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*Article 5*

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## Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice

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# Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice

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## **Abstract**

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# ARTICLE 5 OF THE EEC TREATY: THE EMERGENCE OF CONSTITUTIONAL PRINCIPLES IN THE CASE LAW OF THE COURT OF JUSTICE

*John Temple Lang\**

## INTRODUCTION

Article 5 of the Treaty establishing the European Economic Community (EEC Treaty or Treaty) provides as follows:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.<sup>1</sup>

This Article suggests that Article 5 imposes a wide variety of important duties on Member States, and that its implications extend much further than is generally realized. The significance of Article 5 tends to be underestimated for several reasons: (1) it is a general principle that is also expressed in special Articles to cover specific situations (such as Article 90 and Article 116 of the Treaty); (2) the Court of Justice (Court) does not always refer specifically to Article 5 as the basis for its holdings; and (3) Article 5 is not often relied on by lawyers in concrete situations because of its general terms. Additionally, in an early Article 5 case, the Court found that Article 5 "lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the

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All opinions expressed are purely personal. Some of the suggestions made here have been made in Temple Lang, *European Community Law, Irish Law and the Irish Legal Profession: Protection of the Individual and Cooperation Between Member States and the Community*, The Second Frances E. Moran Memorial Lecture, 1983, *D.U.L.J.* 1; Temple Lang, *The Direct Effects of European Community Law on Individuals and Companies*, The Sixth Fletcher Lecture (London, Law Society, 1985).

1. Treaty establishing the European Economic Community, art. 5, March 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial trans.) [hereinafter EEC Treaty].

Treaty or on the rules derived from its general scheme.”<sup>2</sup> This sentence was sometimes understood to imply that Article 5 in itself had few practical consequences. It is now clear that any such conclusion would have been wrong.

The developing case law of the Court illustrates the variety and importance of the duties imposed on Member States by Article 5. Some of these duties overlap with one another, and could be differently described or classified. No doubt all of the implications of Article 5 cannot yet be seen. As with Article 100, its practical consequences will evolve over time as circumstances change.

However, this Article suggests that Article 5 imposes a duty on national authorities to comply with the “general principles of law,” such as proportionality and legal certainty, when acting within the Community law sphere. This Article also suggests, in circumstances in which the court has not yet had a chance to clarify, that Article 5 has the effect of transferring competence over certain areas of law from the Member States to the Community. For these two reasons, Article 5 is of fundamental importance to the Community’s constitutional law. It binds Member States to observe principles of fundamental rights.

Article 5 applies to all national authorities, whether exercising legislative, executive, or judicial powers, and to State enterprises, as well as to regional and local authorities. Of course, each Member State may decide which national authority is responsible for carrying out any particular duty under Community law,<sup>3</sup> but it is important that Article 5 applies fully

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2. *Deutsche Grammophon GmbH v. Metro-SB-Grossmärkte GmbH*, Case 78/70, 1971 E.C.R. 487, 499, Comm. Mkt. Rep. (CCH) ¶ 8106; *Geddo v. Ente Nazionale Risi*, Case 2/73, 1973 E.C.R. 865, 878, Comm. Mkt. Rep. (CCH) ¶ 8219; *Bulk Oil v. Sun International*, Case 2/73, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,288 (conclusions of the Advocate General); *Commission v. Hellenic Republic*, Case 192/84, 1985 E.C.R. — (para. 19 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,231.

3. *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, Joined Cases 51-54/71, 1971 E.C.R. 1107, 1115-16, paras. 3-4, 1122 (conclusions of the Advocate General); *Amsterdam Bulb B.V. v. Produktschap Voor Siergewassen*, Case 50/76, 1977 E.C.R. 137, para. 32, Comm. Mkt. Rep. (CCH) ¶ 8391; *Atalanta Amsterdam B.V. v. Produktschap Voor Vee en Vlees*, Case 240/78, 1979 E.C.R. 2137, para. 5, Comm. Mkt. Rep. (CCH) ¶ 8594.

to national courts,<sup>4</sup> subject to their duties under Article 177, because they may decide whether and how to give effect to any rule of national law that is incompatible with a Member State's Article 5 duties. The importance of the distinction between rules of Community law that are directly applicable and those which are not may be reduced if the national courts are bound by Article 5 not to breach the obligations that are binding on the Member State. It is also important that Member States are not free to perform a Community law obligation in such a manner that it is incompletely or ineffectively implemented in their national courts.<sup>5</sup>

In three 1973 cases<sup>6</sup> the Court stated that Article 5 and Article 107, which concern national policies on rates of exchange, allow Member States to determine that the obligations resulting from those Articles cannot confer rights on interested parties that national courts are bound to protect. This does not mean, however, that Article 5 cannot have other direct effects.

In one of the *Leclerc* cases the Advocate General stated that "Article 5 does more than merely set out a programme which is relevant solely in the determination of the objectives of the other provisions of the Treaty."<sup>7</sup> The Advocate General noted that Article 5 contains two general duties and one general prohibition whose actual substance depends on obligations and prohibitions set forth elsewhere in the Treaty or arising out of measures adopted by Community institutions even when they are *not directly applicable*. However, as the Court has confirmed on numerous occasions,<sup>8</sup> "the wording of the second and third sentences of Article 5 indicates that the duties of cooperation

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4. Harz v. Deutsche Tradax, Case 79/83, 1984 E.C.R. 1921, 1942, para. 26, Comm. Mkt. Rep. (CCH) ¶ 14,093.

5. *Id.* at 1939-42, paras. 15, 18, 23-28; Von Colson & Kamann v. Land Nordrhein-Westfalen, Case 14/83, 1984 E.C.R. 1891, Comm. Mkt. Rep. (CCH) ¶ 14,092.

6. Firma Carl Schlüter v. Hauptzollamt Lörrach, Case 9/73, 1973 E.C.R. 1135, para. 39, Comm. Mkt. Rep. (CCH) ¶ 8233; Rewe-Zentral v. Hauptzollamt Kehl, Case 10/73, 1973 E.C.R. 1175, para. 26, Comm. Mkt. Rep. (CCH) ¶ 8234; Giuseppe Sacchi, Preliminary Ruling Requested by the Tribunal di Biella, 1974 E.C.R. 409, 435 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8267.

7. Centre Leclerc v. Au Ble Vert, Case 231/83, 1985 E.C.R. — (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 14,111.

8. See, e.g., Deutsche Grammophon v. Metro, Case 78/70, 1971 E.C.R. 487, 499, para. 5; INNO v. ATAB, Case 13/77, 1977 E.C.R. 2115, 2144-45, paras. 30, 31, 36,

imposed on the Member States by that article may under certain circumstances *transcend specific legally binding duties laid down elsewhere.*"<sup>9</sup> The Advocate General noted that "it must be possible to deduce from the general scheme of the Treaty or from other relevant sources a definition of the general duties laid down in Article 5."<sup>10</sup> This Article attempts to define and classify these "general duties" under Article 5.<sup>11</sup>

### I. *THE DUTY TO GIVE FULL EFFECT TO COMMUNITY LAW*

Article 5 obligates Member States to take all necessary steps to give full effect to Community law. The Court has stated:

According to the general principles on which the institutional system of the Community is based and which governs the relations between the Community and the Member States, it is for the Member States, by virtue of Article 5 of the Treaty, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory. Insofar as Community

37; *French Republic v. United Kingdom*, Case 141/78, 1979 E.C.R. 2923, 2942, para. 8.

9. *Centre Leclerc v. Au Blé Vert*, Case 231/83, 1985 E.C.R. — (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 14,111.

10. *Id.*

11. In a recent case on Article 5 the Court stated:

According to a consistent line of decisions of the Court, a provision produces direct effect in relations between the Member States and their subjects only if it is clear and unconditional and not contingent on any discretionary implementing measure.

Those requirements are not fulfilled *with regard to the obligation at issue in these proceedings*, namely the obligation arising from Article 5 of the EEC Treaty to refrain from any unilateral measure that would interfere with the system adopted for financing the Community and apportioning financial burdens between the Member States. The differences which exist in that respect between the practices of the Member States concerning the detailed rules and procedures for exempting teachers from domestic taxation show that the substance of that obligation is not sufficiently precise. It is for each Member State concerned to determine the method by which it chooses to prevent its tax treatment of teachers at the European Schools from producing detrimental effects for the system of financing the Community and apportioning financial burdens between the Member States.

*Hurd v. Jones (Inspector of Taxes)*, Case 44/84, 1986 E.C.R. — (paras. 47-48 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 14,283 (emphasis added). It is noteworthy that the Court did not find that Article 5 can never have direct effects, but only that it had none in this particular case.

law, including its general principles, does not include common rules to this effect, the national authorities when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law. However, as the Court stated in its judgment of 6 June 1972 in . . . *Schluter & Maack v. Hauptzollamt Hamburg Jonas* . . . , this rule must be reconciled with the need to apply Community law uniformly so as to avoid unequal treatment of producers and traders . . . .<sup>12</sup>

In the Italian fruit trees case (*Commission v. Italy*), the Court stated that

A Member State cannot plead the provisions or practices of its internal order in order to justify failure to observe obligations and time-limits arising from Community Regulations.

It falls to a Member State in accordance with the general obligations imposed on Member States by Article 5 of the Treaty, to recognize the consequences, in its internal order, of its adherence to the Community and, if necessary, to adapt its procedures for budgetary provision in such a way that they do not form an obstacle to the implementation, within the prescribed time-limits, of its obligations within the framework of the Treaty.<sup>13</sup>

The duty to give full effect to Community law means that "all the institutions of the Member State concerned must . . . ensure within the fields covered by their respective powers, that judgments of the Court are complied with."<sup>14</sup> This duty is based on Article 171 of the EEC Treaty. It obligates legisla-

12. *Deutsche Milchkontor GmbH v. Fed. Rep. of Germany*, Joined Cases 205-215/82, 1983 E.C.R. 2633, 2665-66, paras. 17, 19, Comm. Mkt. Rep. (CCH) ¶ 14,111 (citation omitted); see also *id.* at 2666, paras. 22-23, 2680, 2683 (conclusions of the Advocate General); *Firma Wilhelm Fromme v. Bundesanhalt für landwirtschaftliche Marktordnung*, Case 54/81, 1982 E.C.R. 1449, 1469, 1477-78 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8835; *Commission v. Belgium*, Case 137/80, 1981 E.C.R. 2393, 2407, para. 9, 2413, 2414, 2416 (conclusions of the Advocate General); *Scheer v. Einfuhr-und Vorratsstelle Getreide*, Case 30/70, 1970 E.C.R. 1197, para. 10, Comm. Mkt. Rep. (CCH) ¶ 8129.

13. *Commission v. Italian Republic*, Case 30/72, 1973 E.C.R. 161, 172 Comm. Mkt. Rep. (CCH) ¶ 8207; see also *Leonesio v. Ministry for Agriculture and Forestry of the Italian Republic*, Case 93/71, 1972 E.C.R. 287, 295-296, Comm. Mkt. Rep. (CCH) ¶ 8175; *Salumificio di Cornuda v. Amministrazione Delle Finanze Dello Stato*, 1979 E.C.R. 867, para. 27, Comm. Mkt. Rep. (CCH) ¶ 8557.

14. *Procureur de la Republique v. Waterkeyn*, Joined Cases 314-316/81 & 83/82, 1982 E.C.R. 4337, para. 14, Comm. Mkt. Rep. (CCH) ¶ 8889.

tures to amend or repeal a national measure that is incompatible with Community law. Member States also must not give effect to arbitral awards if the awards are contrary to, or unenforceable under, Community law, including Community competition law.<sup>15</sup> In addition, the duty to give full effect requires Member States not to interfere with firms and individuals exercising their rights under Community law (including the right to complain about Member States to the Commission), by, for example, making the exercise conditional upon waiver of other rights or acceptance of additional obligations,<sup>16</sup> or by penalizing firms that exercise their rights.

In addition, the duty to give full effect requires national courts to comply with judgments of the Court, even, it is submitted, if the rule on which the judgment is based is not directly applicable.<sup>17</sup> The duty may go further. National courts might have a duty not to enforce national policies or measures that are contrary to Community law, as when, for example, national policies are implemented by private contracts and the national courts must decide whether to give effect to those contracts. National courts themselves are bound by Article 5, and they have a duty, within the limits of their jurisdiction, to ensure that no effect is given to Member States' policies which are contrary to Community law. Article 5 is also the basis for the duty of national courts to raise points of Community law *sua sponte*.

## II. *THE DUTY TO IMPLEMENT COMMUNITY OBJECTIVES*

Member States have a duty under Article 5 to implement

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15. Comm'n, Tenth Report on Competition Policy ¶ 19 (1981) (in connection with the International Energy Agency Dispute Settlement Centre); see *Yoga Fruit Juices Case*, 1969 *Wirtschaft und Wettbewerb* 504 (Bundesgerichtshof), 1969 *Comm. Mkt. L. Rep.* 123; Pescatore, *Interpretation of Community Law and the Doctrine of "Acte clair,"* in *LEGAL PROBLEMS OF AN ENLARGED EUROPEAN COMMUNITY* 33 (Bathurst, Simmonds, Hunnings & Welch eds. 1972).

16. See *Commission v. U.K.*, Case 32/79, 1980 E.C.R. 2403, 2419, *Comm. Mkt. Rep.* (CCH) ¶ 8692 (argument of the Commission).

17. *Pubblico Ministero v. Ratti*, Case 148/78, 1979 E.C.R. 1629, paras. 17-23, *Comm. Mkt. Rep.* (CCH) ¶ 8569; *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, 1982 E.C.R. 53, para. 21, *Comm. Mkt. Rep.* (CCH) ¶ 8789; *Regina v. Tymen*, Case 269/80, 1981 E.C.R. 3079, *Comm. Mkt. Rep.* (CCH) ¶ 8793.

Community objectives when the objective and the required action are sufficiently clear. In *Thieffry*, the Court stated:

[F]reedom of establishment, subject to observance of professional rules justified by the general good, is one of the objectives of the Treaty.

In so far as Community law makes no special provision, these objectives may be attained by measures enacted by the Member States, which under Article 5 of the Treaty are bound to take 'all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community', and to abstain "from any measure which could jeopardize the attainment of the objectives of this Treaty."

Consequently, if the freedom of establishment provided for by Article 52 can be ensured in a Member State either under the provisions of the laws and regulations in force, or by virtue of the practices of the public service or of professional bodies, a person subject to Community law cannot be denied the practical benefit of that freedom solely by virtue of the fact that, for a particular profession, the directives provided for by Article 57 of the Treaty have not yet been adopted.

Since the practical enjoyment of freedom of establishment can thus in certain circumstances depend upon national practice or legislation, it is incumbent upon the competent public authorities—including legally recognized professional bodies—to ensure that such practice or legislation is applied in accordance with the objective defined by the provisions of the Treaty relating to freedom of establishment.<sup>18</sup>

In connection with the Mourné fishery, in one of the UK fisheries cases, the question arose whether a Member State had a legal duty under Article 5 to adopt measures to ensure the conservation of a certain stock of fish, in light of scientific advice that a ban on fishing was needed to conserve the stock. The Court stated:

[T]here are several factors which, when taken together, lead to the conclusion that the United Kingdom was under a duty to take conservation measures in the zone in question . . . it is not in dispute that according to the available scien-

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18. *Thieffry v. Conseil De L'Ordre des Avocats a la Cour de Paris*, Case 71/76, 1977 E.C.R. 765, 777-78, paras. 15-18, Comm. Mkt. Rep. (CCH) ¶ 8396.

tific opinions recognized by all parties a total ban on fishing was required for the conservation of the Mourne stock . . . both Article 102 of the Act of Accession and Council Regulation (EEC) No. 101/76, in particular Article 4 thereof, in the same way as Annex VI to the Hague Resolution and the Council declaration of 31 January 1978, are based on the twofold assumption that measures must be adopted in the maritime waters for which the Community is responsible so as to meet established conservation needs and that if those measures cannot be introduced in good time on a Community basis the Member States not only have the right but are also under a duty to act in the interest of the Community . . . The measure introduced by the United Kingdom . . . acknowledges, albeit belatedly, the United Kingdom's duty to introduce in this fishing zone a conservation measure appropriate to the seriousness of the danger to the existence of the fish stocks in question.<sup>19</sup>

It follows that if clear scientific advice dictates that a given measure is necessary for the conservation of a biological resource, Article 5 imposes a legally binding duty to take the measure, if the resource is one that the Community aims to conserve, for example, marine biological resources, or wild birds.

When one of the purposes of a Community measure is to eliminate distortions of competition, and distortions will arise if exchange rates change significantly, Member States are obligated to take appropriate counter measures.<sup>20</sup> This duty can only be based on Article 5.

If a Community measure contemplates supplementary Community measures, and none have yet been adopted, Article 5 imposes a duty on Member States to adopt national meas-

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19. *Commission v. U.K.*, Case 32/79, 1980 E.C.R. 2403, 2437-38, 2460-61 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8692; *see also* *Commission v. U.K.*, Case 804/79, 1981 E.C.R. 1045, 1089 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8752; *Commission v. Council (AETR)*, Case 22/70, 1971 E.C.R. 263, para. 90, *Comm. Mkt. Rep. (CCH)* ¶ 8134 (duty of Member States to act in interests of Community); *Officer van Justite v. van Dam*, Case 124/80, 1981 E.C.R. 1447, 1463-65 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8763.

20. *Criminal Proceedings Against Petrus Suys*, Case 32/82, 1982 E.C.R. 4111, paras. 21-23, *Comm. Mkt. Rep. (CCH)* ¶ 8763.

ures on behalf of the Community.<sup>21</sup> This duty may exist even when the Member States no longer have any competence of their own to adopt national measures for any other purpose.<sup>22</sup>

### III. THE DUTY NOT TO INTERFERE WITH THE OPERATION OF COMMUNITY LAW RULES

The obligation of Member States not to take action that interferes with the operation of Community law is clearly demonstrated in a long line of cases, mostly involving the common agricultural policy rules.<sup>23</sup> This obligation involves not merely the avoidance of measures that formally conflict with Community rules, but also avoiding measures that interfere with their operation. This obligation arises from Article 5.<sup>24</sup> (As will be discussed below, there are some indications that this rule is one of competence rather than conflict.<sup>25</sup>)

21. In re *Pluimveeslachterij Midden-Nederta BV & Pluim*, Joined Cases 47 & 48/83, 1984 E.C.R. 1721, paras. 22-23, *Comm. Mkt. Rep. (CCH)* ¶ 14,087.

22. *Commission v. U.K.*, Case 804/79, 1981 E.C.R. 1045, para. 30, *Comm. Mkt. Rep. (CCH)* ¶ 8752.

23. *Deuka v. Einfuhr-und Vorratsstelle Getreide*, Case 31/74, 1975 E.C.R. 421, 427, *Comm. Mkt. Rep. (CCH)* ¶ 8354; *Ex Parte Tasca*, Case 65/75, 1976 E.C.R. 291, paras. 1-4, *Comm. Mkt. Rep. (CCH)* ¶ 8354; *Sadam v. Comitato Interministeriale dei Prezzi*, Joined Cases 88-90/75, 1976 E.C.R. 323, paras. 1-4, *Comm. Mkt. Rep. (CCH)* ¶ 8355; *Amsterdam Bulb*, Case 50/76, 1977 E.C.R. 137, *Comm. Mkt. Rep. (CCH)* ¶¶ 8391, 8406; *Procureur du Roi v. Dechmann*, Case 154/77, 1978 E.C.R. 1573, *Comm. Mkt. Rep. (CCH)* ¶ 8504; *Grosoli*, Case 223/78, 1979 E.C.R. 2621, *Comm. Mkt. Rep. (CCH)* ¶ 8603; *Openbaar Ministerie v. Danis*, Joined Cases 16-20/79, 1979 E.C.R. 3327, *Comm. Mkt. Rep. (CCH)* ¶ 8614; *Procureur du Roi v. Kefer & Delmelle*, Joined Cases 95 & 96/79, 1980 E.C.R. 103, *Comm. Mkt. Rep. (CCH)* ¶ 8632; *Pigs Mktg. Bd. v. Redmond*, Case 83/78, 1978 E.C.R. 2347, *Comm. Mkt. Rep. (CCH)* ¶ 8559; *Pigs & Bacon Comm'n v. McCarren*, Case 177/78, 1979 E.C.R. 2161, *Comm. Mkt. Rep. (CCH)* ¶ 8592; *Irish Creamery Milk Suppliers Ass'n v. Ireland*, *Martin Doyle v. An Taoiseach*, Joined Cases 36 & 71/80, 1981 E.C.R. 735, 761-62, para. 15 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8747; *Openbaar Ministerie of the Netherlands v. Van Tiggle*, Case 82/77, 1978 E.C.R. 25, 47 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8461; *Russo v. AIMA*, Case 60/75, 1976 E.C.R. 45, *Comm. Mkt. Rep. (CCH)* ¶ 8338; *Benedetti v. Munari*, Case 52/76, 1977 E.C.R. 163, *Comm. Mkt. Rep. (CCH)* ¶ —.

24. *Procureur Général v. Buys*, Case 5/79, 1979 E.C.R. 3203, para. 30, *Comm. Mkt. Rep. (CCH)* ¶ 8612; *French Republic v. U.K.*, Case 141/78, 1979 E.C.R. 2923, 2948 (opinion of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8609; *Galli*, Case 31/74, 1975 E.C.R. 47, 64, *Comm. Mkt. Rep. (CCH)* ¶ 8294; *see also Hurd v. Jones*, *Inspector of Taxes*, Case 44/84, 1986 E.C.R. — (paras. 38-39, 44-45, 48-49, 58 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ —.

25. *See, e.g.*, *Irish Creamery Milk Suppliers Ass'n v. Ireland*, Joined Cases 36 & 71/80, 1981 E.C.R. 735, 762 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8747; *Toffoli v. Regione Veneto*, Case 10/79, 1979 E.C.R. 3301,

National authorities therefore must avoid adopting decisions that could conflict with future decisions of Community decisions, or with the uniform application of Community law rules, or with the "practical effectiveness" of Community law rules in particular cases. If the national authority has adopted a measure that conflicts with a Community decision, the authority must take whatever action is appropriate to eliminate the conflict.<sup>26</sup>

In *Leclerc*, the Court stated:

[T]he rules on competition are concerned with the conduct of undertakings and not with the national legislation of Member States. However, as the Court has recently ruled in its judgment of 10 January 1985, in . . . *Leclerc* . . . , Member States are nonetheless obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.

However, rules such as those concerned in this case are not intended to compel suppliers and retailers to conclude agreements or to take any other action of the kind referred to in Article 85(1) of the Treaty. . . .<sup>27</sup>

In another of the *Leclerc* cases, the Court explained further:

[T]he purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their duty to abstain from any measure that might jeopardize the attainment of the objec-

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Comm. Mkt. Rep. (CCH) ¶ 8615; *Cucchi v. Avez S.p.A.*, Case 77/76, 1977 E.C.R. 987, 1023, paras. 27-35 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8422; *Russo v. Azienda di Stato per gli Interventi*, Case 60/75, 1976 E.C.R. 45, 61 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8338; *Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollman*, Case 40/69, 1970 E.C.R. 69, para. 4, Comm. Mkt. Rep. (CCH) ¶ 8098.

26. *Walt Wilhelm v. Bundeskartellamt*, Case 14/68, 1969 E.C.R. 1, 13-15, Comm. Mkt. Rep. (CCH) ¶ 8056.

27. *Cullet v. Centre Leclerc Toulouse*, Case 231/83, 1985 E.C.R. — (paras. 16-18 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,139 (citation omitted); *see also* *Criminal Proceedings against van de Haar & Kaveka*, Joined Cases 177 & 178/82, 1984 E.C.R. 1797, para. 24.

tives of the Treaty. It follows that, as Community law stands, Member States' obligations under Article 5 of the EEC Treaty, in conjunction with Articles 3(f) and 85, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books, provided that such legislation is consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods.<sup>28</sup>

In other words, when the Commission's policy becomes clear, Member States could not adopt legislation that would jeopardize the attainment of Community objectives.

In *Van Dam*, a fisheries case, the Advocate General stated that when the Council had the competence to pass conservation measures but had not yet done so, Member States were obligated,

under Article 5 of the EEC Treaty, to take the necessary conservation measures *in the general interest* and having regard to the substantive and formal requirements of Community law . . . . [T]he interim decisions of the Council . . . are merely to be considered as *specifying the duty of cooperation* of the Member States in accordance with Article 5 . . . . [i]f the Council fails to act the Commission is competent to grant that approval regardless of whether the decisions in question are considered a restoration of powers to the Member States or, on a more correct view, a specification of their obligations under Article 5 of the EEC Treaty . . . these decisions . . . merely render specific the Member States' duty of cooperation, which they undertook in accordance with Article 5 of the EEC Treaty by their accession to the Community . . . .<sup>29</sup>

Another example of the duty not to interfere with the operation of Community law is the *Variola* case.<sup>30</sup> In that case the Court held that it was an unlawful obstruction of the direct applicability of a Community regulation for a Member State to enact national measures reproducing the terms of the regulation. Such an enactment was also unlawful because, as will be

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28. *Centre Leclerc v. Au Blé Vert*, Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111.

29. *Officier van Justitie v. Van Dam & Zonen*, Case 124/80, 1981 E.C.R. 1447, 1463-65 (emphasis in original), Comm. Mkt. Rep. (CCH) ¶ 8763.

30. *Variola v. Amministrazione Italiana delle Finanze*, Case 34/73, 1973 E.C.R. 981, 990-91, para. 10, Comm. Mkt. Rep. (CCH) ¶ 8226.

discussed below, it concealed the Community nature of the legal rule, and so interfered with the jurisdiction of the Court under Article 177.

#### IV. THE DUTY NOT TO INTERFERE WITH THE OPERATION OF A COMMUNITY INSTITUTION

Article 5 imposes a duty not to interfere with the operation of a Community institution. The Court stated in the *Lord Bruce* case:

Community law lays down certain limits . . . which the Member States must observe in the enactment of taxation laws applicable to Members of the Parliament. Those limits arise in particular from Article 5 of the EEC Treaty which . . . includes the duty not to take measures which are likely to interfere with the internal functioning of the institutions of the Community.<sup>31</sup>

In the case of *Luxembourg v. Parliament* the Court stated:

[W]hen the Governments of the Member States make provisional decisions they must, in accordance with the rule imposing on Member States and the Community institutions mutual duties of sincere cooperation, as embodied in particular in Article 5 of the EEC Treaty, have regard to the power of the Parliament to determine its internal organization. They must ensure that such decisions do not impede the due functioning of the Parliament.

Furthermore the Parliament is authorized, pursuant to the power to determine its own internal organization given to it by Article 25 of the ECSC Treaty, Article 142 of the EEC Treaty and Article 112 of the EAEC Treaty, to adopt appropriate measures to ensure the due functioning and conduct of its proceedings. However, in accordance with the above-mentioned mutual duties of sincere cooperation, the decisions of the Parliament in turn must have regard to the power of Governments of the Member States to determine the seat of the institutions and to the provisional decisions taken in the meantime.

What is more, it must be emphasized that the powers of the

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31. *Lord Bruce of Donington v. Aspden*, Case 208/80, 1981 E.C.R. 2205, 2218-2219, para. 14, Comm. Mkt. Rep. (CCH) ¶ 8771; *accord Commission v. Ireland*, Case 61/77R, 1977 E.C.R. 937, para. 26, Comm. Mkt. Rep. (CCH) ¶ 8473; *Variola*, Case 34/73, 1973 E.C.R. 981, para. 11, Comm. Mkt. Rep. (CCH) ¶ 8226; *see also Hurd*, Case 44/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,283.

Governments of the Member States in the matter do not affect the right inherent in the Parliament to discuss any question concerning the Communities, to adopt resolutions on such questions and to invite the Governments to act.<sup>32</sup>

It has been suggested that this principle might make the "Luxembourg agreement" (under which the Council will act only by unanimity even when qualified majority voting is envisioned by the Treaty), contrary to Community law. The legality of the Luxembourg compromise is an issue that arises primarily under Article 5.

The principle not to interfere with Community institutions is particularly applicable when the Council has not yet adopted common rules<sup>33</sup> or when the Commission has submitted proposals for urgently needed Community measures.<sup>34</sup> In such cases the obligation is more specific; it is a duty not to hinder the Council in adopting new measures. For example, it may be unlawful for a Member State to enter into an international obligation when Council negotiations were going on, or were about to begin on the same problem.

This principle of Community law was raised by the case *Hasselblad (GB) Ltd. v. Orbison* before the Court of Appeal in England.<sup>35</sup> *Hasselblad* sued *Orbison* for defamation based on statements by *Orbison* in a letter to the EEC Commission suggesting that *Hasselblad* had infringed Article 85, EEC Treaty. The judgment stated that:

[S]ince this country is a Member of the European Community, there is a public interest in ensuring that the Commission, as the primary authority of the Community [in the sphere of competition law] should not be frustrated in the duty imposed on it by the EEC Treaty and Council Regulation 17 of enforcing compliance with Articles 85 and 86  
 . . . .<sup>36</sup>

If *Haaselblad* could proceed with such a claim, the Commis-

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32. *Luxembourg v. European Parliament*, Case 230/81, 1983 E.C.R. 255, 287, para. 37; see also *Hurd*, Case 44/84, 1986 E.C.R. — (paras. 38-49 of the judgment).

33. *French Republic v. U.K.*, Case 141/78, 1979 E.C.R. 2923, para. 8, Comm. Mkt. Rep. (CCH) ¶ 8609; see also *Pluimveeslachterij*, Joined Cases 47 & 48/83, 1984 E.C.R. 1721, paras. 22-23, Comm. Mkt. Rep. (CCH) ¶ 14,087.

34. *Commission v. U.K.*, Case 32/79, 1980 E.C.R. 1045, para. 28, Comm. Mkt. Rep. (CCH) ¶ 8752.

35. *Hasselblad (GB) Ltd. v. Orbison*, 3 Comm. Mkt. L.R. 540, 679 (1984).

36. *Id.* at 692.

sion would find it more difficult to investigate future breaches of Articles 85 and 86. If the Commission disclosed complaint letters knowing they were subjecting the writer to a libel suit, the supply of information to the Commission would be significantly reduced. Additionally, "it cannot be right that national courts and Community institutions shall both independently weigh the force of particular evidence with the possibility of inconsistent results."<sup>37</sup>

The argument that the Commission's ability to obtain evidence should not be interfered with is similar to the judgment of the Court of Justice in *Lord Bruce*.<sup>38</sup> Another problem, the risk of inconsistent decisions of national courts and Community institutions, is analyzed by the Court of Justice in the *Wilhelm* case.<sup>39</sup>

*Lord Bruce* concerned the "internal functioning" of a Community institution. *Hasselblad* extended the principle to the ability of the institution in question to receive information from members of the public. This principle might also apply to submissions to a committee of the European Parliament. In *Luxembourg v. Parliament*, as discussed below, the Court went beyond the express words of Article 5 to find that the Community institutions owe each other a duty of cooperation. This principle could lead to "checks and balances" that might become an important part of the constitutional law of the Community. The Court also recognized the duty of the Community institutions towards Member States, illustrating that the idea of checks and balances is not alien to the passage quoted above.

#### V. THE DUTY NOT TO ENCOURAGE BREACHES OF COMMUNITY LAW

Each Member State is obliged not to enable, encourage, or facilitate a breach by state authorities or private persons of any rule of Community law, or to allow itself or its courts to be used to facilitate a breach of Community law. This principle is derived from both Article 5 and Article 90.<sup>40</sup> As stated by the

37. *Id.*

38. Case 208/80, 1981 E.C.R. 2205, Comm. Mkt. Rep. (CCH) ¶ 8771.

39. Case 14/68, 1969 E.C.R. 1, Comm. Mkt. Rep. (CCH) ¶ 8056.

40. Temple Lang, *Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises; Article 90 EEC Treaty*, in 1984 *FORDHAM CORP. L. INST.* 543 (B. Hawk ed. 1985).

Court in *INNO v. ATAB*:

The second paragraph of Article 5 of the Treaty provides that Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty . . . . Article 90 provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary *inter alia* to the rules provided for in Articles 85 to 94 . . . .

Likewise, Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty.

At all events, Article 86 prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision.<sup>41</sup>

In *Procureur General v. Buys*, the Advocate General found that it was clear that "a Member State would be in breach of Article 5 if it enacted legislation calculated to bring about or to encourage such agreements, decisions or concerted practices" (i.e. those contrary to Article 85).<sup>42</sup> Additionally, in one of the *Leclerc* cases the Advocate General stated:

If by encouraging behavior prohibited by Articles 85 and 86 [a national measures] is, in addition, capable of affecting trade between Member States . . . it will amount to an in-

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41. NV GB-INNO-BM v. ATAB, Case 13/77, 1977 E.C.R. 2115, 2144-45, paras. 30-33, Comm. Mkt. Rep. (CCH) ¶ 8442; *see also* Cullet v. Centre Leclerc Toulouse, Case 231/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,139.

In *Ministère Public v. Asjes* (Nouvelles Frontières), a judgment of April 30, 1986, regarding the compatibility of Community law and a national approval procedure for air tariffs, the Court stated that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive Articles 85 and 86 of their effectiveness. "Such would be the case, in particular if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof." Cases 209-213/84, 1986 E.C.R. — (para. 72 of the judgment), Comm. Mkt. Rep. (CCH) ¶ —. The Court went on: "It is contrary to the obligations of Member States under Article 5 of the EEC Treaty, read in conjunction with Articles 3(f) and Article 85, in particular paragraph (1), of that Treaty, to approve air tariffs and thus to reinforce the effects thereof, where, in the absence of any rules adopted by the Council in pursuance of Article 87, it has found in accordance with the forms and procedures laid down in Article 88 or Article 89(2) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85." *Id.* at — (para. 77 of the judgment).

42. *Procureur Général v. Buys*, Case 5/79, 1979 E.C.R. 3203, 3226, 3230-31, Comm. Mkt. Rep. (CCH) ¶ 8612.

fringement of Article 3(f) and the second paragraph of Article 5, read with Article 85 or 86. . . .

[A] national measure which deprived of practical effectiveness the prohibitions directed to undertakings by Articles 85 and 86 or frustrated action by the Commission under Articles 87 would be in direct conflict with the second paragraph of Article 5 inasmuch as it would prejudice the objective assigned to the Community by Article 3(f), which aims at the institution of a system of effective competition in the Common Market. . . .

[T]hose considerations bring closer to its proper proportions the objection that Article 3(f) merely outlines an aim while the second paragraph of Article 5 is too general. It is true that Article 3(f) lays down an objective for the Community, but it also sets forth a principle, the fundamental nature of which I have just emphasized. As for the second paragraph of Article 5, *it makes the transfer of powers effected by the Treaty irreversible*. The Member States must comply with the provisions in question, so as not to render nugatory the rules of the Treaty which provide for its implementation.

Every time a Member State prevents those provisions from being applied, *its action is liable to deprive individuals of the rights that they might derive therefrom* and prevent the Community institutions from exercising the prerogatives that the Treaty confers on them.

I consider that to be the sense of the court's judgment in *INNO v. ATAB*: a national measure which encourages behaviour in restraint of competition or, more generally, deprives of practical effect the prohibitions laid down in Articles 85 and 86 of the Treaty is incompatible with Article 3(f) and the second paragraph of Article 5, read together with Articles 85 and 86.<sup>43</sup>

This opinion clarifies one important way in which Article 5 has direct effects, by prohibiting national legislation that interferes with the operation of rules of Community law that themselves have direct effects. Furthermore, Member States also presumably have an obligation under Article 5 not to enact legislation that encourage State authorities to breach Community law. Article 90 of the EEC Treaty, which is directly applicable, suggests that such a rule exists, and therefore the princi-

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43. *Centre Leclerc v. Au Blé Vert*, Case 229/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,111 (emphasis supplied).

ple is applicable beyond state enterprises. It also follows that Member States have a duty not to widen the effects of any breach of Community law by, for example, imposing prices resulting from an unlawful price-fixing agreement on corporations that were not parties to the agreement.

## VI. THE DUTY TO ENFORCE COMMUNITY LAW

Article 5 requires Member States to enforce compliance with Community law within their jurisdictions in addition to enforcing compliance with national measures adopted in conformity with Community obligations.<sup>44</sup> It is not enough to enact legislation or other measures implementing Community directives. Member States must enforce them as far as necessary and take all reasonable steps to ensure that citizens, companies, and public authorities comply. The Article 5 obligations that Member States must enforce include the obligations of all those within their jurisdictions. In the *Nordsee* case, the Court stated:

The Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with . . . . Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them . . . .<sup>45</sup>

Therefore, Article 5 imposes on Member States the duty to provide for whatever administrative, policing, or enforcement personnel and procedures may be necessary to ensure compliance by all those to whom the rules apply.

The duty to enforce Community law includes the duty to

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44. *Openbaar Ministerie v Bout*, Case 21/81, 1982 E.C.R. 381, para. 11, Comm. Mkt. Rep. (CCH) ¶ 381; *Commission v. Netherlands*, Case 96/81, 1982 E.C.R. 1791, paras. 7, 8, 12, Comm. Mkt. Rep. (CCH) ¶ 8840 (measures taken must be binding).

45. *Nordsee Deutsche Hochseefischerei*, Case 102/81, 1982 E.C.R. 1095, 1110-11, Comm. Mkt. Rep. (CCH) ¶ 8822.

recover from private parties sums of money paid contrary to Community law. In *Fromme*, the Court stated:

[A]ctions for the recovery of sums which have been wrongly paid under Community law must be decided by national courts in accordance with their own national law in so far as Community law has not provided otherwise. In particular, it is for the national authorities to settle all ancillary questions relating to such recovery, such as the question of payment of interest . . . [This requirement] does no more than confirm expressly an obligation already incumbent on the Member States by virtue of the principle of cooperation enunciated in Article 5 of the Treaty.<sup>46</sup>

The duty to enforce Community law also includes enforcing the rights of private parties under directly applicable rules of Community law against the public authorities of the Member State itself. This principle was first stated in *Rewe*<sup>47</sup> and

46. *Fromme v. Bolin*, Case 54/81, 1982 E.C.R. 1449, 1463-64, Comm. Mkt. Rep. (CCH) ¶ 8835; *Baywa v. Balm*, Joined Cases 146, 192 & 193/81, 1982 E.C.R. 1503, para. 23, Comm. Mkt. Rep. (CCH) ¶ 8834 (duty to ensure denaturing properly carried out to qualify for Community grant, prevent irregularities, and recover lost sums all said to be based on Article 5); *Deutsche Milchkontor v. Germany*, Joined Cases 205-215/82, 1983 E.C.R. 2633, 2665-66, Comm. Mkt. Rep. (CCH) ¶ 14,011; *Amministrazione della Finanze v. Salumi*, Joined Cases 66, 127 & 128/79, 1980 E.C.R. 1237, Comm. Mkt. Rep. (CCH) ¶ 8663.

However . . . the application of national law must not adversely affect the scope or impair the effectiveness of Community law by making the recovery of sums wrongly paid impossible in practice. Nor may it make the recovery of such sums subject to conditions or detailed rules less favourable than those which apply to similar procedures governed by national law alone. In such matters the national authorities must proceed with the same care as they exercise in implementing corresponding national laws so as not to impair, in any way, the effectiveness of Community law. . . . [W]ith regard to the relationship to procedures for determining similar, but purely national, disputes . . . the application of national law . . . must be affected in a non-discriminatory manner as compared with those procedures. The rule against discrimination so enunciated also implies that the obligations imposed by national legislation on undertakings which have been wrongly granted pecuniary advantages based on Community law must not be more stringent than those imposed on undertakings which have wrongly received similar advantages based on national law, assuming, however, that the two groups of recipients are in comparable situations and therefore that that different treatment is not objectively justifiable.

*Fromme*, Case 54/81, 1982 E.C.R. at 1463-64.

47. *Rewe-Zentralfinanz*, Case 33/76, 1976 E.C.R. 1989, 1997-98, Comm. Mkt. Rep. (CCH) ¶ 8382; *Comet v. Produktschap voor Siergewassen*, Case 45/76, 1976 E.C.R. 2043, Comm. Mkt. Rep. (CCH) ¶ 8383; *Ianelli v. Meroni*, Case 74/76, 1977 E.C.R. 557, 592 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶

repeated in other cases concerned with repayment of taxes imposed in violation of Community law. However, the language of *Rewe* is deliberately broad and is not limited to tax cases, but extends to actions for declarations, or the equivalent, and to all claims for compensation against public authorities. In *Rewe*, the Court stated:

The prohibition laid down in Article 13 of the Treaty . . . [has] a direct effect and confers on citizens rights which the national courts are required to protect.

Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. In the absence of . . . measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

This is not the case where reasonable periods of limitation of actions are fixed.

The answer to be given to the first question is therefore that

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8401; *Just v. Ministry for Fiscal Affairs*, Case 68/79, 1980 E.C.R. 501, 522-23, 531 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8650; *Pigs & Bacon Comm'n v. McCarren*, Case 177/78, 1979 E.C.R. 2161, 2192, Comm. Mkt. Rep. (CCH) ¶ 8592; *Ferwerda v. Produktschap Voor Vee En Vlees*, Case 265/78, 1980 E.C.R. 617, 629, Comm. Mkt. Rep. (CCH) ¶ 8655; *Amministrazione Della Finanze v. Denkavit*, Case 61/79, 1980 E.C.R. 1205, 1226, Comm. Mkt. Rep. (CCH) ¶ 8731; *Amministrazione Dello Finanze v. Ariete*, Case 811/79, 1980 E.C.R. 2545, 2554, Comm. Mkt. Rep. (CCH) ¶ 8693; *Amministrazione Dello Finanze v. Mireco*, Case 826/79, 1980 E.C.R. 2559, 2574, Comm. Mkt. Rep. (CCH) ¶ 8694; *Lippische Hauptpenossenschaft v. Balm*, Joined Cases 119 & 126/79, 1980 E.C.R. 1863, Comm. Mkt. Rep. (CCH) ¶ 8681; *Amministrazione Dello Finanze v. San Giorgio*, Case 199/82, 1983 E.C.R. 3595, 3612, Comm. Mkt. Rep. (CCH) ¶ 14,045.

The opinion of the Advocate General in *Russo*, Case 60/75, 1976 E.C.R. at 62-63, is particularly clear.

in the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.<sup>48</sup>

The duty to enforce Community law also implies that national courts must provide remedies for individuals and firms injured by breaches of applicable Community rules when those rules are binding on the private parties against whom the remedies are sought.<sup>49</sup> In addition, this prohibits efforts of private parties to enforce their rights through national courts, for example, by enacting procedural rules making it excessively difficult to obtain evidence of the breach of Community law. It has been suggested for example that Article 5 might necessitate amendment of the rule in the UK allowing companies to refuse to incriminate themselves when sued for breach of Community competition law.<sup>50</sup>

#### VII. *THE DUTY TO CLARIFY THE NATIONAL POSITION UNDER COMMUNITY LAW*

When there is a possibility of uncertainty or conflict, Article 5 imposes a duty on Member States to clarify its position under Community law.<sup>51</sup> This may be required as a particular application of the Community law principle of ensuring legal certainty with regard to national measures, but it is preferable to regard it as a separate and specific duty.<sup>52</sup> There are several illustrations of this duty in the case law of the Court, especially when national law appears to conflict with Community law. In

48. *Rewe*, Case 33/76, 1976 E.C.R. at 1997-98.

49. Temple Lang, *EEC Competition Actions in Member States' Courts—Claims for Damages Declarations and Injunctions for Breach of Community Antitrust Law*, in 1983 *FORDHAM CORP. L. INST.* 219-304 (B. Hawk ed. 1984).

50. *But see* Temple Lang, *Proceedings for Damages Before National Courts in Competition Cases*, in *EEC LAW AND NORDIC COMMERCIAL RELATIONS WITH OUR COMMUNITIES* at 187-91 (Sundström, Joutsamo, Sund & Loikkanen eds. 1985).

51. Lord Mackenzie Stuart, *Legitimate Expectations and Estoppel in Community Law and English Administrative Law*, 1983 *LEGAL ISSUES EUR. INTEGRATION* 53, 59 (1983).

52. *Amsterdam Bulb*, Case 50/76, 1977 E.C.R. 137, paras. 5, 7, 8, *Comm. Mkt. Rep.* (CCH) ¶ 8391; *Buyis*, Case 5/79, 1979 E.C.R. 3203, 3244 (conclusions of the Advocate General), *Comm. Mkt. Rep.* (CCH) ¶ 8612.

addition, the duty to clarify requires national courts to refer questions of Community law to the Court under Article 177 if there are conflicting national judgments on the question, in order to reestablish a uniform application of Community law. This duty to clarify applies primarily when the Community law rules and the national law rules create rights and duties for private parties.

### VIII. *THE EFFECT OF MAKING CERTAIN ACTS BINDING*

It is often pointed out by the Court that specific provisions of Community legislation or the treaties are merely particular statements of the general duties imposed by Article 5.<sup>53</sup> When the specific provisions are themselves legally binding, the practical result is normally unaffected by the simultaneous application of Article 5. However, if a specific measure would not otherwise be legally binding, the fact that it is a concrete example of a general duty imposed by Article 5 has the effect of making compliance legally obligatory on Member States.

By way of illustration, Annex VI to certain resolutions adopted by the Council said that Member States consult the Commission for its approval when adopting certain fisheries measures. Being a resolution, this would not normally have been legally binding. However, the Court stated:

The Commission has rightly claimed that the resolution, in the particular field to which it applies, makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community. Performance of these duties is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States.<sup>54</sup>

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53. *E.g.*, *Deutsche Milchkontor*, Joined Cases 205-215/82, 1983 E.C.R. 2633, *Comm. Mkt. Rep. (CCH)* ¶ 14011; *Baywa v. Balm*, Joined Cases 146, 192, & 193/81, 1982 E.C.R. at 1533, *Comm. Mkt. Rep. (CCH)* ¶ 8834; *Commission v. Netherlands*, Case 97/81, 1982 E.C.R. 1819, para. 7, *Comm. Mkt. Rep. (CCH)* ¶ 8842; *INNO v. ATAB*, Case 13/77, 1977 E.C.R. 2115, paras. 31, 32, 42, *Comm. Mkt. Rep. (CCH)* ¶ 8442.

54. *France v. U.K.*, Case 141/78, 1979 E.C.R. 2923, 2942, *Comm. Mkt. Rep.*

What would appear to be political resolutions or conclusions may therefore be legally binding by virtue of Article 5 if they merely specify duties that otherwise would have resulted generally from Article 5.

IX. *THE DUTY OF MEMBER STATES TO COMPLY WITH  
THE "GENERAL PRINCIPLES OF LAW"  
BINDING ON THE COMMUNITY INSTITUTIONS*

Member States are bound by Article 5 to abstain from any measures which could jeopardize "the objectives of the Treaty." Under Article 164 of the Treaty, the Court must ensure that, in the interpretation and application of the Treaty, "the law is observed." This law includes certain "general principles of law" with which the Community institutions must comply: the principles of proportionality, equality, legal certainty, the principle that private parties must be heard before decisions are made that affect their interests, the principle that reasons must be given for decisions, so that judicial review is possible, and others.

Perhaps compliance with the law in the interpretation and application of the Treaty should be regarded as one of the objectives of the Treaty, even though it is normally assumed that the objectives referred to are only those set out in Article 3. In any case, the question arises whether, under Article 5 or elsewhere, these "general principles of law" bind Member States in the sphere of Community law. There is strong judicial authority supporting the idea that Member States are bound. The question came before the Court in *Jongeneel Kaas*,<sup>55</sup> but the Court avoided it in making its decision. The Advocate General's opinion, however, clearly stated:

The . . . question is concerned with the general principles of Community law, and in particular, with the principle of proportionality. The national court wishes to ascertain whether that principle is directly applicable in a case such as that pending before it.

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(CCH) ¶ 8752; *Commission v. U.K.*, Case 804/79, 1981 E.C.R. 1045, 1090-91 (conclusions of the Advocate General), *Comm. Mkt. Rep.* (CCH) ¶ 8752; *Gewiese v. Mackenzie*, Case 24/83, 1984 E.C.R. 817, *Comm. Mkt. Rep.* (CCH) ¶ 14,039.

55. *Jongeneel Kaas B.V. v. Netherlands*, Case 237/82, 1984 E.C.R. 483, 520, *Comm. Mkt. Rep.* (CCH) ¶ 14,059; *see also Hurd*, Case 44/84, 1986 E.C.R. —, *Comm. Mkt. Rep.* (CCH) ¶ 14,283.

The answer to that question must be in the affirmative. The general principles elicited by the Court from the primary and secondary provisions of Community law, and in particular from those fundamental values which are common to the legal systems of the Member States, form part of the Community legal order and may therefore be relied upon by individuals before the national court which, as is well known, is also a Community court. However, that is subject to the limitation that such principles may come into operation only in cases where the application of substantive rules of Community law is involved. To be more explicit, those principles may be relied upon by individuals and will be taken into account by the courts not in any circumstances but only in cases which display some connection with the legal order of the Community . . . .

The general principles of law and, in particular, the principle of proportionality have direct effect. Accordingly, they must be applied by national courts if the circumstances in relation to which they are relied upon display a connection with the Community system.<sup>56</sup>

The last phrase is important. It could not be suggested that Article 5, or any other rule of Community law, makes "general principles of law" binding on Member States *outside* the Community law sphere. If general principles of law do bind Member States within that sphere, it is necessary to define more precisely when those principles apply to national measures. This Article suggests that they apply whenever Member States are implementing Community measures or policies, are acting in any sense on behalf of the Community, or are using powers that the Community regulates.

In *Benedetti v. Munari*, the Advocate General stated that:

Member States are bound by the prohibition on discrimination in Article 40 . . . . This likewise follows from the judgment in Case 60/75 with its reference to the fact that State measures must not jeopardize the objectives and operation of a common organization of the market. It may accordingly be assumed that a Member State on adopting measures which effect the common organization of the market must have regard to all principles governing this sphere, that is including the prohibition on discrimination. Refer-

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56. *Jongeneel Kaas*, Case 237/82, 1984 E.C.R. at 510 (opinion of the Advocate General).

ence may also be made to the judgment in . . . *Van der Hulst's Zonen v. Produktschap voor Siergewassen* . . . . In this case the principle of Article 40 was declared applicable by analogy to a national intervention of the market . . . .<sup>57</sup>

Similarly, in one of the UK fisheries cases the Court stated:

In order to safeguard the rights and interests protected by Community law for other Member States and their nationals it was necessary to lay down and publish all the detailed rules for the implementation of the system chosen by the British authorities for the implementation of Regulation No. 1779/77 so as to enable all Member States and all persons concerned, in the same way as the Community authorities, to see whether the system put into operation fulfilled both the United Kingdom's obligations under the relevant regulation, Regulation No.1799/77, and the general requirements of non-discrimination and equality as regards the conditions of access to the fishing grounds enshrined in Article 2 of Regulation No. 101/76 and Article 7 of the EEC Treaty. This obligation to introduce implementing measures which are effective in law and with which those concerned may readily acquaint themselves is particularly necessary where sea fisheries are concerned, which must be planned and organized in advance; the requirement of legal clarity is indeed imperative in a sector in which any uncertainty may well lead to incidents and the application of particularly serious sanctions.<sup>58</sup>

This ruling apparently goes beyond the provisions of any of the Community acts referred to in the judgment, and suggests that Member States are bound, as a result of the principle of legal certainty, to ensure that the rights and duties of private parties under official measures are clearly stated in published documents. This is an extremely important principle.

In *Biologische Produkten*, the Court, in ruling on products alleged to be hazardous to public health, stated:

Whilst a Member State is free to require a product of the type in question, which has already received approval in another Member State, to undergo a fresh procedure of examination and approval, the authorities of the Member States

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57. *Benedetti v. Munari*, Case 52/76, 1977 E.C.R. 163, 188 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8406 (citation omitted).

58. *Commission v. U.K.*, Case 32/79, 1980 E.C.R. 2403, 2445, *Comm. Mkt. Rep. (CCH)* ¶ 8692.

are nevertheless required to assist in bringing about a relaxation of the controls existing in intra-Community trade. It follows that they are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal.

For the same reasons, a Member State operating an approvals procedure must ensure that no unnecessary control expenses are incurred if the practical effects of the control carried out in the Member State of origin satisfy the requirements of the protection of public health in the importing Member State.<sup>59</sup>

This passage could perhaps be viewed as merely elaborating on the Article 36 concept of "arbitrary discrimination." It is preferable, however, to regard it as indicating that the principle of proportionality applies to national measures in the Community law sphere. In another 1982 case the Court made it clear that Member States are bound by the principle of equal treatment when exercising discretion granted to national authorities under Community law.<sup>60</sup>

It is well established that Member States must not adopt overly restrictive measures for the purposes mentioned in Article 36 of the EEC Treaty.<sup>61</sup> This obligation can be regarded as resulting from applying the principle of proportionality to national measures or merely as a result of the rule that excep-

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59. *Frans-Nederlandse Maatschappij voor Biologische Producten*, Case 272/80, 1981 E.C.R. 3277, 3291, *Comm. Mkt. Rep. (CCH)* ¶ 8783; *Commission v. France*, Case 42/82R, 1982 E.C.R. 841, para. 24, *Comm. Mkt. Rep. (CCH)* ¶ 8931; *Commission v. U.K.*, Case 124/81, 1983 E.C.R. 203, para. 16, *Comm. Mkt. Rep. (CCH)* ¶ 8911; *Kramer*, Joined Cases 3, 4 & 5/76, 1976 E.C.R. 1279, 1328 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8372.

60. *Norddeutsches VieH-UND Fleischkontor v. Balm, Will, Trawako*, Joined Cases 213-215/81, 1982 E.C.R. 3583, para. 9, *Comm. Mkt. Rep. (CCH)* ¶ 8881.

61. *E.g.*, *Commission v. Germany*, Case 247/81, 1984 E.C.R. 1111, para. 7, *Comm. Mkt. Rep. (CCH)* ¶ 14,075; *Rivoira*, Case 179/78, 1979 E.C.R. 1147, 1157, *Comm. Mkt. Rep. (CCH)* ¶ 8565; *Commission v. U.K.*, Case 40/82, 1984 E.C.R. 283, *Comm. Mkt. Rep. (CCH)* ¶ 8911; *Commission v. U.K.*, Case 124/81, 1983 E.C.R. 203, 235-36, *Comm. Mkt. Rep. (CCH)* ¶ 8911; *Commission v. France*, Case 42/82, 1983 E.C.R. 1013, 1047, *Comm. Mkt. Rep. (CCH)* ¶ 8931; *Campus Oil v. Minister for Industry & Energy*, Case 72/83, 1984 E.C.R. 2727, paras. 37, 44, 47, *Comm. Mkt. Rep. (CCH)* ¶ 14,069; *De Peijper*, Case 104/75, 1976 E.C.R. 613, para. 32, *Comm. Mkt. Rep. (CCH)* ¶ 8353; *see also Luisi and Carbone*, Joined Cases 286/82 & 26/83, 1984 E.C.R. 377 (Article 106 of the EEC Treaty), *Comm. Mkt. Rep. (CCH)* ¶ 14,038.

tions to basic Community principles, such as free movement of goods, must be strictly construed. Lord Mackenzie Stuart, speaking extra-judicially, has stated that the Court applies the doctrine of legitimate expectations to Member States.<sup>62</sup>

The case law of the Court also suggests that, when acting in the Community sphere, Member States are bound by the principle of fundamental rights included in Community law.<sup>63</sup> If this position is correct, and this Article submits that it is in the Community law sphere, it confirms that Member States are bound by the "general principles of law," because there is no reason to distinguish between the "general principles of law" and fundamental rights principles in the narrower sense. Outside the sphere of Community law, only national principles of fundamental rights would apply.

Article 5 probably also binds national authorities to comply with certain principles of Community legislation primarily applicable to Community institutions, for example, the obligation to keep certain information confidential.<sup>64</sup> National measures inconsistent with these general principles would be invalid under national law, and would be a violation of the obligations of Member States under Community law. National courts would be obliged to apply the general principles rather than national law in case of conflict.

#### X. *DUTIES OF MEMBER STATES IN THE SPHERE OF EXTERNAL RELATIONS*

Article 234 obligates Member States to eliminate conflicts between the Community Treaties and treaties they have entered into before they became Member States. This a specific duty that results from Article 5, and it applies a fortiori to obligations entered into after they became Member States. Under Article 5, Member States have a duty to cease being parties to conventions that are inconsistent with, or obligate them to act inconsistently with, Community law.

Similarly, Article 5 and Article 228 require Member States

62. Lord Mackenzie Stuart, *supra* note 51, at 59.

63. *Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, para. 32 (referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms), Comm. Mkt. Rep. (CCH) ¶ 8322.

64. *See, e.g.*, EEC Treaty, *supra* note 1, art. 214.

not to do anything that would cause the Community to be in breach of its obligations under any Treaty to which it is a party.<sup>65</sup> Member States must refrain from any action that would make it more difficult for the Community to pursue an effective international negotiating position. A Member State could breach Article 5 by prejudging or compromising the result of internal discussions on the negotiating position of the Community, or by weakening its negotiating position in any fashion.<sup>66</sup> Additionally, Article 5 binds Member States to use every legal and political means at their disposal to ensure the participation of the Community in international conventions<sup>67</sup> when the Community must do so in the exercise of its exclusive competence, or when the Council has decided or is likely to decide that the Community should participate. Member States must enable the Community to exercise its powers and therefore should not, for example, agree to the terms of a draft convention or rules of procedure for negotiations unless they contain provisions enabling the Community to become a party unconditionally, or on conditions that are compatible with Community law.<sup>68</sup> Finally, Member States must also use every legal and political means to ensure that the Community can exercise its exclusive competence in international organizations.

#### XI. THE DUTY TO TAKE COLLECTIVE ACTION AND TO COOPERATE WITH OTHER MEMBER STATES

The Court has repeatedly found that Article 5 imposes a duty of solidarity on Member States.<sup>69</sup> This implies, among

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65. Kupferberg, Case 104/81, 1982 E.C.R. 3641, para. 13, Comm. Mkt. Rep. (CCH) ¶ 8877; EEC Treaty, *supra* note 1, art. 228.

66. Commission v. Ireland, Case 61/77R, 1977 E.C.R. 937, para. 28, Comm. Mkt. Rep. (CCH) ¶ 8473; Commission v. Ireland, 1978 E.C.R. 417, 468-69 (conclusions of Advocate General), Comm. Mkt. Rep. (CCH) ¶ —; Kramer, Joined Cases 3-5/76, 1976 E.C.R. 1279, paras. 44-45, Comm. Mkt. Rep. (CCH) ¶ 8372.

67. Kramer, 1976 E.C.R. at 1311, paras. 44-45; *see also* Allott, *Adherence to and Withdrawal from Mixed Agreements*, in MIXED AGREEMENTS 120 (D. O'Keeffe & H. Schermers eds. 1983).

68. Feenstra, *A Survey of the Mixed Agreements and their Participation Clauses*, in MIXED AGREEMENTS 207 (D. O'Keeffe & H. Schermers eds. 1983).

69. Commission v. France, Joined Cases 6 & 11/69, 1969 E.C.R. 523, paras. 16-17 (the Court held that "the exercise of reserved powers cannot . . . permit the unilateral adoption of measures prohibited by the Treaty"), Comm. Mkt. Rep. (CCH) ¶ 8105; *see also id.* at — (paras. 30, 41 of the judgment); Commission v. Council

other things, a duty not to act unilaterally, as is specifically confirmed by Article 116 of the EEC Treaty. The Court has also found a duty of cooperation between Member States (and not merely with the Community institutions), inherent in the Community system, which applies when new national measures that could create obstacles to intra-Community trade are adopted.<sup>70</sup>

## XII. *THE DUTY TO CONSULT THE COMMISSION*

Annex VI of the Hague Resolutions of 1976 provides for consultation of the Commission by Member States on all proposed national fishery conservation measures. Annex VI also provides that Member States should "seek the approval" of the Commission. The Court has ruled that this Annex "makes specific the duties of cooperation" already imposed on Member States by Article 5.<sup>71</sup> In any sphere in which "worthwhile results can only be obtained thanks to the cooperation of all the Member States," a Member State planning to adopt national measures, even measures intended to promote an objective already recognized and accepted in principle by the Community, may have an obligation to consult the Commission and seek its approval. Whether the Court would decide that such a duty existed or not in any particular situation would depend on the facts of the situation. Presumably the Court would be less likely to find a duty to consult if neither the Council nor the

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(AETR), Case 22/70, 1971 E.C.R. 263, paras. 77, 90, Comm. Mkt. Rep. (CCH) ¶ 8134; *Kramer*, Joined Cases 3-5/76, 1976 E.C.R. 1279, 1321, paras. 44-45 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8372; *France v. U.K.*, Case 141/78, 1979 E.C.R. 2923, para. 8, Comm. Mkt. Rep. (CCH) ¶ 8609; *Commission v. U.K.*, Case 32/79, 1980 E.C.R. 2403, para. 10, Comm. Mkt. Rep. (CCH) ¶ 8692.

For the limits of this rule, see *Schluter*, Case 9/73, 1973 E.C.R. 1135, para. 39, Comm. Mkt. Rep. (CCH) ¶ 8233; *Rewe*, Case 10/73, 1973 E.C.R. 1175, para. 26, Comm. Mkt. Rep. (CCH) ¶ 8234 (duty to cooperate in connection with rates of exchange does not give individuals rights).

70. *Commission v. U.K.*, Case 42/82, 1983 E.C.R. 1013, 1044, Comm. Mkt. Rep. (CCH) ¶ 14,017; *Frans-Nederlandse Maatschappij voor Biologische Producten B.V.*, Case 272/80, 1981 E.C.R. 3277, para. 14, Comm. Mkt. Rep. (CCH) ¶ 8783.

71. *France v. U.K.*, Case 141/78, 1979 E.C.R. 2923, para. 8, Comm. Mkt. Rep. (CCH) ¶ 8609. In *Commission v. Belgium*, Case 52/84, a judgment of 15 January 1986, the Court stated that Article 5 imposes a duty of a "genuine cooperation" on Member States and on the Commission to work together. 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,297, at —.

Commission had requested consultation, or if the proposed national measures would cause little inconvenience.

### XIII. *THE DUTY TO PROVIDE INFORMATION*

To enable the Commission to fulfill its responsibilities under Article 155 EEC of the Treaty and under Community legislation, Article 5 imposes a duty to provide information to the Commission. As clearly stated by the Court:

It should . . . be emphasized that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the Treaty and the measures adopted by the institutions pursuant thereto are applied. It is for those reasons that Article 12 of the directive in question, like other directives, imposes upon the Member States an obligation to provide information.<sup>72</sup>

Accordingly, if the Commission believes that it needs certain information to carry out its tasks, and requests that information from Member States, the Member States must either provide it or challenge the Commission's power under Article 173 of the EEC Treaty to make such a request. Article 21 of the Statute of the Court also obliges Member States, even when non-parties, to supply "all information which the Court considers necessary for the proceedings."<sup>73</sup>

### XIV. *COMPETENCE RULES AND CONFLICT RULES*

The Court has frequently stated that Member States no longer have the competence to adopt national measures that conflict with Community law or interfere with its operation. The duty not to interfere with the operation of Community law is derived from Article 5 as noted above. In case of conflict,

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72. *Commission v. Netherlands*, Case 97/81, 1982 E.C.R. 1819, para. 7, *Comm. Mkt. Rep. (CCH)* ¶ 8842; *France, Italy & U.K. v. Commission*, Joined Cases 188-190/80, 1982 E.C.R. 2545, 2593-94 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8852; *Commission v. Italy*, Case 147/77, 1978 E.C.R. 1307, 1314 (conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)* ¶ 8498; *Judgment of December 11, 1985, Commission v. Greece*, Case 192/84, 1985 E.C.R. at — (paras. 19-20 of the judgment).

73. Statute of the Court of Justice, art. 21. Presumably, this duty would have no direct effect on national courts.

Community law applies. However, this phrase conceals an ambiguity. If the rule is merely one of conflict, the use of the word competence adds nothing. A rule concerning competence rather than conflict would be different. It would say that Member States no longer have competence to legislate concerning a specific subject matter, whether or not the legislation conflicted with Community rules (or interfered with their operation). On several occasions the Court has used language that does not distinguish between conflict, interference, and transfer of competence. For example, two paragraphs in the *Bollmann* case touch on all three concepts:

Since Regulation No. 22/62, in conformity with the second paragraph of Article 189 of the Treaty, is directly applicable in all Member States, the latter, unless otherwise expressly provided, are precluded from taking steps, for the purposes of applying the regulation, which are intended to alter its scope or supplement its provisions. To the extent to which Member States have transferred legislative powers in tariff matters with the object of ensuring the satisfactory operation of a common market in agriculture they no longer have the powers to adopt legislative provisions in this field.

Therefore Article 14 of Regulation No. 22/62 is to be interpreted as meaning that Member States must take all steps necessary to eliminate obstacles which may arise under their own legislation to the application of the regulation as from 1 July 1962. This article does not therefore permit Member States to adopt any internal measures affecting the scope of the regulation itself.<sup>74</sup>

Analysis of competence and conflict rules is made more complicated because many of the relevant cases involved common rules for agricultural products. For example, in *Russo v. AIMA* the Advocate General used language based on competence rather than conflict:

According to a well-established line of cases, of which the judgment of the Court of January 23, 1975, in the case of *Galli* . . . is only a continuation, Member States can no longer intervene in sectors where there is a common organ-

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74. *Bollman*, Case 40/69, 1970 E.C.R. 69, paras. 4-5, Comm. Mkt. Rep. (CCH) ¶ 8098; *Krohn*, Case 74/69, 1970 E.C.R. 451, paras. 4-5, Comm. Mkt. Rep. (CCH) ¶ 8094; *Toffoli v. Regione Veneto*, Case 10/79, 1979 E.C.R. 3301, para. 12, Comm. Mkt. Rep. (CCH) ¶ 8615.

ization of the market by adopting unilateral provisions which are an unnecessary repetition of Community rules or even run counter to them . . . . The common organization of the market in durum wheat, which is provided for by Article 40(2) of the Treaty and was established by Regulation No 120/67, empowers the Community institutions entrusted with the task of running it to adopt the necessary measures to deal with price rises on the Italian market and we have seen that these powers have been exercised by them. These powers override any concurrent powers vested in the Member States.

If concurrent powers of the kind at issue in this case were permitted, that would be tantamount to retaining or reviving a national organization of the market, which by definition has been replaced by a common organization (Article 43(3) of the Treaty).<sup>75</sup>

In another agricultural case, *Jongeneel Kaas*, the Court, in a ruling specifically limited to the facts of the case, held that the common organization of the market in milk products did not exclude national measures on the quality of cheese.<sup>76</sup>

The well-known *AETR* judgment, which refers specifically to Article 5, is open to two interpretations, one concerned with conflict, the other with competence.<sup>77</sup> The relevant parts of the judgment are as follows:

Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty.

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75. *Russo v. A.I.M.A.*, Case 60/75, 1976 E.C.R. 45, 61, Comm. Mkt. Rep. (CCH) ¶ 8338 (citation omitted). In a narrower context, see *Cucchi v. Avez*, Case 77/76, 1977 E.C.R. 987, 1023, paras. 27-35 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8422; *Toffoli*, Case 10/79, 1979 E.C.R. 3301, 3320-22, para. 12 ("national legislation designed to promote and encourage . . . a uniform producer price for milk . . . is . . . outside the bounds of the powers given to Member States . . .") (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 8615. *But see* *Irish Creamery Milk Suppliers Ass'n v. Ireland*, Joined Cases 36 & 71/80, 1981 E.C.R. 735, 761-63 (Advocate General spoke only in terms of conflict and interference), Comm. Mkt. Rep. (CCH) ¶ 8747.

76. *Jongeneel Kaas*, Case 237/82, 1984 E.C.R. 483, 515-17, paras. 12-16 (conclusions of the Advocate General), Comm. Mkt. Rep. (CCH) ¶ 14,059.

77. *Commission v. Council (AETR)*, Case 22/70, 1971 E.C.R. 263, paras. 21, 22, 28 & 31, Comm. Mkt. Rep. (CCH) ¶ 8134.

If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.<sup>78</sup>

This passage suggests a decision based on conflict principles. The following passages, however, suggest a principle of competence:

Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No. 543/69 of the Council on the harmonization of certain social legislation relating to road transport (O.J. L 77/49) necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation . . . . These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law.<sup>79</sup>

It is perhaps wise to consider that this question cannot be answered in general terms, but only in the context of specific situations. It is clear that competence over a complete sphere may be transferred from Member States to the Community, as has been done with commercial policy<sup>80</sup> and fisheries.<sup>81</sup> It also seems clear that Community legislation could be intentionally comprehensive or exhaustive, so as to exclude the possibility of any national measure on the same subject matter. This intent would have to be a matter of interpretation in each case, as it was in *Jongeneel Kaas and Bochsbeutel*, in which the Court stated:

It is true that, once rules on the common organization of

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78. *Id.* at 275, paras. 21, 22.

79. *Id.* at 275-76, paras. 28-31.

80. Opinion of the Court given pursuant to Article 228 of the EEC Treaty of 11 November 1975, *Local Cost Standard*, Opinion 1/75, 1975 E.C.R. 1355, *Comm. Mkt. Rep.* (CCH) ¶ 8365.

81. *Commission v. U.K.*, Case 804/79, 1981 E.C.R. 1045, *Comm. Mkt. Rep.* (CCH) ¶ 8752.

the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise . . . . As regards the question of bottle shapes and the protection which they may possibly enjoy, which is of secondary importance in relation to the fundamental principles of a common organization of the market, it is not possible to deduce from the provisions regarding the protection of the "flute d'Alsace" that the Community legislation has exhausted its competence under Article 54, mentioned above. In this regard it may also be noted that negotiations have been conducted at the Community level for several years with the aim of introducing rules for protecting the Bocksbeutel bottle and that to that end several draft regulations have been prepared but without success. It thus appears that the Community legislation protecting the "flute d'Alsace" is not exclusive. Therefore Article 54(1) of Regulation No. 337/79 allows the rules adopted by the Member States to be maintained in this field provided that they do not contravene Article 30 et seq. of the EEC Treaty.<sup>82</sup>

It seems to follow that Member States no longer have competence over a given subject matter if either (1) competence has been transferred to the Community (whether or not it has been exhaustively exercised); or (2) the Community legislation is to be interpreted as exhaustive or comprehensive. If neither of these two conditions is satisfied, the only rules applicable are rules of conflict and non-interference. In other words, except in the two cases of exclusive Community competence, Member States no longer have competence to adopt measures conflicting with or interfering with the operation of Community rules, but remain competent to adopt other legislation concerning the same subject matter.

In some circumstances Member States may no longer have competence because any national measure would interfere with the operation of Community rules or policies. This possibility is suggested by the Ruling on Physical Protection of Nuclear Materials,<sup>83</sup> but there the exclusive powers of the Community were clear and did not need to be deduced from either

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82. In re Prantl, Case 16/83, 1984 E.C.R. 1299, paras. 13, 16, Comm. Mkt. Rep. (CCH) ¶ 14,089.

83. Physical Protection of Nuclear Materials, Ruling 1/78, 1978 E.C.R. 2151.

the comprehensiveness of Community legislation or the risk of conflict. Member States could only be completely preempted if the Community legislation dealt thoroughly with the subject matter, and the question whether the situation fell into the second or the third category described above would usually have little practical significance.

Competence rules, of course, always have direct effects on national courts. The conflicts rule has direct effects as long as the relevant rule of Community law has direct effects.

XV. *RECIPROCAL OBLIGATIONS UNDER ARTICLE 5:  
THE DUTIES OF MEMBER STATES TOWARDS  
ONE ANOTHER, AND THE DUTY OF  
COMMUNITY INSTITUTIONS TO  
COOPERATE WITH MEMBER STATES*

Article 2 of the Treaty states that various aspects of economic expansion are Community objectives. Article 5 obligates Member States to refrain from measures that could jeopardize the attainment of the Community's objectives. It may be significant, therefore, that the Court held a Member State had failed to fulfill its obligations when it, *inter alia*, "adversely affected the interests of another Member State" without sufficient reason and without the consultation called for by the relevant Council Resolution.<sup>84</sup> It would not be surprising if the Court deduced from Article 5, and from the principle of proportionality, that each Member State has a duty to take no action that could unnecessarily or unjustifiably cause harm to another Member State, because the prosperity of all Member States is a Community objective.

The Court has also recently held that the Commission has a reciprocal duty of cooperation with Member States.<sup>85</sup>

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84. *Commission v. U.K.*, Case 32/79, 1980 E.C.R. 2403, para. 58, *Comm. Mkt. Rep. (CCH)* ¶ 8692; *Commission v. France*, Case 42/82, 1983 E.C.R. 1013, para. 36, *Comm. Mkt. Rep. (CCH)* ¶ 8931.

85. In *Commission v. Belgium*, Case 52/84, 1986 E.C.R. —, *Comm. Mkt. Rep. (CCH)* ¶ 14,297, the Court stated that the Commission, as well as the Member States, had obligations of "genuine cooperation" under Article 5 to work together to resolve problems. In *Hurd v. Jones, Inspector of Taxes*, Case 44/84, 1986 E.C.R. —, *Comm. Mkt. Rep. (CCH)* ¶ 14,283, the Court stated: "As the Court held in particular in its judgment of 10 February 1983 . . . , *Luxembourg v. European Parliament* . . . that provision [Article 5] is the expression of the more general rule imposing on Member States and the Community Institutions mutual duties of genuine cooperation and

*CONCLUSION*

Two acknowledgements must be made: not all of the rules referred to above necessarily result only from Article 5, and this Article treats what may in some cases have been incidental comments as if they were fully considered and authoritative statements of principle. Certainly, the principles stated in this Article will be clarified, and made subject to conditions and exceptions, by future case law. Nevertheless, the case law of the Court now provides an impressive number of cases in which concrete obligations have been derived from Article 5. No doubt there will be more.

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assistance . . . if the implementation of a provision of the Treaties or of secondary Community law or the functioning of the Community Institution were impeded by a measure taken to implement . . . an agreement concluded between Member States outside the scope of the Treaties . . . the measure in question could be regarded as contrary to the obligations arising under the second paragraph of Article 5 of the EEC Treaty." *Id.* at — (paras. 38-39 of the judgment) (citation omitted); *see also id.* at — (paras. 44-45, 48, 49 of the judgment).