: Stevens & Sons, 1965), p. 445.
[60] Cour de Justice CECA, LSA, Gaudet, CEE, 3.
[61] Article 21, 2ème version, LSA, Gaudet, CEE, 3.
[62] Raymond Bousquet to Christian Pineau, 'État actuel des travaux de la Conférence de Bruxelles sur le plan Marché commun', Brussels, 10 December 1956. Archives of the French Foreign Affairs Ministry, DECE, 618, and 'Note. Objet : réflexions sur le rôle de la Cour dans le futur Traité de Marché commun'. Note forwarded by Alby (Secrétaire général adjoint du Comité interministériel pour les questions de coopération économique européenne) to Robert Marjolin, Paris, 3 January 1957. FJM, ARM 16/10/15.

'Uniform application, common rules.'[63] These were the principles Gaudet had associated with an effective execution of the EEC Treaty by the European institutions. In his view, the establishment of a common market required a coherent and effective legal system—a *droit communautaire*—to underpin it. Since Gaudet only joined the *groupe de rédaction* in January—after much of the negotiations inside the committee related to these questions had been conducted—we do not know the extent to which his distinct vision entered the mix of opinions in the committee. What we know, however, is that the German delegates asked for a complete rethinking of the jurisdiction of the ECJ that was then debated by the committee at several meetings in December 1956.[64] This rethinking concerned the key mechanisms that potentially could ensure the type of *droit communautaire* Gaudet sought. During these talks the committee members were confronted with a dilemma. Mechanisms for enforcing and ensuring the uniformity of interpretation of European law would potentially intrude deeply into the administrative and constitutional orders of the member states. Since the negotiations on the institutional system continued at the ministerial level into January 1957, the *groupe de rédaction* did not yet know to what extent the legislative acts of the European institutions and their implementation would be mediated by the national administrations and courts before entering the member states. They did know, however, that the Council of Ministers was to be the central decision-making institution and that an outright constitutional and federal approach to the design of the legal system was off the table. As we shall see below, the result was the development of very timid mechanisms for enforcement and uniformity of interpretation that protected the member states from unwelcome intrusions by the new European institutions. And in the same manner, the access to judicial protection by citizens of member states against the decisions and acts of the European institutions were also limited arguably to protect the decisions of the national governments in the Council of Ministers.

[63] Handwritten notes by Gaudet on 'Note du président sur le système institutionnel dans le traité sur le marché commun européen' (Ch. Del. 50), Brussels, 10 November 1956. LSA, Gaudet, CEE, 3.
[64] Mühlenhöver, 'Aufzeichnung ... Hier : Gerichtshof', Bonn, 17 December 1956. PAAA. Abteilung II, Aktenzeichen 225-30-04, 933.

Enforcement: Articles 169–171

Discussions on the design of the public enforcement system began at a meeting on 11 December 1956. Article 88 (para. 3) of the ECSC treaty provided for the possible imposition of penalties and possible reprisals (authorised by the HA and subject to judicial control) by the other member states against a state found delinquent with respect to its treaty obligations. This option was now removed to reflect the centrality of the member states' political will rather than the supranational power of the Commission. To further moderate the system of public enforcement, the *groupe de rédaction* inserted a political filter. Inspired by the European Convention of Human Rights, the committee decided that the Commission had to deliver a reasoned opinion to a member state that had failed to fulfil a treaty obligation before taking the latter to court (article 169). Likewise, at the demand of the Dutch government[65], national governments could only bring each other to court for infringement of their treaty commitments after submitting their case to the Commission (article 170). The majority of the members of the *groupe de rédaction* found that the infringement procedure offered sufficient protection for firms and individuals regarding the proper enforcement of European law in the member states because it was believed that the Commission as well as their respective national governments would look after their interests.[66] A parallel system of enforcement through the means of private litigation was therefore not considered.[67] Finally, the committee discussed the fate of national legislation deemed by the ECJ to have violated European law in an infringement case. The German representatives, coming from a dualist constitutional tradition for the reception of international law into the domestic legal order, insisted that the national authorities should maintain the full competence to

[65] 'Les compétences et les procédures prévues dans le rapport sur le marché commun', 11 September 1956 (MAE 269 f/56). HAEU; CM3.NEGO,259.

[66] These discussions can be followed by means of a precious source authored by German representative Josef Mühlenhöver, who reported back to the Foreign Ministry on the committee meetings held on 11 and 14 December 1956. Mühlenhöver, 'Aufzeichnung ... Hier : Gerichtshof', Bonn, 17 December 1956. PAAA, Abteilung II, 225-30-04, 933. This key source was first discovered and cited by Anne Boerger in Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome', *Contemporary European History 21*, no. 3, (2012): pp. 339–356.

[67] This was something Nicola Catalano discussed explicitly in his first handbook about the Treaties of Rome already published in 1957. Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957), p. 37.

address this. To them, the judgement of the ECJ could not in itself annul a national law.[68] The federalists in the committee probably speculated whether the ECJ could be given the jurisdiction to nullify national legislation.[69] In the end, the more conservative view won the argument. We can thus conclude that the *groupe de rédaction* was careful to avoid any real intrusion of the autonomy of the member states and perceived the public enforcement system merely as a 'blame and shame' procedure with a clear political component and without direct recourse for private litigants.

Uniformity of Interpretation: Article 177

To a European federalist such as Catalano, the infringement mechanism must have looked entirely unsatisfactory. The new public enforcement system did not fully solve the complex legal situation for firms and individuals that would arise during and after the establishment of the common market. In a book on the Treaties or Rome presumably written immediately after the negotiations ended and published in 1957, Catalano estimated that a firm might be able to persuade its own government to raise an infringement case against another member state, but wondered how this scenario would play out if the infringing party was the firm's own government. It was in his view highly doubtful that the Commission would possess the resources or the political capital to address the numerous and complex problems, arising from the implementation of European legislation, which individual firms would face during the construction of the common market.[70]

Two days after the first meeting of the committee, Catalano tabled an innovative and politically daring proposal to be discussed on 14 December 1956.[71] Catalano urged giving the ECJ exclusive jurisdiction by means of a judicial review mechanism to ensure the

[68] Mühlenhöver, 'Aufzeichnung ... Hier : Gerichtshof', Bonn, 17 December 1956. PAAA, Abteilung II, 225-30-04, 933.
[69] This was also a view point held by Michel Gaudet, who only joined the committee after these discussions. Handwritten comments by Michel Gaudet on 'Note du président sur le système institutionnel dans le Traité sur le marché commun européen' (Ch. Del. 50), Brussels, 10 November 1956, p. 8. LSA, Gaudet, CEE, 3.
[70] Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957), pp. 36-37.
[71] Groupe de Rédaction. 'Projet de rédaction d'articles relatifs aux institutions de la communauté pour le marché commun (suite). De la Cour', Brussels, 13 December 1956. HAEU, CM3.NEGO, 258. (There is no MAE number on this document).

uniform interpretation and the correct *application* of European law in the member states. The mechanism of judicial review that Catalano proposed—or preliminary reference as it would be called—was based partly on the system outlined in article 41 of the ECSC Treaty granting the ECSC ECJ the competence to pronounce judgement on the validity of European law, but was primarily inspired by the new Italian system of judicial review created as part of the law on the Italian Constitutional Court in 1953.[72]

In one respect the proposal was very far-reaching. Catalano proposed that the ECJ would be given the jurisdiction to assess the correct application of European law inside the member states. He consequently combined the mechanism for ensuring the uniformity of European law with an alternative system for enforcing European law in the member states where private litigants before national courts through the mechanism for judicial review could help enforce European law against possible contradictory national laws. The latter must have been deeply controversial because it completely sidestepped the national governments that were at the centre of the infringement procedure. There was no doubt that such a system—had it been chosen—implied that the jurisdiction of the ECJ would cut into the national constitutional orders. It would have constituted an important step towards turning the ECJ into a European constitutional court.

In another sense, however, Catalano's conception of the preliminary references remained minimalist. Interestingly, he suggested that only national courts of last instance should be allowed to send preliminary references to the ECJ, and only if they deemed it necessary (they would not be obliged to do so) to hear the opinion of the ECJ on the interpretation

[72] The Italian system of judicial review of legislation was introduced by art. 134 of the Constitution, entered into force on January 1, 1948 ("Art. 134 The Constitutional Court shall pass judgement on: – controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;). Pursuant to art. 137, §1 Const. (A constitutional law shall establish the conditions, forms, terms for proposing judgements on constitutional legitimacy, and guarantees on the independence of constitutional judges) on February 9, 1948 was enacted the constitutional law no. 1/1948. It stated that the question of constitutionality is issued by a Court (referring court or judge 'a quo', which means in Latin "from which") as far as it deems that the legislative act it is due to apply to solve the case does not comply with the Constitution. Pursuant to const. law 1/1948 the judge becomes the "gatekeeper" of the Constitutional Court. It took five years to enact statutory law no. 87/1953, which designed the rules for the functioning of the Court and regulated the trial before it. But the Court was still to be appointed. The task was accomplished three years later, and the Court held its first hearing on 23th April 1956, more than 8 years after the entering into force of the Constitution. I would like to thank Amedeo Arena for providing this important contextual information.

and application of European law. This important limitation was a reaction to the early experiences with the Italian system, which in Catalano's view had been flooded by references from lower courts to the Constitutional Court, and not always references of high quality or relevance. As an *avvocato delle stato* (state's attorney), it fell under Catalano's responsibilities to defend the government and parliamentary legislation against constitutional challenges. This probably explains his perspective on the matter and why he felt it necessary to limit the number of cases eligible for judicial review.[73] His proposal did specify, however, that if a preliminary reference was sent, the national court would be obliged to apply the ECJ judgement in the case at hand. Catalano's draft did not mention whether the parties of the case would also have the right to demand a preliminary reference to Luxembourg, but he presumably modelled his proposal on the Italian system where the courts were the gatekeepers and had the final say over whether a question was sent to the Italian Constitutional Court.[74]

Catalano's proposal raised two questions, which caused long discussions and apparently some disagreement inside the *groupe de rédaction*.[75] One debate concerned the extent to

[73] Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957), pp. 35-36. The Italian Constitutional Court delivered its first ruling in a case stemming from judicial review on 5 June 1956 and had delivered 16 such judgements by the end of 1957. Catalano's assessment of the system was thus based on a very limited Italian experience. Having served as European judge from 1958 to 1962, Catalano had apparently changed his views by 1959. During a visit of the ECJ to the Netherlands, he argued to Dutch Ministry of Justice's officials that national courts should avail themselves generously of the preliminary preference procedure and send as many questions to Luxembourg as possible. See 'Procès-verbal de la réunion tenue à La Haye le 11 juin 1959, à 15H30, entre la Cour de Justice des Communautés Européennes et les représentants du Gouvernement Néerlandais'. National Archives of the Netherlands, Ministerie van Buitenlandse Zaken, 1944–64.913. I, Europa, 913.10, Algemeen, 19970.

[74] We would like to thank Amedeo Arena for guiding us through the complexities of the Italian system of judicial review.

[75] On this question, we have two precious primary sources. One is the report by Mühlenhover dated 17 December 1956 (Mühlenhöver, 'Aufzeichnung ... Hier : Gerichtshof', Bonn,17 December 1956. PAAA, Abteilung II, 225-30-04, 933.) and the other is a memorandum dated 15 December that outlined three different alternatives that the committee considered as possible formulations of article 177. (Groupe de Rédaction. 'Projet de rédaction d'articles relatifs aux institutions de la communauté pour le marché commun (suite). De la Cour de Justice' (MAE 813 f/56), Brussels, 15 December 1956. HAEU, CM3.NEGO, 190). It is important to point out that the report of Mühlenhöver is contradictory in several respects when compared to document MAE 813 f/56. Firstly, Mühlenhöver's summary suggests that the committee accepted that article 177 would allow the ECJ jurisdiction to also judge on the application of European law. However, the memorandum clearly proves that this notion had been removed from Catalano's original proposal already after the first meeting (nor did it reappear in later drafts). Secondly, Mühlenhöver suggests that the committee took a vote on the matter of which national courts would refer questions of the ECJ and already on 14 December concluded in favor of what would ultimately become the final solution (namely that all national courts could refer a question to the ECJ, but that courts of last instance were obliged to do so). However, this is again at odds with the document MAE 813f/56where the three alternative formulations of

which a system of judicial review should remove all questions on the interpretation and application of European law away from national courts.[76] Very different opinions existed, but this notion was eventually rejected. On 15 December 1956, an updated text included three alternative versions of the proposal, none of which gave the ECJ the authority to address the *application* of European law.[77] Apparently, the majority of the committee did not want to go as far as originally proposed by Catalano and decided instead in favour of a less far-reaching balance between the ECJ's jurisdiction and the domestic legal orders. Moreover, the third version, which was eventually adopted, also removed both the explicit emphases of the *exclusivity* of the ECJ's competence to rule on the interpretation and validity of European law, and the sentence signalling the *obligation* by national courts to apply the judgement of the ECJ.[78] Ultimately, the ECJ would thus only receive the competence to render judgement on the validity and interpretation of European law; domestic courts would independently decide how it should be applied in the national legal order. This was a crucial distinction because it designed a preliminary reference mechanism that, while addressing the need for the uniformity of interpretation, kept the constitutional orders of the member states intact.[79]

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article 177 precisely differed on the point of which national courts should send preliminary references to the ECJ. Despite the flaws in Mühlenhöver's summary, it is still the only source we have regarding the committee's debate on the matter.

[76] Mühlenhover described this discussion: '*Eine längere Erörterung fand über die Frage statt, wie weit man im Interesse der Einheitlichkeit der Rechtsprechung alle Fragen, welche die Auslegung und Anwendung des Vertrags betreffen, ausschließlich dem Gerichthof überantworten und sie somit der Rechtsprechung der nationalen Gerichte entziehen müsse.*' Mühlenhöver, 'Aufzeichnung ... Hier : Gerichtshof', Bonn, 17 December 1956. PAAA, Abteilung II, 225-30-04, 933.

[77] Groupe de Rédaction. 'Projet de rédaction d'articles relatifs aux institutions de la communauté pour le marché commun (suite). De la Cour de Justice' (MAE 813 f/56), Brussels, 15 December 1956. HAEU, CM3.NEGO, 190. When Gaudet first read a draft of the article from 27 December (in which the wording of the three alternatives of future article 177 remained the same as in the draft from 15 December), most likely in early January when he joined the committee, he wondered in the margin where 'application' had gone. (Groupe de rédaction. 'Projet de rédaction d'articles relatifs à la Communauté pour le marché commun' (MAE 838 f/56), Brussels, 27 December 1956, p. 14. LSA, Gaudet, CEE, 3). Mühlenhover apparently did not notice the ECJ's competence to address the application of European law disappeared in the formulation of the mechanism. Mühlenhöver, 'Aufzeichnung ... Hier : Gerichtshof', Bonn, 17 December 1956. PAAA, Abteilung II, 225-30-04, 933.

[78] The precise French words left out were: '*seule*' and '*se conforme*'. The words '*se conforme*' are also removed in the first alternative. Groupe de Rédaction. 'Projet de rédaction d'articles relatifs aux institutions de la communauté pour le marché commun (suite). De la Cour de Justice' (MAE 813 f/56), Brussels, 15 December 1956. HAEU, CM3.NEGO, 190.

[79] HAEU, Interviews, INT603, Michel Gaudet (January 1998), pp. 3–4 emphasizes this as a central question. Hauke Delfs interprets this detail very differently. He argues that the fact that the member states' courts maintained the application of European law within their jurisdiction did not really imply that the editing of Catalano's original proposal should be understood as restrictive (Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr

The second discussion of the *groupe de rédaction* centred on how to design the mechanism of the preliminary references. Apparently, the sentiment of the majority of the committee did not agree with Catalano's restrictive approach to which courts should send the preliminary references. All three versions of his text formulated after the first meeting indicate that the committee did not limit the sending of preliminary references merely to courts of last instances. The first version seemed to suggest an obligation for all national courts to send preliminary references if questions concerning the interpretation and validity of European law were relevant to a case.[80] The second and third versions reintroduced explicit instructions for national courts to assess from case to case, whether a preliminary reference was indeed relevant. However, the third version added that courts of last instance were obliged to send preliminary reference if a question concerning the interpretation and validity of European law was raised before them. What the motives behind the three versions were, we do not know. Catalano remarked in his 1957 book, that his peers rejected his 'reasonable solution' because they feared that the costs of bringing cases to the ECJ would be prohibitive for private litigants.[81] Sometime in January, a decision was reached in the committee in favour of the third version. The heads of the delegation followed the recommendation apparently without much discussion and endorsed what would become one of the most famous articles in the EEC treaty—article 177—at their meeting on 23–24 January 1957.[82]

Siebeck, 2015), pp. 186-187). In our view, Delfs glosses over the importance of the explicit mentioning of application (*anwendung*) to the jurisdiction of the ECJ and the nature of the court, and its importance to the competence of national courts, a fact Mühlenhöver vividly described in his account. Our interpretation thus matches both Gaudet's recollection and the primary source authored by Mühlenhöver.

[80] Gaudet conveys a preference for the first version (see his handwritten comments on Groupe de rédaction. 'Projet de rédaction d'articles relatifs à la Communauté pour le marché commun' (MAE 838 f/56), Brussels, 27 December 1956, p. 14. LSA, Gaudet, CEE, 3 and Michel Gaudet, 'Les problèmes juridiques', in *La Comunità Economica Europea*, Centro internazionale di studi e documentazione sulle Comunità europea (Milano: Giuffré, 1960), p. 293.

[81] Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957), p. 35.

[82] Comité des chefs de délégation, 'Projet de procès-verbal (réunion des 23 et 24 janvier 1957)' (MAE 336 f/57— Ch. Del. 265), Brussels, 29 January 1957, p. 18. HAEU, CM3.NEGO, 122. The heads of delegation were reviewing document: Comité des chefs de délégation. 'Projet de rédaction d'articles du Traité instituant le Marché commun établi par le Groupe de Rédaction. Dispositions institutionnelles', Brussels, 22 January 1957 (MAE 220 f/57— Ch. Del. 205). HAEU, CM3.NEGO, 190. The future article 177 EEC is article 34 in that draft.

The final formulation of article 177 was, to some extent, ambiguous. By separating interpretation from application, the *groupe de rédaction* had attempted to give the ECJ a tool that would ensure the uniformity of interpretation of European law, while keeping national constitutional orders intact. But was it indeed possible to separate interpretation from application? The French delegation apparently believed this to be the case. Afterwards, the French administration understood the distinction to mean that the ECJ should interpret European law at the general and theoretical levels, whereas the national courts held the '*pleines compétences sur les faits et moyens*' and assume the ultimate responsibility of applying European law in the concrete cases.[83] As we know, the ECJ eventually developed a very different understanding of how article 177 should be used in the *Bosch* and *Van Gend en Loos* judgements, respectively in 1962 and 1963.[84] The new system of preliminary references also depended on the cooperation of national courts. This was not necessarily a given, in particular because several member states had no tradition for judicial review or even held a prejudice against it.

The ambiguity of article 177 signals that the members of the *groupe de rédaction* did not really share a common understanding about what they had created. The evidence suggests that not all the jurists comprehended the full potential of the article. Pescatore, for example, predicted in 1959 that a coherent system of European public law, which—according to him—the governments refused to create from the outset by means of the treaty, would only gradually develop through the normative acts of the institutions, their implementation by the member states, and the harmonisation of national legislation relevant to the common market (under article 100 EEC Treaty). He did not seem to think that the case law of the ECJ prompted by article 177 would be crucial.[85] Gaudet was apparently more positive about the potential effects of the mechanism. During the

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[83] Morten Rasmussen, 'Revolutionizing European Law: A history of the Van Gend en Loos judgement', *International Journal of Constitutional Law 12*, no. 2 (2014): p. 158.

[84] *Case 13/61 Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH [6 April 1962] and Case 26/62 NV Algemene Transport-Expedite Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen [5 February 1963].*

[85] Pierre Pescatore, 'Les aspects fonctionnels de la Communauté Économique Européenne, notamment les sources du droit', in *Les aspects juridiques de la Communauté Économique Européenne* (Liège : Faculté de droit de Liège, 1958), p. 60. However, p. 62, Pescatore mentions that article 177 could become an article of 'practical application, perhaps even of regular application in the judicial field' without offering further insights on what it could entail for the future development of the European legal order.

negotiations, he found that the new system should also be applied to the ECSC and, in 1959, he stated at a conference that the article could be crucial for preserving the unity of the legal order of the three communities.[86] In the eyes of Catalano, even the watered-down version of his original proposal could prove vital to the development of European law. In his 1957 book, he argued that the preliminary reference mechanism could indirectly address the limitations of the public enforcement mechanism with regard to the lack of legal recourse for individuals against the infringements of their own national governments. Because of article 177, he argued, '[...] it is possibly sufficient to bring a case before a national court and raise the incidental question of the competence of the ECJ.'[87] The author of the article clearly understood its potential.

Judicial Review and Protection of Individuals: Article 173

The last piece in defining the relations between European law and the national constitutional orders concerned the judicial protection of individuals vis-à-vis European legislation. What would eventually become article 173 in the EEC Treaty corresponded to article 33 of the Treaty of Paris. The latter had been groundbreaking in international public law for the extended legal recourse it offered to legal persons (firms and associations). They may directly appeal against individual decisions and recommendations of the HA concerning them, but also against acts of a general nature on grounds of a misuse of powers affecting them. The ECJ of the ECSC had expanded the criteria for access of private litigants in its case law[88], a development not all the member

[86] Handwritten note on Groupe de rédaction. 'Projet de rédaction d'articles relatifs à la Communauté pour le marché commun, Brussels' (MAE 838 f/56), 27 December 1956, p. 14. LSA, Gaudet, CEE, 3 and Michel Gaudet, 'Les problèmes juridiques', in *La Comunità Economica Europea*, Centro internazionale di studi e documentazione sulle Comunità europea (Milano: Giuffré, 1960), p. 293.

[87] Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957), p. 37: *'Il sistema, previsto dalla disposizione in esame, permette, invece, indirettamente, di sottoporre alIa Corte di Giustizia anche le controversie fra i privati cittadini e le autorità nazionali, per quanta concerne l'interpretazione e l'applicazione dei due trattati e dei provvedimenti delle istituzioni delle due Comunità. Pechè ciò sia possibile, sarà sufficiente intentare un giudizio avanti la giurisdizione nazionale e sollevare la questione incidentale di competenza della Corte di Giustizia.*'

[88] Christian Pennera, 'The Court of Justice and its Role as a Driving Force in European Integration', *Journal of European Integration History 1*, no. 1, pp.111-128, 119. Cases 3–4/54

states had appreciated.[89] The question was therefore how the *groupe de rédaction* would redesign article 33 given the constraints at the political level of the negotiations?

Compared to article 33 of the Treaty of Paris, article 173 represented an important weakening of the judicial protection of legal persons. As mentioned above, while designing the infringement procedure, the *groupe de rédaction* did not want to grant individual litigants the right to sue a government for breaking its treaty obligations because the rights of individuals supposedly would be protected by the Commission's prerogative to pursue any treaty infringement by a member state. This restrictive attitude towards the standing of private parties before the ECJ also shaped article 173. The new provision severely restricted the direct access to the ECJ granted to legal persons to ask judicial review of Community acts. Only the member states and Community institutions could now bring a direct action against a Community act of a general nature, whereas individuals could merely seek a review of acts that were directed to them or of direct concern to them. Barring private litigants from challenging acts of a general nature represented an important step backwards.[90] A second restrictive feature of article 173 concerned the lack of rights of the Assembly. Only the acts of the Commission and of the Council could be challenged in the Court by the Council, the Commission or a member state. The ECJ could not review the legality of the acts adopted by the Assembly, and the latter was not granted the right to bring an action for annulment against the acts of the Commission and of the Council. The *groupe de rédaction* had initially considered including the acts of the Assembly within the remit of Court's power of review, as it was the case in the ECSC under article 38[91], and despite some hesitations, left this option open in several treaty drafts[92], which were approved by heads of delegation in late January

[89] Paul Reuter to Eric Stein, 'Observations', December 1959. Eric Stein Papers, Bentley Historical Library, University of Michigan, 12.

[90] Article 33 reads: 'The enterprises, or the associations referred to in Article 48, shall have the right of appeal on the same grounds against individual decisions and recommendations concerning them, or against general decisions and recommendations which they deem to involve an abuse of power affecting them'. Whereas article 173 reads: 'Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'

[91] Article 38 ECSC provided that the Court could review acts of the Assembly at the suit of the High Authority or of a member state.

[92] See Groupe de rédaction, 'Projet de rédaction d'Articles relatifs aux institutions de la communauté pour le marché commun' (MAE 813 f/56), 15 December 1956 Article 27, pp. 3-4. HAEU, CM3.NEGO,190.

1957.[93] It was, however, removed from the 5 March 1957 treaty draft, seemingly to reflect a decision reached by the heads of delegation a few days earlier.[94] No archival documentation allows us to definitively establish the reasons motivating this withdrawal or to identify who supported it, but we can speculate that this change is correlated to the general weakening of the Assembly in the institutional system that the governments decided in January 1957. The only strengthening of the judicial protection, but of a more philosophical than practical nature, came when the committee agreed to emphasise the principle of legality in the new article. In comparison with its ECSC's sister provision, article 33 of the Treaty of Paris, article 173 asserted more firmly the submission of the Community to the rule of law by inserting the word 'legality' in the first paragraph.[95] To Pescatore, who was very likely the main architect behind it, this element was crucial in hindsight as it enhanced the 'constitutional' nature of the treaty.[96]

To conclude, when it came to devising a system for enforcement, uniformity of interpretation of European law and judicial protection, the *groupe de rédaction* generally followed the brief issued at the political level of the negotiations. A key result was that the ECJ would only have '*une compétence de pleine juridiction — de dire le droit*'; it would not concern itself with the application of European law in the member states. Its rulings would not replace domestic law nor would it annul decisions by national administrations or courts. Even the preliminary reference mechanism—which to some extent resembled the judicial review of federal supreme courts—depended on the goodwill of domestic courts. The entire system of enforcement, judicial protection and uniformity thus relied

MAE 838f/56(27 December 1956), MAE 101 f/57(14 January 1957), MAE 220 f/57(22 January 1957). HAEU, CM3.NEGO, 190, and MAE 524 f/57(14 February 1957). HAEU, CM3.NEGO, 203.

[93] Comité des chefs de Délégation, 'Projet de procès-verbal (réunion des 23 et 24 janvier 1957)' (MAE 336 f/57), Brussels, 29 January 1957. HAEU, CM3.NEGO, 122. When Gaudet edited the treaty draft at the end of February, he did not include the Assembly in article 173. See LSA, Gaudet, CEE, 1.

[94] Groupe de rédaction, 'Projet de rédaction d'articles du Traité instituant le Marché commun établi par le Groupe de Rédaction' (MAE 703 f/57), Brussels, 5 March 1957, p. 39. HAEU, CM3.NEGO, 256.

[95] 'The Court of Justice shall review the legality of acts...'. The term was preferred over a weaker alternative ('legal regularity'). Gaudet's handwritten note indicates that he preferred the term 'legality'. Groupe de rédaction. Projet de rédaction d'articles relatifs à la Communauté pour le marché commun (MAE 838 f/56), Brussels, 27 December 1956, p. 14. LSA, Gaudet, CEE, 3.

[96] 'It is here that the Treaty actually appears as the constitution, as the fundamental law of the Community' (Authors' translation). Pierre Pescatore, 'Les aspects fonctionnels de la Communauté Économique Européenne, notamment les sources du droit', in *Les aspects juridiques de la Communauté Économique Européenne* (Liège : Faculté de droit de Liège, 1958), p. 63. See also Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1–4, (1981): p. 175.

on the cooperation of the member states. The system looked even more modest when analysed in detail. The infringement procedure (articles 169 and 170) involved no penalty and was politically controlled by the Commission. In addition, national citizens were deliberately excluded from policing member states' compliance through a mechanism for enforcement through private litigation. Likewise, the standing of individual litigants before the court in order to question the legality of European legislation and decisions under article 173 was more restrictive than it had been in the ECSC. In contrast, the reform of the preliminary reference system in article 177 was an attempt to address the challenge of achieving the uniformity of European law across member states. But, from the outset, it only constituted a modest solution because it required an extensive cooperation from national courts that was far from certain and did not give the ECJ competence to address the application of European law in the member states. That the system devised had a potential beyond securing a more uniform interpretation of European law was generally not well understood, except by its original architect, Catalano. Yet, it would be this modest spark that would ignite and transform European law from the early 1960s onwards.

Designing the Legislative System–Primary and Secondary Law

At their meeting on 4–5 January 1957, the heads of delegation asked the *groupe de rédaction* to prepare a proposal on the effect and nature of the acts of the new community, while they were themselves finalising the political compromise on the institutional system, based on the memorandum of 10 November 1956.[97] This document did not go into specifics about the precise effect and nature of the decisions of the common institutions, but crucially underlined that the Council would be the decision-making centre of the new community, whereas the Commission was relegated to take the

[97] Comité des chefs de délégation, 'Projet de procès-verbal de la réunion des Chefs de délégation tenue à Bruxelles les 4 et 5 janvier 1957' (MAE 58 f/57— Ch. Del. 148), Brussels, 11 January 1957, p. 8. HAEU, CM3.NEGO, 117. See also Comité des chefs de délégation, 'Rédaction approuvée par le Comité des Chefs de Délégation au cours de sa réunion des 4 et 5 janvier 1957 concernant Titre II, Chapitre 2, Rapprochement des législations et distorsions spécifiques' (MAE 92 f/57- Ch. Del. 160), Brussels, 12 January 1957, p. 3. HAEU, CM3.NEGO, 216.

legislative initiative. Only in competition policy, and on a few other administrative questions, was the Commission to have decision-making functions.[98] This decision tilted the institutional balance of the new community in an intergovernmental direction beyond that allotted by the Spaak report.[99] The direct impetus to begin the work on the nature of the decisional acts came, however, from the Committee of the common market, which had been working on how to construct the common market since the early autumn of 1956. When it reviewed the preliminary scheme developed by this committee on the harmonisation of national legislation relevant for the functioning of the common market, the heads of delegation decided to ask the jurists to begin working on the legal nature and shape of the decisional acts. The Belgian delegation also raised the question of the role of national parliament in certain acts[100] and it quickly dawned on the committee that the concrete design of the decisional acts required the expertise of legal experts.[101]

On 5 January 1957, the *groupe de rédaction* started by mapping the status of the work of the Committee of the common market regarding the type of decisional acts that respectively the Council and the Commission would take on different policies.[102] The result was expectedly very complex due to the many different policy areas considered. However, it generally followed the memorandum of 10 November by limiting the decision-making role of the Commission to competition policy and a few other administrative areas, and by assigning to the Council decision-making powers in those same fields, plus all the rest. Yet, this initial work went beyond the repartition of powers,

[98] Comité des chefs de délégation, 'Projet de procès-verbal de la réunion des Chefs de délégations tenue à Bruxelles le 22 novembre 1956' (MAE 647 f/56), Brussels, 27 November 1956. HAEU, CM3.NEGO, 112.
[99] The original Spaak report of April 1956 had generally refrained from defining with precision the nature of the decisional acts of the institutions. The report merely stated that both the Council and the Commission would have important decision-making functions. It was specific only with regard to competition policy, where the Commission was supposed to have the power to issue regulations with direct effect on the European market–in French: '*règlements généraux d'exécution*' (Spaak report, p. 56–57).
[100] Comité des chefs de délégation. 'Projet de rédaction établi par le Groupe du Marché commun au cours de sa séance du 19 décembre 1956 concernant Titre II. Chapitre 2 : Rapprochement des législations et distorsions spécifiques' (MAE 771 f/57— Ch. Del. 117), Brussels, 20 November (sic) 1956. HAEU, NEGO.CM3.149.
[101] Nederlandse delegatie bij de intergouvernementele Conferentie voor de oprichting van een Geweenschappelijke Markt en van Euratom. 'Weekbericht 21. Periode 3 t/m 5 januari 1957', p. 8. National Archives of the Netherlands, Ministerie van Buitenlandse Zaken, 913.100 Europese integratie, 6350-6352.
[102] Groupe de rédaction. 'Interventions du Conseil des Ministres prévues dans les documents [...]' (MAE 35 f/57), Brussels, 5 January 1957 and Groupe de rédaction. 'Interventions de la Commission prévues dans les documents [...]' (MAE 34 f/57.), Brussels, 5 January 1957. LSA, Gaudet, CEE, 3.

as an effort was made to define more closely the precise nature of the decisional acts. For the first time, the *groupe de rédaction* defined not only the act with direct application (‘*effet obligatoire*’), which had already figured in the Spaak report, but also included a new type of decisional act to be used by the Council of Ministers that would be directed to the authorities of the member states that would then ensure concrete implementation.[103] This last category was an important addition and reflected the general political wish to place the national governments and the member states at the centre of the EEC. Where the Council of Ministers would play the dominant legislative role at the European level, this new type of act that relied on national authorities for their implementation obviously maintained member state autonomy and gave the latter a relatively free hand when it came to the concrete realisation of European public policies at the national level.

A similar approach, although more fully systematised, followed a few days later, when the German delegation submitted an extensive memorandum on the nature of the decisional acts.[104] The proposal divided the decisional acts into two categories and explored their full constitutional (this was the term used) consequences, including the balance between the member states and the new European institutions. The first category concerned the field where the EEC treaty would establish European public law; competition policy was mentioned as the key example. The Commission or Council, or indeed both together, would make decisions that would be *directly applicable* inside national legal orders. The second category was characterised as *international obligations* and included, for example, the harmonisation of national legislation but also the establishment of the common market policies such as the free movement of capital and labour, transport or

[103] Groupe de rédaction. ‘Interventions du Conseil des Ministres prévues dans les documents [...]’ (MAE 35 f/57), Brussels, 5 January 1957 et Groupe de rédaction. ‘Interventions de la Commission prévues dans les documents [...]’ (MAE 34 f/57), Brussels, 5 January 1957. LSA, Gaudet, CEE, 3.

[104] 'Arbeitsunterlage. Bemerkungen zu den institutionellen Problemen’ (Beschränkte Verteilung f. d. Redaktionsgruppe), Brussels, 8 Januray 1957. Konrad-Adenauer-Stiftung, Archiv für Christlich-Demokratische Politik, I-659-089/3 Nachlaß Hans von der Groeben. Hans von der Groeben's handwritten note identifies this document as the ‘German proposal’. A translated copy can be found in Gaudet’s papers on the Treaties of Rome negotiations. See ‘Document de travail. Observations relatives aux problèmes institutionnels’ (Restreint pour le Groupe de rédaction), Brussels, 8 January 1957. LSA, Gaudet, CEE, 3. Pierre Pescatore wrote in 1981 that he drafted the first take on the nature of the decisional acts and thus was responsible for the notion of direct applicability of a certain category of decisions. (Pierre Pescatore, ‘Les travaux du ‘Groupe juridique’ dans la négociation des Traités de Rome’, *Studia diplomatica 34*, no. 1–4 (1981): p. 171.) This is clearly incorrect.

agricultural policies. This second category of acts clearly drew on public international law. The Council would legislate and the acts would only bind the member states; the question whether they would be only directed to the governments, or whether national parliaments would also be involved in their implementation, remained open. The recommendation of the memorandum was that such acts would only bind national governments, but this required, as it had been agreed inside the German administration, that the European assembly would sign off on the decisions in question. It was not clear in the memorandum to what extent the so-called international law obligations would also bind or give rights to national citizens directly. However, there exists no evidence to suggest that the German memorandum was not conceived in the strong dualist tradition of the reception of international law. The latter was considered merely to bind national governments, thus giving rights and obligations to citizens would require that either the government or the national parliament translated them into national law.

While the German memorandum offered a very straightforward and systematised division of which decisional acts were to be used in the treaty, the dynamics of the negotiations of the Committee of the common market, from January to March, eroded to some extent the neatness of the system proposed. The first drafts on this issue suggested that acts based on an international obligation would dominate all policy fields but competition. However, the actual negotiations related to the construction of the common market and the policies intended to make it function resulted in a more extended use of both negative obligations in primary law and acts with direct applicability, arguably as a substitute for a strong supranational executive like the High Authority of the ECSC. The dynamics of the various negotiations were typically that the governments supporting the development of a particular policy insisted that the Council adopt acts with direct applicability, or that negative obligations were inserted in the treaty obliging states to directly implement or refrain from action under the threat of infringement. Several negative obligations were introduced in the EEC treaty, for example, concerning the establishment of the customs union (articles 9 and 12) and the termination of quantitative restrictions on trade (articles 30 and 31). More recalcitrant governments would, on the contrary, argue that the Council should take decisions solely directed to the member states, which would retain the freedom to choose the means to implement them. The rules

already in place in the OEEC generally served as the starting point, but the negotiations often yielded more far-reaching results and the use of acts going beyond traditional public international law.[105] The emergence of this more complex pattern of legislative acts of the Council complicated the picture when it came to which type of acts were used in which places in the EEC treaty.

The members of the *groupe de rédaction* may already have taken this development into account when they drafted the first working document on the nature of the decisional acts on 15 January 1957. Although the legal experts followed the German memorandum, they now generalised the different types of legislative acts and did not link them with precise competences of a specific institution. Before discussing the legislative categories, they briefly discussed the way the treaties would step into force in the national legal orders. The Treaties of Rome would be '*applicables directement dans les États membres*' or '*gelten in den Migliedstaaten unmittelbar*' with the entry into force of the treaty, which entailed the necessary changes to national legislation.[106] Hauke Delfs has recently argued that this provision represented a major shift towards a monist approach to the effect of primary law in the member states, and that this shift mutually reflected and reinforced

[105] Hauke Delfs offers interesting examples of the dynamics of these discussions on free movement of labor and on the harmonization of national legislation. Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p. 192-197. Negotiations in these two policy fields took place during December and January and thus evolved parallel to the work of the *groupe de rédaction*.

[106] The French version is: '*Les normes édictées par les dispositions du Traité lui-même sont applicables directement dans les États membres du fait de la mise en vigueur du Traité, qui comporte les modifications nécessaires des législations internes. Des procédures ne doivent donc être prévues dans le Traité que pour permettre l'adoption de mesures résultant non du Traité lui-même, mais de délibérations prises par les institutions de la communauté en application du Traité.*' (Groupe de rédaction. 'Document de travail, 15 January 1957 (MAE 127 f/57). HAEU, CM3.NEGO, 259). The German version reads like this: '*Die in den Bestimmungen des Vertrages selbst enthaltenen Vorschriften gelten in den Mitgliedstaaten unmittelbar auf Grund des Inkrafttretens des Vertrages, der die erforderlichen Änderungen der innerstaatlichen Rechtsvorschriften enthält. Im Vertrag sind daher Verfahren lediglich vorzusehen, um Durchführung von Massnahmen zu ermöglichen, die sich nicht aus dem Vertrag selbst ergeben, sondern aus Beschlüssen der Organe der Gemeinschaft in Anwendung des Vertrages.*' (Redaktionsgruppe, 'Arbeitsunterlage' (MAE 127 d/57), 15 January 1957. HAEU, CM3.NEGO, 259). Document MAE 127 f/57 was restricted for the *groupe de rédaction*. A second version appeared nine days later and was destined to reach the common market committee. While in French the sentence quoted above remained the same but for one word ('*comporte*' was replaced by '*réalise*'), the German version read: '*Die in den Bestimmungen des Vertrages selbst enthaltenen Normen erlangen in den Mitgliedstaaten unmittelbar mit Inkrafttretens des Vertrages Geltung, wodurch die erforderlichen Änderungen der innerstaatlichen Rechtsvorschriften von selbst eintreten.*' (Arbeitsgruppe für den Gemeinsamen Markt. 'Bemerkungen der Redaktionsgruppe zu der vom Vorsitzenden der Arbeitsgruppe für den Gemeinsamen Markt aufgeworfenen Frage betreffend die rechtswirkung der akte des rates' (MAE 263 d/57), Brussels, 24 January 1957. HAEU, CM3.NEGO, 192).

the trend towards strengthening the normativity of the treaty in the direction of an integration-through-law paradigm.[107] This interpretation is not correct in our view. In fact, the statement was simply the standard way of expressing the introduction or transformation of an international treaty into domestic law whether by means of a monist or a dualist constitutional approach to the incorporation of international law[108], even if the latter process was only indirectly mentioned.[109] For this reason the statement was eventually left out of the treaty text because it was considered to be self-evident.[110]

Once this principle was established, the *groupe de rédaction* considered how secondary law would be shaped in their working document of 15 January.[111] Three suggested categories of decisional acts were inspired by the German proposal. The first category, preliminarily named 'regulations', concerned cases where member states delegated their competences to the European institutions that would adopt decisions with a direct effect for citizens in the member states. Following the German proposal, competition policy was mentioned as the classic example. The second category, labelled 'decisions', concerned instances where the treaty did not imply a delegation of competence. In these cases, member states would legislate in parallel, following classic international public law, acting in a context of '*compétence liée*'. Such decisions would consequently fix objectives but leave to member states the choice of measures necessary to fulfil them. The final category, named 'suggestions', concerned cases where the member states had retained their competence to act and their liberty to decide. In this circumstance, the institutions would merely formulate non-binding recommendations. Finally, the *groupe de rédaction* recommended not involving the national parliaments in the implementation of the second category of acts; this had been proposed, as we saw above, by the Belgian

[107] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p.241. In the sources, the concepts of monism and dualism do not appear. Negotiators instead operated with a European public law versus international obligations.
[108] We would like to thank Michel Waelbroeck for clarifying this point to us.
[109] Catalano also mentioned this point in his book from 1957. Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957), pp. 60-61.
[110] Even if we accepted Delfs' argument that the document represented a breakthrough for a monist understanding of the primary law, he would have to explain why, in the end, the text was omitted in the EEC treaty.
[111] MAE 127 f/57, Groupe de rédaction. Document de travail, 15 January 1957. HAEU, CM3.NEGO, 259.

government in the context of harmonisation of national legislation.[112] Just like the German proposal, the *groupe de rédaction's* systematised the legislative acts in correspondence to the extent that the member states had transferred competences to the European level.

A copy of the working document was sent to the Committee of the common market on 22 January, where it did not seem to have elicited any specific comments.[113] This was, however, not the case in Germany. On 14 January, Minister of economics Ludwig Erhard submitted a cabinet proposal in order to shape the German approach in the remaining negotiations on the EEC Treaty. From the outset, Erhard had been very sceptical about the plans for the EEC. He had preferred a larger free trade area that better reflected German patterns of exports, but also avoided supranational institutions, which he believed were nothing less than a scheme for French economic planning. Erhard had lost this battle in November 1956, when Chancellor Konrad Adenauer finally endorsed what would become the Treaties of Rome.

Erhard was now fighting a rearguard battle against the supranational elements of the EEC Treaty. He consequently asked the cabinet to resist the French demands over social harmonisation and protectionist inclinations regarding the common commercial policy. Moreover, in order to diminish the binding nature of the EEC, Erhard rejected the notion of community legislation with direct applicability. He argued that legislation with direct applicability should only be allowed if a democratically elected European parliament could endorse it.[114] Erhard based his argument on a new strong trend in West German legal academia where prominent professors increasingly argued that any surrendering of

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[112] See FN 106 (MAE 771 f/57— Ch. Del. 117). Groupe de rédaction. 'Document de travail' (MAE 127 f/57), 15 January 1957. HAEU, CM3.NEGO, 259.

[113] Groupe du Marché commun, 'Observations du Groupe de Rédaction sur le problème soulevé par le Président du Groupe du Marché Commun et relatif à la question des effets juridiques des actes du Conseil' (MAE 231 f/57), Brussels, 22 January 1957. HAEU, CM3.NEGO, 259. The three categories of acts were not included in this document, probably because the jurists were still refining their features and definitions.

[114] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), pp. 207-208. See the memorandum by Erhard for his reflections on the dangers of associating too closely with the French economy: Der Bundesminister für Wirtschaft, I A 1 - 160/57, Kabinettsvorlage, 'Betr.: Regierungskonferenzfür den Gemeinsamen Markt und Euratom, hier: Gemeinsamer Markt', Bonn, 14 January 1957, p. 6. PAAA, B 10, 916, N°. A 9059, p. 15 (17-2). (This document was most kindly shared by Hauke Delfs).

competences by the means of Article 24 of the German Constitution required the structural congruence of the European institutions, in the sense that they include democratic representation and the protection of fundamental rights.[115] This point also resonated with voices from several *Länder* such as Bayern and Baden-Württemberg, where the *Ministerpräsidents* expressed their deep concern about the erosion of regional prerogatives by European legislation with direct applicability.[116] At the cabinet meeting on 1 February, Erhard's proposal was nevertheless rejected.[117]

Once the German internal hesitations were cleared, the *groupe de rédaction* finalised what would become article 189. This task was assigned to Catalano.[118] From 26 February to 5 March, various drafts were produced and discussed in the committee.[119] From the documentary evidence in our possession, it seems quite clear that beyond Catalano, Gaudet was one of the main developers of the final text of article 189. The evidence, furthermore, suggests that Pescatore also played a small part in the work by suggesting a set of alternative formulations in late February, as we shall see below.

As mentioned above, the opening paragraph to the introduction/transformation of the EEC treaty into the constitutional orders of the member states was now omitted. In addition, the connection between the different categories of acts and the extent of the transfer of competence from member states to the EEC was not mentioned either. Instead, the committee described the decision-making system of article 189 in a more general manner. A new introduction to the article, which was reformulated several times but without any significant change of meaning, made clear that the Council and the

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[115] Bill Davies, *Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949–1979,* (Cambridge: Cambridge University Press, 2012), pp. 59–63 and Bill Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and Solange in its Intellectual Context', *European Law Journal 21,* nos. 4 (2015): 434–459.

[116] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p. 208. With regard to Baden-Württemberg and Bayern, see Gemeisamer Markt–Euratom, p. 24 (Letter from Minister President of Bayern). PAAA, Abteilung II, Aktenzeichen 225-30-04, 933.

[117] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p. 208.

[118] 'Traité instituant le marché commun. Dispositions institutionnelles (suite). Chapitre 6. (Projet d'articles établi par le Groupe de travail institué par le Groupe de Rédaction' (MAE 530 f/57), Brussels, 14 February 1957, p.5. HAEU, CM3.NEGO, 259.

[119] These can be found in LSA, Gaudet, CEE, 1, but are not included in HAEU, CM3.NEGO, 259.

Commission reached decisions (in different shapes and with different legal implications) in order to fulfil their respective mission and under the conditions laid down by the treaty.[120]

The four types of acts proposed on 26 February were *règlement*, *directives/injonctions*, *décisions* and *avis/suggestions*. Their respective description was quite close to the final text of article 189. *Règlements* were obligatory and directly applicable in the member states, whereas *directives/injonctions* only bound the member states with regard to the result and left it to national authorities to choose the means of implementation. Key exceptions were that the member states were not explicitly made *destinataire* in the descriptions of *directives/injonctions* and that *décisions* were not explicitly made *obligatoire*.[121] On 27 February, Pescatore introduced a somewhat different text that separated directives and injonctions into two distinct categories.[122] In the *groupe de rédaction*, this proposal did not go down well and a third draft appeared also dated 27 February, which was very close to the final text of article 189. In the end, it was Gaudet, who edited the remaining linguistic details to produce ultimately the final text on 5 March. In certain ways, as Pescatore has argued, the new article 189 presented a more streamlined legislative system than the parallel articles 14 and 15 of the Treaty of Paris in the sense that they differentiated better between acts that were general and normative and acts that were addressed to individuals. Also, the notion of direct applicability was now explicit for regulations, where it had been unclear in the Treaty of Paris, which simply specified that the 'decisions' (as regulations were named) 'shall be binding in all their details'[123]. With the legislative system defined, the *groupe de rédaction* would decide, in

[120] LSA, Gaudet, CEE, 1 includes three drafts of this article: 'Projet de rédaction. Articles relatifs à la définition des actes des Institutions de la Communauté', Brussels, 26 February 1957; 'Projet de rédaction présenté par M. Pescatore', Brussels, 27 February 1957; and finally 'Projet de rédaction, Article 53', Brussels, 27 February 1957.

[121] LSA, Gaudet, CEE, 1 includes three drafts of this article: 'Projet de rédaction. Articles relatifs à la définition des actes des Institutions de la Communauté', Brussels, 26 February 1957; 'Projet de rédaction présenté par M. Pescatore', Brussels, 27 February 1957; and finally 'Projet de rédaction, Article 53', Brussels, 27 February 1957.

[122] 'Projet de rédaction présenté par M. Pescatore', Brussels, 27 February 1957. LSA, Gaudet, CEE, 1.

[123] Treaty of Paris (1951), article14.

cooperation with the other committees, which decisional acts should be employed in the various policy fields.[124]

To conclude this section, the work of the *groupe de rédaction* clearly follows the political consensus on the centrality of national governments and the member states in the EEC. The development of the *directive* that gave national authorities the choice of means with which to implement it, kept the autonomy of the member states intact. Since the Council of Ministers would play the central role in the legislative process, and directives generally would choose as the predominant legislative act, the institutional and legislative system went hand in hand to ensure the dominant role of state power in the EEC. Secondly, despite this important intergovernmental element in the legislative system, the concrete negotiations on the common market by the Committee of the common market led at the same time to a more extensive use of both negative obligations in primary law and acts with direct applicability to ensure the solid nature of various policy compromises between the governments in areas that the original German proposal from early January had placed under international obligations. Finally, in article 189, the *groupe de rédaction* managed to develop the loose notion of acts with direct applicability (understood as similar to the ECSC model), that had been part of the Spaak report, into a more streamlined legislative system. Not only did this system include regulations with direct applicability, it was also formulated as a general system, which implicitly allowed the Commission to decide independently on the legislative shape of its proposals unless restrictions in this regard were specified in the treaty text. Whether such a general legislative system meant that a genuine European legislative power had been created was not really clear. In the years following the ratification, legal authors and commentators would not only disagree about the extent to which the decision-making system and the nature of the different acts meant that the Community constituted a genuine legislative power but also discussed whether the acts amounted to actual European legislation.[125]

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[124] Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1–4 (1981): p. 171, and Interview with Hubert Ehring by Etienne Deschamps (le rôle du groupe juridique) (Uccle, 25 October 2006), CVCE.eu.

[125] See Gerhard Bebr, *Judicial Control of the European Communities* (London : Stevens & Sons 1962), pp. 14–15; Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milano: Giuffré, 1957); Michel Gaudet, 'Les problèmes juridiques', in *La Comunità Economica Europea*, Centro internazionale di studi e documentazione sulle Comunità europea (Milano: Giuffré, 1960), p. 276; Pierre Pescatore, 'Les aspects

Although, the Community may not entirely qualify as a genuine legislative power and its decisional acts may not be truly comparable with national legislation, it was obvious that the decision-making system and the nature of the acts designed by the *groupe de rédaction* went considerably beyond the standard international organisation of the time.

Hauke Delfs has argued that a monist breakthrough in the negotiations, together with the normative strengthening of primary and secondary legal norms, fundamentally transformed the legal nature of the EEC Treaty and laid the foundation for the 'integration through law' paradigm. In this light, Delfs finds it puzzling that *groupe de rédaction* did not revisit its own work on enforcement, uniformity of interpretation and judicial protection of individuals from December, which in his view relied on a dualist approach.[126] We disagree with his analysis and point out that he misunderstood the standard transition of the Treaties of Rome into the constitutional orders of the member states to signify that the two treaties somehow sidestepped national constitutional clauses and acquired a monist quality. In addition, we argued that the work of the *groupe de rédaction* with the decisional acts generally confirmed the compromise struck on institutions and the legal dimension at the political level of the negotiations with a definition of the *directive*. At the same time, the dynamics of the negotiation of the common market also resulted in a more extensive use of negative obligations of primary law and of regulations with direct applicability than first expected. But all in all, this did not significantly alter the general system chosen. In 1958, Pescatore himself admitted that the use of regulations was relatively limited, and therefore concluded that the execution of the EEC Treaty relied more on indirect action (directives and intergovernmental consultations) than on direct action by the means of community *loi*.[127] Likewise, although

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fonctionnels de la Communauté Économique Européenne, notamment les sources du droit', in *Les aspects juridiques de la Communauté Économique Européenne* (Liège : Faculté de droit de Liège, 1958), p. 65; Ernst Wohlfahrt, 'Europäisches Recht. Von der Befugnis der Organe der Europäischen Wirtschaftsgemeinschaft zur Rechtsetzung', *Jahrbuch für internationales Recht 9* (1960): pp. 12-32, at p. 28.

[126] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p. 261.

[127] Pierre Pescatore, 'Les aspects fonctionnels de la Communauté Économique Européenne, notamment les sources du droit', in *Les aspects juridiques de la Communauté Économique Européenne* (Liège : Faculté de droit de Liège, 1958) p. 65 : '*...nous constatons que les renvois aux règlements sont relativement rares. Le Traité C.E.E. est axé, si je puis employer ce mot, beaucoup plus sur l'action indirecte, c'est-à-dire sur les*

the negotiations of the Committee of the common market produced a limited number of negative obligations for the states, in particular in the chapters on the customs union, it was an open question whether they were addressed to the state authorities under the threat of infringement procedure or whether national courts would apply such norms in their case law.[128] An additional proof that this was indeed the case comes from the fact that the intermediary committee set up to launch the EEC felt it necessary, in May 1957, to issue a public declaration to ensure that national authorities would interpret the relevant articles of the EEC treaty on competition policy as having direct applicability.[129] It is telling that even this additional public statement did not prove sufficient to avoid diverging interpretations of whether the treaty articles defining the competition policy had direct applicability by the member states in the period from 1958 to 1962.[130] Considering the limited impact of the legislative system on the general economy of the EEC Treaty, it is therefore not so strange that the *groupe de rédaction* felt no need to revisit its work on enforcement, uniformity and judicial protection.

The Preamble and the General Principles of the Treaty

The EEC Treaty included a preamble as well as a number of general principles underpinning the new community. Both the preamble and several of the general principles have played an important role in the way the ECJ has since interpreted the Treaties of Rome. Although the first discussions on the general principles began in November 1956 in the *groupe de rédaction*, the preamble and the general principles were

directives et sur les consultations intergouvernementales, que sur l'action directe par le moyen des lois communautaires.'

[128] The most likely interpretation is that they were directed to state authorities without the interference of national parliaments because the handling of questions of tariffs was exceedingly complex and the questions were dealt with by experts in the national administration. There is no direct evidence that the negotiators were considering the possibility that national courts would intervene in this field. HAEU, CM3.NEGO, 114 and 218.

[129] Comité intérimaire pour le Marché Commun et l'EURATOM. 'Relevé des déclarations interprétatives se rapportant à des dispositions du traité instituant la communauté économique et de ses annexes, ou des protocoles, conventions et déclarations qui l'accompagnent', Brussels, 6 May 1957. Archives of the Belgian Foreign Ministry, Brussels, Doc. N°. 18.881/IV/4.

[130] Morten Rasmussen, 'Revolutionizing European Law: A history of the Van Gend en Loos judgement', *International Journal of Constitutional Law 12*, no. 1 (2014): pp. 146–152.

developed during the drafting of the entire treaty and only crystallised in February and early March 1957. Since they were finalised at the end of the negotiations, the key question is whether the preamble and key general principles altered the general balance of the EEC treaty achieved by February 1956. We will therefore offer an analysis of the history of the famous stipulation that the EEC Treaty started a process of 'ever closer union between the European peoples', the principle of legal personality of the EEC (Articles 210, 211 and 228) and the principle of member state loyalty (article 5).

Ever Closer Union – The Preamble

In the preamble's opening sentence, the EEC Treaty signatories declared themselves 'determined to lay the foundations of an ever closer union among the peoples of Europe' ('*Déterminés à établir les fondements d'une union sans cesse plus étroite entre les peuples européens*'). This phrase contains the most cited words of the EEC treaty–the 'ever closer union'–, celebrated by those who seek a greater integration of Europe[131] and decried by those who dread the federal ambition seemingly harboured in those three words.[132] The 'ever closer union' professed goal has constituted an important element in the constitutional interpretation of the treaty by the ECJ since 1963.[133] How did this opening phrase make its way into the preamble and how was its normative value perceived by the negotiators at the time? Was the sentence symbolic or perhaps merely rhetorical, a simplified—yet more catchy—version of its sister sentence in the Treaty of Paris' preamble which declared the intention of the signatories to 'establish ... the foundation of a broad and independent community among peoples long divided by bloody

[131] For example, Belgian senator, law professor, and then president of the Consultative Assembly of the Council of Europe, Fernand Dehousse, a fervent European federalist, already noted the treaty's opening sentence at a law seminar in May 1958. According to him, the treaty negotiators knew that the irreversibility of the economic integration would inevitably lead to a 'gradual and continuous integration', and consequently inserted the 'ever closer union' goal in the preamble. Fernand Dehousse, 'Les aspects politiques et institutionnels de la Communauté Économique Européenne', in *Les aspects juridiques de la Communauté Economique Européenne*, Collection Scientifique de la faculté de droit de l'Université de Liège 8, (Liège : Faculté de droit de Liège, 1958), p.42. Pierre Pescatore, who also spoke at the seminar, did not evoke the preamble.

[132] The 'ever closer union' has become a particularly controversial theme in the recent context of Brexit and has since generated various discussions and publications. For the historical emergence of the phrase, see for example LSE, European Institute, *Ever Closer Union*. Report of the hearing held on 15th April, 2016. http://eprints.lse.ac.uk/66958/1/Hearing-10---Ever-Closer-Union-REPORT.pdf. .

[133] Important but probably not indispensable. See LSE, European Institute, *Ever Closer Union*, p. 17.

conflicts; and to lay the basis of institutions capable of giving direction to their future common destiny'?[134] To address these questions, we need trace how the preamble was drafted during the negotiations.

Jean-François Deniau, a member of the French delegation sitting on the Committee of the common market, has offered a heroic account of this affair recounting how he produced the entire preamble within a couple of hours when, a week before the signature of the treaty, someone suddenly realised that it was missing.[135] This embellished story has already been debunked[136], but remains persistent.[137] Although, as we will see, Deniau was involved in the drafting of the preamble, the process was more complex and lengthy than he recalled.

It was actually Michel Gaudet who had a first crack at the preamble, shortly after he officially joined the *groupe de rédaction*, in early January 1957.[138] He laboured through several drafts on 9 January 1957 before submitting a proposal to his peers.[139] His five-paragraph text asserted the treaty signatories' determination to remove obstacles weakening the European economy, slowing down production increase and limiting the standards of living; to do so in a concerted manner in order to ensure fair competition, a better balance in the exchanges and a steady expansion; to improve workers' living and employment conditions; to reduce development gaps within Europe; and by doing so, to

[134] Similarly, according to Article 1a of its statute (5 May 1949), the Council of Europe's aim is to 'achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.'
[135] Jean-François Deniau, *L'Europe interdite* (Paris: Seuil, 1977), p. 65 and Jean-François Deniau, *Mémoires de 7 vies*, tome 2 (Paris: Plon, 1997), p. 156-157. See also HAEU, INT 767, 2004, p. 19.
[136] Morten Rasmussen, 'From Costa v ENEL to the Treaties of Rome: A Brief History of a Legal Revolution', in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, edited by Miguel Maduro and Loïc Azoulai (Oxford: Hart Publishing, 2010), p. 82.
[137] See for exemple Laurence Potvin-Solis (ed.), *Le statut d'État membre de l'Union européenne : quatorzièmes journées Jean Monnet* (Brussels: Bruylant, 2018).
[138] This initiative might have stemmed from the discussions of the heads of delegation, during their first January 1957 meeting. As they addressed the issues of harmonization and distortions, the French requested that the preamble mentioned a commitment of the member states to social progress. 'Weekbericht 21. Periode 3 t/m 5 januari 1957', p. 8. National Archives of the Netherlands, Ministerie van Buitenlandse Zaken, 913.100 Europese integratie, 6350-6352.
[139] These drafts with handwritten edits can be found in LSA, Gaudet, Communauté européenne économique, 4. His final text became document MAE 62 f/57. Groupe de rédaction. 'Projet de rédaction du préambule et des dispositions initiales du traité instituant le marché commun' (restreint pour le Groupe de Rédaction), Brussels, 10 January 1957. HAEU, CM3.NEGO182.

strengthen the safeguards of freedom.[140] If Gaudet's drafts already contained the core ideas and wording of the text that would eventually be inserted at the beginning of the Treaty of Rome, they did not include the famous opening phrase on the foundations of an ever closer union. Also missing was the paragraph on the overseas territories which would only be added in March after a compromise on this question had been reached by the governments.

Between 10 January and 7 February 1957, Gaudet's text was reviewed and polished by the *groupe de rédaction*[141], by Pierre Uri[142], and by a group of unidentified experts.[143] Of notice in Uri's proposal was an invitation to other countries sharing the same ideal to join the Community.[144] The French delegation also submitted its own text, in which the opening sentence acknowledged the responsibilities assumed by the member states for the future of Europe by unifying their markets and economies, and by 'defining the principles of a common policy'.[145] Interestingly, this was the first document to include a more general statement of the future consequences of the EEC Treaty.

All in all, this intense editing process yielded a more sophisticated version of the preamble which was then examined by the Committee of the common market on 9 and 14

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[140] Groupe de rédaction. 'Projet de rédaction du préambule et des dispositions initiales du traité instituant le marché commun' (restreint pour le Groupe de Rédaction) (MAE 62 f/57), Brussels, 10 January 1957. HAEU, CM3.NEGO182.

[141] Groupe de rédaction. 'Projet de rédaction du préambule du traité instituant le marché commun' (MAE 102 f/57), Brussels, 14 January 1957. HAEU, CM3.NEGO182. The word 'peace' was for example added in the last paragraph evoking the signatories' resolution to 'preserve and strengthen peace and freedom' by pooling their resources. (See Gaudet's handwritten edits on document MAE 62 f/57 in LSA, Gaudet, Communauté européenne économique. 4)

[142] Groupe de rédaction. 'Projet de rédaction du préambule du Traité instituant le Marché Commun (proposition de M. Uri)' (MAE 112 f/57), Brussels, 14 janvier 1957. HAEU, CM3.NEGO182.

[143] Groupe du marché commun. 'Projet de rédaction pour le préambule et les articles 1 à 3 [...] soumis sur la base de la discussion intervenue entre les experts, les 5 et 6 février 1957' (MAE 430 f/57), Brussels, 7 February 1957. HAEU, CM3.NEGO182. The Heads of delegation mentioned the preamble during their meeting on 21–22 January 1957, but no discussion took place. It was agreed that Spaak would submit a draft of the preamble to his peers. (MAE 295 f/57, p. 6. HAEU, CM3.NEGO,121)

[144] The key part of the sentence will be eventually combined with the last paragraph of the Groupe de redaction (document MAE 102 f/57) and make its way to the final version of the preamble.

[145] '*Conscients des responsabilités qu'il assument pour l'avenir de l'Europe en unissant leurs marchés, en rapprochant leurs économies et en définissant les principes d'une politique commune,*'. Groupe de rédaction. 'Projet de déclaration commune des Ministres des Affaires étrangères (Proposition de la délégation française)', Brussels, 7 February 1957. HAEU, CM3.NEGO182.

February.[146] Although primary sources do not reveal the original author(s) of the first rough version of the opening statement, it may indeed have been Deniau who sat on the committee; it was without a doubt during these two meetings that the now-famous line was inserted in the preamble. It was first phrased in the following way: '*En vue d'établir les fondements pour l'union [toujours] plus étroite entre les peuples européens*'.[147] This was clearly a more far-reaching formulation than the French proposal mentioned above, but it remained relatively vague and open-ended. Clearly '*l'union toujours plus étroite entre les peoples européens*' could both mean an ever closer community or connection between the European people or refer to the organisation of Europe into a Union. If the latter was the case, this union was still not properly defined. The ambiguity was probably not accidental given the different views of the governments on this subject. The core deal between the French and German governments consisted of a commitment to closer and more binding cooperation in a European Community based on an intergovernmental approach with functional supranational institutions. However, the Dutch and Italian governments both supported stronger supranational institutions and, in the latter case, wanted the establishment of a European federation.

After the meetings of the committee of the common market, the draft of the preamble was discussed by the heads of delegation, who—according to a Dutch representative—adopted it without much fuss on 17–18 February.[148] They apparently appreciated the conciseness and clarity of the text. The word '*toujours*' in the opening sentence was replaced by '*de plus en plus*'.[149] If this change slightly softened the notion that the union of European people would extend endlessly, the purposive and progressive nature of the project was

[146] On 9 and 14 February 1957. See Groupe du marché commun. 'Projet de procès-verbal des réunions du Groupe tenues à Bruxelles du 31 janvier au 9 février 1957' (MAE 896 f/57), Brussels, 11 April 1957. ANF. F.60.3101, and Groupe du marché commun. 'Projet de procès-verbal des réunions du Groupe tenues à Bruxelles du 14 au 18 février 1957' (MAE 895 f/57), Brussels, 11 April 1957. HAEU, CM3.NEGO, 154. The document discussed was MAE 430 f/57.

[147] 'Projet de rédaction pour le préambule et les articles 1 à 6 établi par le Groupe du Marché commun le 14 février' (MAE 543 f/57— Ch. Del. 333), Brussels, 15 February 1957. This is the annexe I to MAE 895 f/57 mentioned above.

[148] 'Weekbericht 29. 16 en 17 februari 1957'. Dutch National Archive, AZ/KMP, inv.nr. 2852.

[149] The sentence thus read as: '*En vue d'établir les fondements d'une union de plus en plus étroite entre les peuples européens*'. 'Projet de procès-verbal de la réunion du Comité des chefs de délégation tenue à Paris les 17 et 18 février 1957' (MAE 613 f/57), Brussels, 19 February 1957, HAEU, CM3.NEGO, 126 and Comité des chefs de délégation. 'Rédaction pour le préambule et les articles 1 à 6 adoptée par le Comité des Chefs de délégation le 16 février 1957' (MAE 586 f/57), Paris, 16 February 1957. ANF-F.60.3105.

still clearly asserted. It was also at this point that the heads of delegation settled the official name of the common market, on which the experts of the Common Market Group had not been able to agree. Based on a Dutch proposal, the new initiative would be called the European Economic Community.[150] This was a significant concession by the French government because they had initially been reluctant to adopt that name, preferring to call it an 'organisation' or the 'common market'.[151]

When the *groupe de rédaction* reviewed the preamble one more time on 26 February, the turn of phrase was further tweaked. In order to better track these changes, let us quote again the *groupe de rédaction*'s original opening sentence: '*En vue d'établir les fondements d'une union de plus en plus étroite entre les peuples européens*.'[152] Handwritten annotations on the French delegation's copy of the document reveal the careful attention paid to that line.[153] The need to better align the opening sentence to the structure of the rest of the preamble—each line starting with a present or past participle instead of a conjunction—led to the deletion of '*en vue de*' (with the aim of) at the beginning of the sentence. Two choices seem to have been considered for its replacement: '*conscients*' (aware) and '*déterminés*' (determined). The former would have weakened the opening sentence by reducing it to a simple statement of fact (the signatories were aware that they were laying the foundations of closer union among the peoples of Europe), instead of setting the goal of an ever closer union.[154] This weakening of the opening

[150] 'Weekbericht 29. 16 en 17 februari 1957'. Dutch National Archive, AZ/KMP, inv.nr. 2852.
[151] 'Entretien [Emile Noël] avec P.-H. Spaak. Bruxelles, 3 juillet 1956. Questions de procédure dans la conférence de Bruxelles'. FJM, ARM 12/3/5. See also concerns expressed at the Quai d'Orsay about this name change in 'Note. A/S Changement de dénomination du Traité du Marché Commun', 19 March 1957. ANF-F60/3112. It was argued that the label 'European Economic Community' evoked far more-reaching policies than a simple innocuous common market and echoed to closely the CED and CPE terminology. It could consequently jeopardize the ratification process in the National Assembly.
[152] Groupe de rédaction. 'Première lecture. Projet de traité instituant la Communauté Economique Européenne. Préambule. Principes généraux.' (Restreint pour le Groupe de rédaction) (MAE 674 f/57), Brussels, 26 February 1956. ANF-F.60.3105 (groupe de rédaction). The handwritten annotations are only made on this line of the preamble.
[153] Based on a comparison with handwritten texts found in Deniau's personal archives, we concluded that the handwritten annotations on the copy of document MAE 674 f/57 found in the French national archives were Deniau's. (ANF. F.60.3105 (Groupe de rédaction). The handwritten correction of '[*toujours*]' by '*de plus en plus*' on document MAE 543 f/57 found in the French National Archives (ANF-F.60.3096 (Chefs de délégation)) seems to have been jotted down by someone other than Deniau.
[154] Groupe de rédaction. 'Première lecture. Projet de traité instituant la Communauté Economique Européenne. Préambule. Principes généraux.' (Restreint pour le Groupe de rédaction) (MAE 674 f/57), Brussels, 26 February 1956. (ANF. F.60.3105 (Groupe de rédaction).

sentence would have been even more significant that the '*de plus en plus*' was reduced to '*plus*' ('*conscients d'établir les fondements d'une union plus étroite des p[euples] europ [éens]*'). The legal experts were probably well aware of this difference and adopted the last option instead. In addition, the *groupe de rédaction* chose to replace the words '*l'union de plus en plus étroite*' with the somewhat more compelling locution '*l'union sans cesse plus étroite*'. One has to be careful, however, not to read too much into this modification. The vocabulary in German remained unchanged throughout the various drafts: the group of the common market proposed '*einen [immer] engeren Zusammenschluß der europäischen Völker*'; the heads of delegation accepted the '*immer*' and the brackets were simply removed. No change was made in the final version of the preamble to mirror the modification introduced in the French text at the legal committee.[155]

The latest version of the preamble was submitted to the heads of delegation in early March, and was accepted without further ado. The heads of delegation now shifted their focus on the very controversial issue of associating the overseas territories to the treaty. It was at this point that they added to the preamble a paragraph proclaiming the solidarity between Europe and the overseas territories, and their desire to contribute to the development of these parts of the world.[156]

To summarise, the 'ever closer union' opening sentence was introduced by the Committee of the common market, but there was no immediate agreement over the wording. The decision to keep the 'ever closer union' concept was ultimately made at the political level. The *groupe de rédaction* sharpened the phrasing slightly (in French) afterwards, without altering the meaning intended by the heads of delegation. The hesitation over the wording and the complex process of editing suggest that the sentence was considered of some importance. The French delegation clearly understood that and put effort into moderating the phrasing, even if, in the end, it did accept the objective of laying the foundations for an 'ever closer union'. Ultimately, the key to understanding the French willingness to compromise was likely the undefined nature of the union. Anything more specific would

[155] 'Vertrag', HAEU, CM3.NEGO, 280, p. 22
[156] Comité des chefs de délégation, 'Projet de procès-verbal de la réunion tenue à Bruxelles les 7 et 8 mars 1957' (MAE 827f/57), Brussels, 15 March 1957, p. 12. HAEU, CM3.NEGO,129.

have been politically impossible by fear of rejection of the entire treaty in France. Adding the ever closer union concept proved already somewhat challenging. In conclusion, the preamble was symbolic and not just rhetorical, but it did not necessarily imply that the EEC was the first step towards a European federation.

Legal Personality of the EEC

In the post-war years, academic debate on international public law had coalesced around the view that international organisations required a clearly defined legal status to be able to perform their functions. When asked whether the new United Nations had a legal personality on the international stage, even if article 4 of the UN Charter stipulates only that the organisation enjoys a legal personality within the legal orders of the member states, the International Court of Justice (ICJ) confirmed this in a 1949 advisory opinion.[157] Despite this breakthrough, it was nevertheless unique when article 6 of the Treaty of Paris gave the ECSC 'a juridical personality' both internally and in international relationships.[158] Niels Blokker has traced how the wording of the second paragraph of article 6 ECSC was directly inspired by the 1949 Advisory Opinion of the ICJ[159] and, given that one of the main drafters of the Treaty of Paris was Paul Reuter, a French professor of international law, specialist of international treaties and organisations, such a transfer of concepts is not surprising.

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[157] Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949, United Nations [UN]; International Court of Justice [ICJ].

[158] Art. 6 ECSC reads: 'The Community shall have juridical personality.
In its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends.
In each of the member States, the Community shall enjoy the most extensive juridical capacity, which is recognised for legal persons of the nationality of the country in question. Specifically, it may acquire and transfer real and personal property, and may sue and be sued in its own name.
The Community shall be represented by its institutions, each one of them acting within the framework of its own powers and responsibilities.'

[159] Niels Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law. International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law', *Yearbook of European Law 35*, no. 1 (2016): pp. 471–483.

Yet, the negotiators of the Treaties of Rome did not exactly reproduce this bold antecedent. Instead of one single provision placed among the general principles underlying the community at the beginning of the EEC treaty, they included a limited definition of legal personality in the general and final provision sunder articles 210 and 211. Article 210 was very minimalist, merely stating that the Community had a legal personality. Article 211 copied the third paragraph of the article 6 ECSC about the legal personality of the Community in the national constitutional orders, the only noticeable change being that, in the EEC, only the Commission would represent the Community while in the ECSC, all the institutions could act within the framework of their powers and responsibilities.[160] This meant that the crucial second paragraph of article 6 ECSC, the one that broke new ground in international public law, was not included in the new treaty. Given the trend in public international law just described and the ECSC's precedent, how should we interpret that the EEC was not granted a legal personality on the international stage? Why did the negotiators retreat from the ECSC's groundbreaking article 6 and why was the provision defining the legal personality of the EEC placed in the final section of the EEC Treaty?[161] Was this yet another example of the governments' more restrictive view of the institutional and legal dimension of the EEC?

Another question relates to the role of the *groupe de rédaction* in drafting the articles on legal personality. On this matter, Pescatore has been particularly forthcoming in his writings and interviews. Pescatore's testimony should perhaps be taken with a pinch of

[160] This precision of the role of the Commission reflected the concrete experience of the ECSC. Article 6 of the Treaty of Paris had mentioned all the institutions of the ECSC in relation to the legal personality, but Section 14 on the Convention of the transitional provisions made quite clear that the High Authority would represent the ECSC on the international stage and would act upon the instructions of the Council. Article 6 was the subject of discussions by the Assembly and a legal committee (with Ophüls, Reuter, and Rossi) also analysed it, but the role of the High Authority was never really questioned. Dirk Spierenburg and Raymond Poidevin, *The History of the High Authority of the European Coal and Steel Community. Supranationality in Operation* (London: Weidenfeld and Nicolson, 1994), p. 186.

[161] The question of whether the European construction has a legal personality has been an ongoing saga. When the European Union was founded, it was not given a legal personality due to British opposition. Instead, the three European communities retained their legal personalities. This finally changed in the Treaty of Lisbon as practice had demonstrated that the EU could not perform its tasks without a more clearly defined legal personality. On this see Niels Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law. International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law', *Yearbook of European Law 35*, no. 1 (2016): pp. 471–483.

salt given that, as judge rapporteur in the famous ERTA case from 1971[162], he was a key figure behind the famous ECJ judgement that finally, and very controversially among the member states, cemented the international legal personality of the EC through a doctrine of implied powers and confirmed the Community's international personality by establishing the Commission's capacity to conclude agreements with third countries in Community policy areas.[163] According to Pescatore, he was assigned the task of setting out the general principles of the treaty in November and December 1956.[164] As he remembered the discussions, he failed to convince the *groupe de rédaction* to unambiguously recognise the international legal personality of the EEC, adding with regrets that '(c)learly, the notion of legal personality continues to breed superstitions, even in this enlightened age'.[165] Yet, Pescatore nevertheless believed he had won the battle on a crucial point: he managed to introduce some ambiguity by securing *two* provisions on the matter: since article 211 exclusively stipulates that the Community enjoys a legal personality in the member states, one could apparently then interpret article 210 EEC as dealing with the Community's international legal personality. This ambivalence opened the door, according to Pescatore, for the ECJ's judgement in the 1971 ERTA case.

In this case, the primary sources do not add much new to our understanding of how the principle of legal personality was developed.[166] We have not been able to identify any instructions on the question from the national governments[167], but it is probable that the French government in particular was not keen on repeating the ECSC experiment, given its quite progressive legal nature. Likewise, the heads of delegation apparently did not

[162] Judgment of the Court of 31 March 1971. - *Commission of the European Communities v Council of the European Communities*. - European Agreement on Road Transport. - Case 22-7.
[163] Anne McNaughton, 'Acts of Creation: The ERTA Decisions as a Foundation Stone of the EU Legal System', in *EU Law Stories. Contextual and Critical Histories of European Jurisprudence*, edited by Fernanda Nicola and Bill Davies (Cambridge: Cambridge University Press, 2017), pp. 134–155.
[164] Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1-4 (1981): pp. 166-167.
[165] Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1-4 (1981): p. 174.
[166] The Council archive (CM3.NEGO), which documents the paper trail kept on every treaty article, contains nothing on the negotiations on articles 210 and 211. HAEU, CM3.NEGO, 261.
[167] But it was a question that part of the German administration was considering. The Ministry of Justice, and its representative in the *groupe de rédaction* considered that the question of the legal personality Community would ultimately have to be decided at the political level. (Vermerk, 4.12.56 to 'Allgemeine Bestimmungen des Vertrages' from BJM (Wohlfahrt) (B141—11050 Bundesjustizministerium: Verhandlungen über die Europäische Integration: Gemeinsamer Markt Nov 1956—Jan 1957).

discuss the question, at least we have no indication of this from the official minutes. Therefore, all we can do is follow the debates of the *groupe de rédaction*.

The general provisions' first draft from 26 November 1956, which may well have been drafted by Pescatore, addressed in its very first article, the question of the Community's legal personality, in both international and national orders, and did so in an explicit manner.[168] The content and wording were largely inspired by Article 6 ECSC[169], but also sought to address a deficit, i.e. the lack of specific indication about how/where this international legal personality has application. So, a few lines were added to the second paragraph to specify that the Community could, within the limits of its competencies, engage and conclude agreements with third countries and economic international organisations.

The following draft from 10 December 1956 clearly indicates disagreements within the group.[170] The jurists now split the internal and international legal status of the Community into two provisions; the first one (article A) regrouped what would later become articles 210 and 211 of the EEC treaty, and did not seem controversial. The second provision (article B) simply mentioned '(legal personality and capacity of the Community in the international relationships)', the use of brackets indicating that this issue was unresolved.[171] The discussions of the committee led to a new draft, five days later on 15 December, providing now three provisions.[172] Article A only specified that the Community shall enjoy a legal personality (this would eventually become article 210); article B concerned its application in the member states and largely reads like the future article 211. Without explicitly acknowledging that the Community also enjoys international legal

[168] Groupe de rédaction, 'Projet d'articles... (Dispositions générales qui pourraient former le dernier chapitre du traité)' (MAE 641 f/56), Brussels, 26 November 1956. HAEU, CM3.NEGO, 262.
[169] The second paragraph of Article 6 ECSC reads: 'In its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends.' Here, the final six words were dropped.
[170] Unfortunately, these discussions were not captured by the two summaries sent by Mühlenhöver to the German Foreign Ministry.
[171] Groupe de rédaction. 'Projet de rédaction...' (MAE 707 f/56), Brussels, 10 December 1956, p.9-10. LAS. Gaudet 3, p. 220. The same dispositions were copied in 'Groupe de rédaction. Projet de rédaction d'articles relatifs à la Communauté pour le marché commun' (MAE 838 f/56), Brussels, 27 December 1956.
[172] Groupe de rédaction. 'Projet de rédaction...' (MAE 813 f/56), Brussels, 15 December 1956, p. 9–11. HAEU, CM3.NEGO, 190.

status, a new article, article C (paragraph 1) addressed one aspect of such a status, i.e. the Community's legal capability to conclude agreements with third countries and international organisations. The committee could still not settle on which institution should conclude such agreements on behalf of the Community. In addition, Riphagen—if we are to believe Pescatore—had introduced a new idea in a second paragraph of article C namely that possible international agreements signed by the Community would not only bind its institutions, but also the member states.[173] This important principle was unanimously supported, and eventually made its way, in the exact wording of Riphagen's proposal, into article 228 EEC treaty, which specified by whom and how external agreements should be concluded. The *groupe de rédaction* also decided not to include a provision granting the Community a right of representation in international fora. Other related issues, such as the Community's participation in other economic international organisations and its relationships with the UN and the Council of Europe, remained unsolved. The latter issue was submitted for the decision of the heads of delegation.[174]

By early January 1957, the *groupe de rédaction* again discussed article C para. 1[175], leading to a new solution in the following draft of the general dispositions, on 15 January 1957. The Commission would be allowed to negotiate the agreements and, when specified in the treaty, the Council would conclude them (often after consultation of the Assembly). If there was no specification in the treaty, then the Commission could conclude the agreement alone. The ECJ could, if asked by the Commission, Council or a member state, render an opinion on the compatibility of the agreement with the treaty dispositions, an idea already discussed in December.[176] The new draft also provided that the Commission would ensure 'all appropriate relations' with international organisations (the core of

[173] Pierre Pescatore, 'Les travaux du 'Groupe juridique' dans la négociation des Traités de Rome', *Studia diplomatica 34*, no. 1–4 (1981): p.174. No empirical evidence allows us to definitively confirm that Riphagen was indeed the author of this clause.

[174] The jurists asked whether the new treaty should include two provisions similar to Articles 93 and 94 ECSC, which addressed the Community's relationships with the UN and the Council of Europe. (Groupe de rédaction. 'Projet de rédaction...' (MAE 813 f/56), Brussels, 15 December 1956, p. 11. HAEU, CM3.NEGO, 190).

[175] On draft MAE 838f/56(27 December 1956–see above), Gaudet scratched both proposals and wrote '*proposition allemande à presenter*'. This file also contains a new version of Article C dated 10.1.1957 similar to what was proposed in draft MAE 113 f/57. LSA, Gaudet, CEE 3.

[176] Groupe de rédaction. 'Projet de rédaction d'articles concernant les dispositions générales' (MAE 113 f/57), Brussels, 15 January 1957. HAEU, CM3.NEGO, 262.

future article 229 EEC), and a provision still to be written concerning the relationship with the Council of Europe (future article 230 EEC). The *groupe de rédaction* reviewed document MAE 698/57 (27 February 1957), which includes the essentially final version of article 228: The Commission would negotiate agreements, but the Council would conclude them 'subject to the powers vested in the Commission in this field' and after consulting the Assembly when required by the Treaty.[177]

To conclude, the most important decisions on the legal personality of the EEC were taken in the *groupe de rédaction* in December and first half of January. The choice not to grant the EEC an international legal personality was well aligned to the general agreement on the institutional and legal dimension of the EEC to place the member states at the centre of the new community. The first proposal, perhaps drafted by Pescatore, was therefore rejected in favour of a much more watered-down solution where the legal personality of the EEC was placed in the back of the treaty and its responsibilities vis-à-vis other international organisations were split between several articles such as 228, 229, 230 and deliberately kept vague. In such a situation, the insertion of the precision in article 288 that member states would also be bound by agreements in which the EEC engaged was the most important subtle improvement that the *groupe de rédaction* offered. Overall, the negotiations on legal personality again demonstrated how the committee largely followed the relatively restrictive approach taken at the political level of the negotiations.

General Principles—Loyalty—Article 5

The principle of member state loyalty was already part of the Treaty of Paris in article 86. It declared that 'member states bind themselves to take all appropriate measures, whether general or particular, to ensure the fulfilment of their obligations resulting from the decisions and recommendations of the institutions of the Community and to facilitate the achievement of the Community's aims. Member states bind themselves to refrain from

[177] Groupe de rédaction, 'Projet de Traité instituant la Communauté Économique Européenne. Première lecture. Dispositions générales. (article 4), restreint pour le Groupe de rédaction' (MAE 698 f/57). 27 February 1957. ANF, F60.3105. (not in the CM3. NEGO serie)

any measures incompatible with the common market referred to in articles 1 and 4....' In addition, the article described certain specific obligations, such as facilitating the inspection of the High Authority on the territories of the member states. The general view of the legal literature has been that article 86 was based on a classical principle of public international law, namely the *pacta sunt servanda* principle which obliged the signatories of an international treaty to abide by it in good faith.[178] In the Treaty of Paris, this principle was specified probably because of the unusual competences of the High Authority.

During the negotiations of the EEC Treaty, the principle of member state loyalty was taken up again. This time, it was placed at the beginning of the treaty (article 5) and its wording was slightly more accentuated: 'Member States shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from acts taken by the institutions of the Community. They shall facilitate the achievement of the Community's aims. They shall abstain from any measure likely to jeopardise the attainment of the objectives of this Treaty.' What did the negotiators imply when they mentioned in the new article not only secondary law, but also primary law, and why did they replace 'common market' with 'the objectives of this Treaty' at the end? Let us briefly follow the elaboration of article 5 during the negotiations and see what the primary sources reveal as reasons for the slight change of wording.

After the heads of delegation asked the *groupe de rédaction* to work on the general principles at their meeting on 22 November, the committee quickly began its task. In the first draft of the general provisions from 26 November, the legal experts decided to include an article very similar to article 86 of the Treaty of Paris.[179] It closely followed article 86, but did at the outset mention that the member states should take appropriate measures to ensure the execution of the obligations from both primary law (the treaty)

[178] Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, Oxford, 2014).
[179] Groupe de rédaction, 'Projet d'articles (...) (Dispositions générales qui pourraient former le dernier chapitre du Traité)' (MAE 641 f/56), Brussels, 26 November 1956, article 8. HAEU, CM3.NEGO, 216. p. 213. '*Les États membres s'engagent à prendre toutes mesures générales ou particulières propres à assurer l'exécution des obligations découlant du Traité ou résultant des (décisions et recommandations) des institutions de la Communauté, et faciliter à celle-ci l'accomplissement de sa mission. Les États membres s'engagent à s'abstenir de toute mesure incompatible avec l'existence du Marché commun.*'

and secondary law. However, in the second section of the provision, member states were still supposed to abstain from any measure incompatible with the common market (and not the objectives of the treaty). Thus, from the very beginning, the *groupe de rédaction* had almost found the final form of the article. The wording of the article was repeated in the next draft of the general principles from 5 December.[180]

In fulfilling its task, the *groupe de rédaction* did not pay too much attention to the work of the Committee of the common market which, on 6 November, had received a proposal from the German delegation that included a variant of the loyalty principle in the context of the harmonisation of national legislation with an impact on the common market.[181] The German text provided that the member states had to cooperate closely and refrain from all measures that would be incompatible with the objectives of the treaty. This was the first time a reference was made to the objectives of the treaty and not merely to the common market. On 6 December, the Committee of the common market wrote directly to Spaak to ask whether the loyalty article developed, now renumbered as article 3bis, should be included in the treaty text. The formulation still included the notion that the member states had to cooperate closely. In addition, they had to take all necessary measures in order to realise the objectives of the treaty and the application of the dispositions of the treaty. Finally, the member states had to avoid measures likely to compromise the realisation of the objectives of the treaty.[182] When Von der Groeben

[180] Groupe de rédaction, 'Projet d'articles (...) (Dispositions générales qui pourraient former le dernier chapitre du Traité)' (MAE 641 f/56rev.), Brussels, 26 November 1956, article 8. HAEU, CM3.NEGO, 216, p. 220.

[181] Arbeitsgruppe für den gemeinsamen markts. 'Vorschlag der deutschen Delegationen für eine Neufassung der Artikel 45 bis 47' (MAE 507 f/56). Brussels, 6 November 1956. Article 45 reads: *'Die Mitgliedstaaten verpflichten sich, zur Erreichung der Ziele dieses Vertrages laufend eng zusammenzuarbeiten und alle Massnahmen zu unterlassen, die mit Zielen dieses Vertrages unverinbar sind.*' HAEU, CM3.NEGO, 216. p. 211.

[182] Groupe du Marché Commun, 'Note du président. Rapprochement des législations – Distorsions particulières' (MAE 712f/56- Mar.Com 123), Brussels, 6 December 1956. HAEU, CM3.NEGO, 216, p. 244. Article 3bis now read: '*Aux fins de la réalisation des objectifs du présent Traité, les États membres s'engagent à collaborer d'une manière étroite et continue. a) en procédant à l'harmonisation de leurs politiques économiques respectives dans la mesure nécessaire au développement progressif du marché commun, b) en réalisant le rapprochement nécessaire de leurs dispositions législatives et réglementaires dans la mesure nécessaire au fonctionnement du marché commun et, au cas où ils sont amenés à établir de nouvelles dispositions en se consultant mutuellement afin d'éviter de fausser le jeu de la concurrence, c) en prenant toutes les mesures nécessaires à la réalisation des objectifs du présent Traité et à l'application des dispositions qu'il contient, d) en évitant toutes mesures susceptibles de compromettre la réalisation des objectifs du présent Traité.*'

presented the progress of the Committee of the common market on harmonisation on 20 December, he emphasised how the article was supposed to enter the first section of the treaty on general principles and was meant to explicate the need for the member states to work closely together. He also mentioned the addition of a second paragraph on the improvement of living standards and working conditions of labour that in turn would lead to social harmonisation.[183]

At their meeting on 4–5 January, the heads of delegation took note of the proposal by the Committee of the common market but instructed the *groupe de rédaction* to follow the text of article 86 of the Treaty of Paris when finalising the loyalty article.[184] Nevertheless, the Committee of the common market continued to work on the principle of loyalty in the context of harmonisation.[185] But eventually, it agreed to strip down the principle to the text originally proposed by the *groupe de rédaction*. Consequently, any reference to social harmonisation was removed.[186] Inside the *groupe de rédaction*, Devadder and Pescatore had begun working on the general principles in early February, including the future article 5. In a memorandum dated 13 February, they repeated the text from the early draft of 5 December, but added an interesting section suggesting that a member state would not be able to terminate its obligations to the EEC in case another member state infringed on the treaty until the ECJ and the Council of Ministers had decided on the infringement. The relation between the member states inside the EEC would thus be communitarian and break with the doctrine of 'self-help' under international public law. According to the 'self-

[183] Comité des chefs de délégation, 'Project de rédaction établi par le Groupe du Marché Commun au cours de sa séance du 19 décembre 1956. Concernant Titre II. Chapitre 2 : Rapprochement des législations et distorsions spécifiques' (MAE 771 f/56). Brussels, 20 December 1956. HAEU, CM3.NEGO, 216, p. 245.
[184] Comité des chefs de délégation, 'Projet de procès-verbal de la réunion du Comité des Chefs de délégation tenue à Bruxelles les 4 et 5 janvier 1957' (MAE 58 f/57 — Ch. Del. 148), Brussels, 11 January 1957. HAEU, CM3.NEGO, 117, p. 10.
[185] Arbeitsgruppe für den Gemeinsamen Markt, 'Rechtsangleichung und Verzerrungen, Neufassung des Artikels 3a) , l d) und Erganzung des deutschen Vorschlages zu Artikel 48, Brüssel, den 22. Januar 1957, Beschr. Verteilung f. d. Gemeinsamen Markt' (MAE 232 d/57). HAEU, CM3.NEGO, 216. Article 3bis now read: '*Aux fins de la réalisation des objectifs du présent Traité, les États membres s'engagent à collaborer d'une manière étroite et continue, a) en procédant à la coordination de leurs politiques économiques respective dans la mesure nécessaire au développement progressif du marché commun, b) en réalisant le rapprochement de leurs dispositions législatives et administratives dans la mesure nécessaire au fonctionnement du marché commun, c) en prenant toutes les mesures nécessaires à l'application des dispositions du présent Traité, d) en évitant toutes mesures susceptibles de compromettre la réalisation des objectifs du présent Traité*'.
[186] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p. 247.

help' doctrine, international treaties were considered to be of a contractual nature, and the relation between the signatories relied on interstate-reciprocity and potential countermeasures if a signatory states reneged on the treaty obligations. Pescatore and Devadder's communitarian vision would later be developed by the ECJ but did not survive here.[187] We found no evidence to suggest that this last clause, which would have moved the EEC treaty in a constitutional direction, was ever sent to the heads of delegation.[188]

In the final phase of the negotiations, the *groupe de rédaction* was asked to edit article 5 in light of the general dispositions of the treaty and of the obligatory character of the Council of Ministers' decisions. The result was some tightening of the language. The references to primary law already inserted in the very first draft from 5 December and to the general objectives of the treaties were integrated into the article on 14 February.[189] In a slightly sharper manner, the final version of the article, accepted by the heads of delegation on 5 March, stated that the member states '*prennent toutes les mesures*' instead of '*s'engagent à prendre toutes mesures*' and '*s'abstiennent de toutes mesures*' instead of '*s'engagent à s'abstenir de toutes mesures*'.[190]

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[187] 'Avant-projet de dispositions générales préparé par le Groupe de Travail constitué de Messieurs Devadder et Pescatore', 13 February 1957, 11. HAEU, CM3.NEGO, 189. '*Les États membres s'engagent à prendre toutes mesures générales ou particulières propres à assurer l'exécution des obligations découlant du Traité ou résultant des (actes) des institutions (de la Communauté), et à faciliter à celle-ci l'accomplissement de sa mission.*
Les États membres s'engagent à s'abstenir de toute mesure incompatible avec l'existence du marché commun.
Aucun État membre ne peut se dispenser d'exécuter une obligation découlant du traité en raison d'un manquement à celui-ci commis par un autre État membre, sans que la Cour, par application des articles 31 ou 32, n'ait préalablement constaté le manquement et sans que le Conseil, sur proposition de la Commission et par décision prise à la majorité qualifiée, n'ait accordé ladite dispense en vue de corriger l'effet manquement.'
Interestingly, the ECJ would later in its revolutionary case law Van Gen den Loos, Costa v. E.N.E.L. and most clearly in the Case 90 and 91/63 Commission v. Luxembourg and Belgium (1964) ECR 625 reject the doctrine of 'self-help'. For an extensive analysis of this development consult: Will Phelan, *In Place of Inter-State Retaliation. The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford: Oxford University Press, 2015).

[188] See ECJ case on Belgium (reference to be added).

[189] Comité des Chefs de délégation, 'Projet de rédaction pour le préambule et les articles 1 à 6, établie par le Groupe du Marché Commun le 14 février 1957' (MAE 543 f/57), Brussels, 15 February 1957. HAEU, CM3.NEGO, 204, p. 10. The article now read: '*Les États membres prendront toutes les mesures nécessaires en vue d'exécuter les obligations résultant du présent Traité ou des décisions prises par les institutions de la communauté. Ils éviteront toutes les mesures susceptibles de mettre en péril la réalisation des objectifs du présent Traité.*'

[190] The final article reads: '*Les États membres prennent toutes mesures générales ou particulières propres à assurer l'exécution des obligations découlant du présent Traité ou résultant des actes des institutions de*

According to Hauke Delfs, article 5 represented a strengthened emphasis on the binding nature of European primary law compared to article 86 of the Treaty of Paris. In his view, the proposals of the Committee of the common market outlined a much weaker loyalty principle based on a dualist notion. But the heads of delegations eventually pushed the editing of the article towards a rephrasing of article 86 ECSC with an emphasis on the role of primary law and a somewhat more binding language. This, according to Delfs, confirms his interpretation of the history of the negotiations in which a general breakthrough for a monist understanding of the EEC treaty happened from January to March 1957.[191] We have already demonstrated the flawed nature of Delfs' overall interpretation and here again, the empirical analysis of article 5 does not sustain his argumentation. The inclusion of the reference to primary law in the drafts of article 5 already happened in the very first document prepared by the *groupe de rédaction* on 5 December, i.e. before any involvement of the heads of delegations and before the negotiations witnessed Delfs' so-called 'monist breakthrough'. In addition, the reference to the objectives of the treaties, instead of merely the common market, actually first appeared in the drafts of the Committee of the common market. Finally, the tightening of the language that occurred in the final editing did perhaps represent a certain sharpening of the obligations of the member states, but it hardly changed the normative meaning of the article.

To conclude, there is really no evidence supporting an interpretation of article 5 as a breakthrough for monism. Article 5 was clearly a continuation of article 86 of the Treaty of Paris, based on the *pacta sunt servanda* principle from international public law and directed towards the member states. The new linguistic wording did perhaps represent a certain precision of the obligations of the member states, but hardly altered the nature of the article. The loyalty of the member states could be secured by them following the obligations of the treaty and not working against its objectives. This could be achieved simply by the national governments and institutions working within the framework of the

la Communauté. Ils facilitent à celle-ci l'accomplissement de sa mission. Ils s'abstiennent de toutes mesures susceptibles de mettre en péril la réalisation des buts du présent Traité'.

[191] Hauke Delfs, *Komplementäre Integration. Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Tübingen: Mohr Siebeck, 2015), p. 351.

domestic political system and constitutional order. It thus followed the system of enforcement and uniformity of interpretation of European law that had been carefully constructed in such a manner as to leave the national constitutional orders intact. Thus, article 5 confirmed the approach endorsed at the political level of the negotiations to place the member states at the centre of the institutional system. The fact that Devadder and Pescatore's communitarian vision of the loyalty principle did not go beyond the draft stages further supports this conclusion.

Conclusion

There is no doubt that the EEC Treaty would establish a European Economic Community with important competences and, at the core, a common market with the potential for transforming both the internal socio-economic fabric of the societies of the member states and the interstate relations between the latter. At the same time, and arguably because of the transformative nature of the EEC, the national governments decided that the establishment of the community and the common market should depend on the participating states. This decision was adequately reflected in the institutional system designed at the political level of the intergovernmental conference. The EEC Treaty was to be an international treaty, not a constitution. The Council would be the key decision-making institution and the supranational elements of the institutional system would play important but generally minor roles to help establish the EEC and the common market. If the institutional system had the vague contours of a proto-federation, the concrete shape and tasks of the supranational institutions could hardly be characterised as federal. They included the role of initiative of the Commission, the limited role of parliamentary scrutiny and an ECJ that supposedly would arbitrate between the member states, deal with infringement, and control the legality of the actions of the Council and the Commission.

The brief given to the *groupe de rédaction* was clear about the general nature of the institutional system and the treaty. The committee was to draft an international treaty, help with the legal details on the institutional system, design the ECJ and a legal system, define the decisional acts and contribute to the preamble and the general principles of the

treaty. In addition, but not reviewed here, the committee also helped formulate all the legal details of the policy areas developed on the common market. What was then the result?

Generally speaking, there is no doubt that the committee followed the brief issued at the ministerial level. This applied to the committee's contribution to the definition of the mission of the institutions. It also characterised the design of the ECJ and the legal system of the EEC. The enforcement system (articles 169 and 171) lost the option to fine a member state and was politicised; as well, the committee was quite clear that the national citizens of the member states should have no legal recourse to address a poor implementation record of European legislation against their own national authorities. The access of individual litigants to challenge European legislation (article 173) was also narrowed considerably compared to the ECSC. Finally, the now-famous article 177 that outlined a system of judicial review to secure the uniformity of interpretation of European law across the member states was designed in such a manner that it did not intrude on the integrity of the national constitutional orders. Indeed, all these three key elements of the legal system designed by the *groupe de rédaction* shared this common feature. Any policing by the EEC of the implementation record would happen through the weakened and politicised enforcement system, and the mechanism to ensure the uniformity of interpretation of European law would rest on the cooperative spirit of national courts. All in all, the legal order designed rested on the political will of the member states to establish the EEC and make the common market a success.

The decisional acts largely followed the same pattern, although with one important exception. Most of the primary law of the EEC Treaty was to be considered a policy agenda to be fleshed out through subordinate legislation by the Council; only competition policy was designed as a European public policy with the Commission in a central decision-making role. The typical decisional act was the directive that followed international law in the sense that it was directed to the member states, which decided the means to achieve the objective defined in the act. However, due to the dynamics of the negotiations on the design of the common market, more binding legal norms were also introduced, although in a limited fashion. These took the form of negative obligations related to the building of

the customs union and the abandonment of quantitative trade restrictions, but also more importantly of legislative acts, called regulations, with direct applicability inside national legal orders.

Finally, the *groupe de rédaction* contributed to the development of the preamble, even if the famous 'ever closer union' phrase came from the Committee of the common market. Although the formulation was certainly not only rhetorical, its normative value remained vague at best because it avoided any clear definition of the end goal of the integration process. Likewise, the formulation of the legal personality of the EEC and the loyalty principle of the member states followed the general trend. The legal personality of the EEC was weakened compared to that of the ECSC by the removal of any clear definition of its international legal personality and article 5 on the member state loyalty was squarely based on the traditional norm of international public law *pacta sund servanda*.

All in all, what resulted was a legal system that would maintain the integrity of national constitutional orders. The central role of decision-making was given to the Council, which would help flesh out European primary law into directives and regulations. The implementation and application of this legislation was dealt with by respectively national administrations and national courts. This system would ultimately depend on the political will of the member states and the latter would also largely control the concrete application of concrete legislation.

What then had happened to the aim to design an institutional system that would be efficient enough to establish a common market? Arguably, the negotiators did not manage to devise such an institutional system. The Commission was given an important dynamic role because it would have the right of initiative, but this did not change the basic political fact that the Council had the decision-making competence. A second key move was the introduction of majority voting, which would make the decision-making process of the Council more efficient. There is no doubt that the *groupe de rédaction* also contributed to the efficiency of the system. Most important was the definition of the different acts that streamlined the different legislative modes of the Community and helped create an accumulative legal order, where parts had direct applicability. For an international

organisation, this was a unique feature that would give real bite to the fleshing out of the treaty. The other key contribution was article 177 which, despite its rudimentary nature, created a potential mechanism for securing a uniform interpretation (and eventually also application through the case law of the ECJ) of European law. However, the overall result fell undeniably short of a uniformly interpreted and applied *droit communautaire* that could underpin the common market across the member states, as Michel Gaudet desired. In addition to efficiency, the federalist part of the committee clearly also attempted to insert constitutional legal elements when possible. However, our analysis shows how little leeway there was for constitutional solutions in the work of the committee. As the overall analysis in this book demonstrates, one can hardly argue that the overriding objective of the EEC, the common market, transformative as it was and with its vague proto-federal contours of the institutional system, somehow turned the EEC treaty into a constitution. That would contradict the findings of the book on the precise nature and design of the institutional and legal dimension of the EEC Treaty.

But this does not mean that the committee did not add a few elements of what could be characterised as constitutional law. Typically, these elements were very subtle and often of a more philosophical nature, as for example the rationalisation of the decisional acts in generalised system (article 189) or the maintenance of the mission of the ECJ to ensure the rule of law (article 164). When the federalist members of the committee attempted to insert more dramatic constitutional elements, they mostly failed. This was the fate of Devadder and Pescatore's idea to abandon, in article 5, the doctrine of 'self-help' from public international law in favour of a communitarian understanding of the obligations of the EEC Treaty. The two main instances where a constitutional approach was accepted were firstly the design of regulations with direct applicability as a general decisional act to be applied beyond competition policy, although in a limited fashion, and secondly the system of judicial review, however, circumscribed.

Finally, let us conclude the discussion on the internal dynamics of the *groupe de rédaction* and its role in relation to the other actors of the intergovernmental conference. Due to the limited primary sources dealing with the internal meetings of the group, our analysis in this respect has been subject to obvious limitations. Evidence remains

scattered, but primary sources seem to largely confirm the claim that the committee was split between a federalist faction and a more traditionalist group. Due to the clear brief for the committee, it is also evident that more traditionalist members of the committee could dominate the proceedings given that the concrete results parallel their position. Nevertheless, at the same time, the evidence suggests that jurists like Catalano, Pescatore and Gaudet were significant players and managed to secure important results, if limited and constrained by the general trend of the negotiations. The primary evidence is too weak to fully analyse the relationship between the *groupe de rédaction* and the heads of delegations. There is no supporting evidence that the committee of jurists systematically tried to smuggle in solutions against the guidelines laid down by the heads of delegation. However, likely not all heads of delegations understood the few subtle constitutional elements that were inserted by the lawyers or key breakthroughs such as the system of judicial review.

This working paper has fundamentally refuted the general argument regarding the design of the legal dimension of the EEC treaty promoted by Hauke Delfs in his recent monograph. We found no evidence of a general shift in the approach by the governments and the heads of delegation to the legal dimension of the EEC Treaty. There was no monist breakthrough. Instead the intergovernmental approach from November and December 1956 persisted until the end of the negotiations. We did note a slightly more widespread use of negative obligations of primary law and regulations when the policies of the common market were developed in the first months of 1957, but this did not significantly change the general legal design. Indeed, the *groupe de rédaction* saw no reason to go back to the system of enforcement, judicial protection and uniformity they had first created. Through an in-depth analysis of the legal dimension of the EEC treaty that goes beyond her earlier work, our argument is much more in line with the argument proposed earlier by Anne Boerger. We have in comparison emphasised the extent to which the work of the *group de rédaction* actually followed the general brief set out by the governments and how the legal order they designed underpinned the institutional system designed by the governments in December 1956 and January 1957. If certain elements of constitutional law were promoted by the federalists of the committee, these were arguably more limited

than presented earlier by Boerger when weighed against the general design of the legal dimension of the EEC Treaty as opposed to the context of later ECJ case law.

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