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ARTICLES

The Community and the Unity of the Common Market

Some Reflections on the Economic Constitution of the Community

By René Barents*

I. Introduction

In the present state of Community law it is justified to say that for the member States, the rules of the Common Market have a constitutional character.[1] But to what extent does the Common Market have the same significance for the Community? The purpose of this contribution is to explore some of the legal consequences which the Common Market may entail for the Community legislator itself. At first sight, this might seem a rather superfluous exercise. As the Common Market constitutes the foundation of the Community,[2] it is obvious that, as the member States, the Community institutions are also bound by the rules and principles relating to it. However, from various cases in which the Court of Justice has rendered a judgment, it appears that for the Community legislator the establishment and functioning of the Common Market have some particular consequences which merit a closer look at the significance of this concept for the economic constitution of the Community.[3]

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* Member of the Legal Services of the Commission of the EC. The views expressed only reflect the personal opinion of the author.

[1] *See, generally, M. Cappelletti / M. Seccombe / J. Weiler* (eds.), Integration through Law, Florence 1986. For a concise description of this development, *see A. Easson*, Legal approaches to European integration: the role of the Court and legislator in the completion of the European common market, in: Revue d'Intégration européenne (1989), 101-120.

[2] *See* the heading of title II of the Treaty.

[3] The economic constitution (*Wirtschaftsverfassung*) of a country or of the Community can be defined as all the basic legal rules and principles which govern public and private interventions in the economy, whether or not contained in the constitution, legislation or, with respect to the Community, in the Treaty. The concept of the *Wirtschaftsverfassung* is developed and studied in particular in the Federal Republic of Germany (FRG), *see inter alia P. Badura*, Wirtschaftsverfassung und Wirtschaftsverwaltung, Frankfurt 1971.

For a comparison between the *Wirtschaftsverfassung* of the FRG and of the Community, *see Volkmar Götz*, Verfassungsschranken interventionistischer Regulierung nach europäischem Gemeinschaftsrecht im Vergleich mit dem Grundgesetz, in: Juristenzeitung (1989),

II. The Unity of the Common Market

Although numerous provisions of the EEC-Treaty refer to the Common Market,[4] this concept is nowhere defined. As far as the member States and individuals are concerned, this absence is compensated by the detailed provisions of Articles 9-102 by which every aspect of public or private action which is incompatible with the establishment or functioning of the Common Market is subjected to rules.[5] With respect to the restrictions which the Common Market imposes on the Community itself, the situation is different. Specific criteria for Community measures can only be found in the provisions on competition. However, these provisions also relate to the behaviour of member States and individuals (Arts. 85-102). The various other powers attributed to the Community are featured by a discretionary redaction and references to the Common Market, if present, are only of a very general nature.[6] It is therefore useful to see if some of the definitions of the Common Market which have been developed in the case law and literature may shed more light on the consequences of the Common Market for the Community legislator.

1021-1024. In general the German literature tends towards the conclusion that the Community is build upon the model of a market economy, *i. e.* that the main way by which individual economic decisions on the market have to be co-ordinated is through the market mechanism, while interventions in the economy have to remain exceptional. *See Ernst-Joachim Mestmäcker*, Auf dem Wege zu einer Ordnungspolitik für Europa, in: Eine Ordnungspolitik für Europa, Festschrift *Hans von der Groeben* zu seinem 80. Geburtstag, Baden-Baden 1987, 9-49.

A different thesis, that the Treaty is neutral with respect to the relation between planning (intervention) and freedom (competition) is defended by *Pieter VerLoren van Themaat*, Die Aufgabenverteilung zwischen dem Gesetzgeber und dem Europäischen Gerichtshof bei der Gestaltung der Wirtschaftsverfassung der Europäischen Gemeinschaften, in: Festschrift *Hans von der Groeben*, *op. cit.*, 425-443. This is also defended by *J. Mertens de Wilmars*, De economische opvattingen in de rechtspraak van het Hof van Justitie van de Europese Gemeenschappen, in: Miscellanea *W. J. Ganshof van der Meersch*, Vol. 2, Brussels 1972, 258.

In view of the completion of the Internal Market and the drive towards an economic and monetary union these questions are not only theoretical, *see O. Schlecht*, Ein Modell macht Karriere, Soziale Marktwirtschaft ist der Dritte Weg, in: *Frankfurter Allgemeine*, 3 März 1990, 15.

[4] *See* Articles 2, 3 f., 8 (1) (7), 38 (2) (4), 44 (3), 67 (1), 75 (3), 85 (1), 86 (1), 88, 91, 92, 93, 99, 100, 101, 102, 105 (2), 108 (1), 109 (1), 115, 116, 117, 123, 128, 130, 223 (1), 224, 225, 226, 235.

[5] The Common Market comprises the "provisions ... relating to the elimination of barriers and of fair competition both of which are necessary for bringing about a single market" as the Court ruled in Case 32/65 *Italy* v. *Council and Commission*, 1966 ECR 389, 405.

[6] *See* Articles 43 (common agricultural policy), 75 (common transport policy), 100 and 100 A (harmonization), 113 (common commercial policy), 117-117 a (social policy), 130 A (regional policy), 130 f (technology), 130 s (environmental policy). As a consequence, under each of these policies the question may arise to what extent the Community may intervene in the market. With respect to Article 100 A on this question, see *Peter-Christian Müller-Graff*, Die Rechtsangleichung zur Verwirklichung des Binnenmarktes, in: Europarecht (1989), 107-151.

1. The Internal Market

It is possible to explain the Common Market in terms of what according to the Treaty had to be attained at the end of the transitional period and what has to be attained on the last day of 1992.[7] The objective of the Community "is the attainment of a [S]ingle [M]arket", as the Court already recognized in its judgment in Cases 56 and 58/64 *Grundig-Consten*.[8] Seen from this perspective, the Common Market requires the merging of national markets into a Single Market for the whole of the Community territory through the elimination of all obstacles by which these markets are separated from each other. In this somewhat geographical approach, the Common Market can be compared to a domestic market, which is usually accompanied with the complete and free movement of economic factors.

This assimilation has also found a clear recognition in the Court's case law. In Case 270/80 *Polydor* it was said that "the Treaty seeks to create a [S]ingle [M]arket reproducing as closely as possible the conditions of a domestic market".[9] Even more clear was the ruling in Case 15/81 *Schul*, according to which the "concept of a [C]ommon [M]arket ... involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a Single Market bringing about conditions as close as possible to those of a genuine internal market".[10] Through the Single European Act, this concept of the Internal Market has been incorporated in the Treaty in Art. 8 A.

For the member States and individuals, the consequences of the abolition of the national markets are clear. The elimination of "all obstacles" means that all measures which directly or indirectly, actually or potentially, affect inter-State trade, are prohibited, which well known formula the Court employed in Cases 56 and 58/64 *Grundig-Consten* with respect to private measures and in Case 8/74 *Dassonville* with respect to public measures.[11] However, the concept of the Internal Market does not shed much light on the possible normative consequences for the Community legislator of the unrestricted, freely circulating economic factors within the Community. As generally accepted, the Common Market relates to Arts. 9-102 of the Treaty and does not include the provisions on the common policies and the co-ordination of national policies.[12] Consequently, the

[7] The possible differences between the concepts of "common" and "internal" market (Articles 8 and 8 a) are not examined here. Given the text of Article 8 a ("without prejudice to the other provisions of this Treaty", the concept of the Internal Market can never be interpreted in the sense that the Treaty would no longer require the establishment of a Common Market, *see also R. Hayder*, Neue Wege der EG-Rechtsangleichung, in: Rabels Zeitschrift für ausländisches und Internationales Privatrecht 53 (1989), 638-698.

[8] Cases 56 and 58/64 *Gründig-Consten*, 1966 ECR 299, 341.

[9] Case 270/80, *Polydor* v. *Harlequin*, 1982 ECR 329, cons. 16.

[10] Case 15/81 *Schul* v. *Inspecteur der Douane*, 1982 ECR 1409, cons. 31.

[11] Case 8/74 *B. & G. Dassonville* v. *Ministère Public*, 1974 ECR 851.

[12] *See also Hayder* (note 7), 642.