



Brokering Europe

Euro-Lawyers and the Making of a
Transnational Polity

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Antoine Vauchez^{*}

Abstract: This Working Paper explores how the entanglement between Law and European polity-building was initially established. To this aim, it follows the short historical sequence in which EC institutions and policies set up by the Rome Treaties were first invented and formalized. It considers the early emergence of transnational microcosms of practitioners of European politics, judiciary, bureaucracy and market in Brussels, Strasbourg and Luxembourg. Often endowed with legal credentials and well-connected to legal scholarship and judiciaries, these first office holders shaped the foundational concepts and theories through which EC-specific institutions and policies soon established themselves. The paper therefore contends that lawyers and their *ad hoc* legal theories were integral to the transformation of the institutional and policy complex set up by the Paris and the Rome Treaties (three separate Communities, a complex set of institutions, a variety of policies) into *one* ‘constitutional settlement’ providing a unitary understanding of this emerging transnational institutional terrain.

^{*} Research Professor at the CNRS Centre européen de sociologie et science politique Université Paris 1-Sorbonne This is the introduction to the first part of my forthcoming book *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press) followed by the first chapter of that book. A French version is available: *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe*, Paris, Presses de Sciences Po, 2013. This paper was presented to the Golem lecture series at the London School of Economics on 24 January 2013. I am very grateful to Damian Chalmers and all the participants for their insightful comments and criticisms.

In the realm of State structure, jurists are contained and dominated by political authorities, for at the present time there no longer exists any government, in any State, that is in the hands of specialists in law. In all modern countries power belongs to the representatives of public opinion, and it is they who enact laws and dominate jurists. In international organizations, we see jurists occupying a place that they have lost in the internal [national] order. States want to abandon the smallest possible number of sovereign prerogatives when they agree to be bound by the terms of treaties instituting international organizations. They therefore ask jurists to prepare complex magical formulas that will allow the organizations to function while preserving as many privileges as possible for the State structures. [...] To implement these treaties, courts of justice, judicial committees and legal departments are required, and they have characteristically flourished in international organizations. [...] Their work is not finished, however, for they will subsequently incorporate themselves into the bodies of the monsters they have created.¹

INTRODUCTION

The Rome Treaties were signed on 25 March 1957. At the time, nothing led to think that a first transnational polity would grow up between the lines of this international agreement, attracting a multitude of political, administrative, economic, academic and other actors. The three treaties (ECSC, EEC, Euratom) and the supplementary Convention regarding certain institutions common to the European Communities represented a dense set of texts comprising respectively 100, 248, 225 and 8 articles. At the outset, this collection did not appear to offer a palette of immediately available opportunities, and even less a unique institutional *system* endowed with a specific rationale. The treaties were the product of a heterogeneous set of diverse diplomatic forces and ideological influences, and were not immediately intelligible as an ‘institutional terrain’ creating relationships between and giving meaning to all the groups, institutions and policies that they brought into existence.² Likewise, they did not in one fell swoop redraw the lines of the dominant beliefs and representations with regard to the spheres of political mediation, nor did they by themselves upset the organizational practices that determine the national echelon as the natural locus for the aggregation of interests.

There are several explanations for this. After decades of ritual commemoration of this ‘founding moment’, we have forgotten that the Rome Treaties were greeted with a certain degree of indifference. At the time, few professional groups, companies, labour and employer organizations, political parties or academic disciplines felt that the treaties’ dispositions were relevant to

¹ Paul Reuter, ‘Techniciens et politiques dans l’organisation internationale’, in *Politique et technique*, Presses Universitaires de France, 1958, pp. 181-196, p. 195.

² Neil Fligstein, Jason McNichol, ‘The Institutional Terrain of the European Union’, in Wayne Sandholtz, Alec Stone, dir., *European Integration and Supranational Governance*, Oxford, Oxford University Press, 1998, pp. 59-91.

them. It must be said that the road to the unification of Europe was already quite congested. The Europe embodied by the European Communities was just one of the forms of transnational political and economic cooperation that were springing up at the time, and that were debated in various forums simultaneously: the Greater Europe forged by the Organisation for European Economic Co-operation, the proposed free-trade zones that would give birth to the European Free Trade Association, the Atlantic Europe of NATO, international institutions such as the GATT or the IMF. As noted by Laurent Warlouzet, ‘the principal organization of European economic cooperation in which the Six were engaged in 1955 was not the ECSC but the OEEC, and the latter handled the development of trade for all economic sectors in Western Europe with considerable success’.³ In other words, the community institutional framework was just one of several European stages on which politicians and diplomats acted simultaneously. Of course, the importance of the Common Market is not to be under-estimated; but although the dismantling of customs and tariff barriers was organized in detail by the Rome Treaties, the prospect of ‘market merger’ leading to harmonization of national economic and professional regulations was a distant and frankly improbable outcome. The signatories who gathered at the Capitoline Hill certainly had ambitions for the political unification of Europe. But as the Rome Treaties were explicitly founded on the renunciation of the constitutional aims linked to the European Defence Community, from the start it was hard to mobilize the nebulous pan-European formation on this basis. Worse still, the adoption of the Treaties opened deep divisions within Europe, with a maximalist faction around the Italian socialist Altiero Spinelli who scathingly decried the ‘Common Market hoax’,⁴ and a pragmatic faction around Paul-Henri Spaak who saw in the treaties the seeds of a future political unity.⁵

It must be said that nothing in the treaties hinted at the premises of a new political centre. As the treaties pursued essentially economic goals, they ultimately left to one side the institutional system intended to organize the Common Market policies. Indeed, commentators pointed out that contrasting with the Treaty of Paris, Community policies were described with a wealth of details in these treaties, and henceforth preceded any mention of institutions, which were relegated to the fifth and final section of the text. The low level of political content in the new treaties is reflected in the expression ‘Common Market’ that was most often used to designate the Communities in ordinary parlance. The EEC treaty contains far fewer declarations of values and statements of principles than the ECSC treaty. After the Coal and Steel Community which the Paris treaty pledged would create

³ Laurent Warlouzet, *Le choix de la CEE par la France. Les débats économiques de Pierre Mendès-France à Charles de Gaulle (1955-1969)*, Paris, CHEFF, 2011.

⁴ Altiero Spinelli, ‘La beffa del Mercato comune. 24 sett. 1957’, *L’Europa non cade dal cielo*, Bologna, Il Mulino, 1960, pp. 282-87.

⁵ On the political rifts that divided the European Movement at the time the Rome Treaties were implemented, see Daniela Preda, ‘The movements for European unity (1958-1972)’, in Antonio Varsori, dir., *Inside the European Community: Actors and Policies in the European Integration 1957-1972*, Baden-Baden, Nomos, 2006, pp. 177-193.

‘the basis for a broader and deeper community among peoples long divided by bloody conflicts’, came a European Economic Community with the ‘task’ first and foremost of ‘establishing a common market [...] and to promote throughout the Community a harmonious development of economic activities’ (article 2). In practical terms the ‘basis’ of this community would be a customs union (article 9). But there is something even worse. The singular form (the Rome Treaty) which is commonly used today notwithstanding, three international instruments were signed in Rome on 25 March 1957 – the EEC and Euratom treaties, and a supplementary Convention. These documents mark the separation of the European Community into three distinct entities on the institutional level, the ECSC, Euratom and the EEC. It was clear to all that the institutional characteristics of the two new Communities differed profoundly from those of the ECSC. This ensemble was held together by just one thread, the supplementary Convention to the treaties, a spare document of eight articles that ensures no more than the *coordination* of the three Communities by setting up shared institutions, principally the Court of Justice and the Parliamentary Assembly, which as commentators pointed out would nevertheless have different competencies and act according to different procedures under the different treaties. As it turned out, the absence of a unified institutional system in no way impeded the formation of several sectoral communities that brought together European civil servants, business managers of European enterprises, and high-level civil servants and other experts representing the Member States.⁶ These groups sought to flesh out the skeleton of the various chapters (transport, fisheries, agriculture, social policy, etc.) that made up the new treaties. It remains, nonetheless, that at the outset no shared framework of understanding was immediately available that would enable members to read between the lines and develop an institutional dynamic, or going farther a political system. The Paris and Rome Treaties are primarily a set of cursorily defined institutions, an index of (possible) European public policies, and a list of objectives to attain.

By what ‘miracle’, then, have these diverse European constructions been able to take shape and grow up within a single ‘institutional terrain’ that constitutes a relatively stable order of practice and meaning? Through what processes have the various Community treaties come to constitute a system and coalesce around a unified, structured and finalized core? Readers will have already understood that this essay will not answer these questions by retrospectively assigning a single intrinsic logic to the Rome Treaties. On the contrary, this work will track the conflicts that arose as ‘meaning’ and ‘scope’ were given to these documents. To put it another way, it makes no sense to raise the issue of the objective traits of the Rome Treaties. This issue exists only insofar as it is brandished by advocates who seek to establish or consolidate a certain vision of Europe, in line with their trajectories and their social and professional positions. This question comes up

⁶ Neil Fligstein, Jason McNichol, ‘The Institutional Terrain of the European Union’, *art. cit.*

only to the extent that it is also inevitably the occasion for a debate comparing the legitimacy of claims by different groups of actors (and different types of competencies) who want to be active in institutional spaces for which they seek to lay the groundwork. In this regard the Rome Treaties are a terrain for the confrontation between different definitions of the European Community, its institutions, its operational dynamics and its modes of legitimization, and, in fine, between the competencies wished for by the people who live within its borders.⁷ On this stage are found, in addition to diplomats and political leaders, various sectoral communities and specialists wielding many sorts of expertise – economic, legal, and others – all of whom have an interest in formalizing the ‘logic’ (intergovernmental or supranational) underlying the treaties, and the political, economic and legal questions relevant to the functioning of the treaties. We designate here this competitive and collective process aimed at setting the organizational framework for the uses and meanings of the Rome Treaties as a process of institutionalization whereby the European Community has emerged as a tangible reality possessing its own distinct rationale of national and international political orders, and as a shared ‘institutional terrain’ for various policies (fisheries, Common Agricultural Policy, fiscal policy, etc.) that are implemented in its name.

Running counter to the historiography of European integration that has alternately preferred ‘economic’ or ‘politics-centred’ explanations⁸, we maintain that this symbolic and practical unification of the Communities has taken place on the legal terrain, forming a single political order endowed with its own rational basis. The legal authority was in no way predestined to act as the catalyst of a European Community that had a primarily economic scope. Indeed, the European Communities were set up in a context of marked depreciation of the law and of the authority of legal professions in national political, administrative and economic spheres, where other competencies and bodies of knowledge were deemed better suited to the multiple forms of ‘modernization’ of the European States and economies.⁹ There is no trace of a European ‘Constitutional Charter’ or of a ‘Supreme Court’ in the Rome Treaties, but rather a fairly mixed bag of references to law, judges and even to a hypothetical goal of ‘rapprochement of national bodies of legislation’, references that echo the conventional wording of other international organizations’ treaties. And yet it was on the groundwork of law that the ‘institutional programme’ was to be built, giving meaning and a foundation to the complex and heterogeneous structure of the Community treaties. This was not due to a purported eternal capacity of law to reconcile antagonisms, nor to claims

⁷ See the work of Antonin Cohen for a similar interpretation, in particular ‘Constitutionalism without Constitution. Transnational Elites between Political Mobilization and Legal Expertise (1940s-1960s)’, *Law and Social Inquiry*, vol. 23, n°1, 2007, pp. 109-135.

⁸ But see more recent developments of EU historiography on transnational networks: cf. Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen, eds., *The History of the European Union: Origins of a Trans- and Supranational Polity 1950-72*, London, Routledge, 2008.

⁹ See notably Daniel Gaxie, Laurent Godmer ‘Cultural Capital and Political Selection: Educational Backgrounds of Parliamentarians’, in Heinrich Best, Maurizio Cotta, dir., *Democratic Representation in Europe: Diversity, Change and Convergence*, Oxford, Oxford University Press, 2007, pp. 106-135.

extolling the depoliticizing virtues of law. The capacity of law to be the locus and operator of this symbolic and pragmatic unification of the European Community is found in the role of the European legal terrain as a crossroads, at the intersection of the different enterprises that coalesced to form a market, a Court, a bureaucracy, a European policy. A ‘weak field’ located at the periphery of the various European edifices, the European legal terrain in fact came to be one of the main agents for the consolidation of a Community *logic* specific to the Rome treaties.¹⁰ It is precisely this intermediate position, initially as a conditional and later a confirmed rallying point for a multitude of European enterprises, that shapes legal constructs as the geometric locus of the ‘institution of Europe’. In this space has emerged a ‘strong programme’ for the Rome Treaties, an expression chosen to designate the reading of the treaties as a ‘Constitution’ that lays down the basis of a unified and hierarchical legal order, consecrates the supremacy of Community law, and elevates the supranational pole formed by the Court and the Commission to the status of keystone of the European institution as a whole. This constitutional and judicially focused reading is schematically opposed to a ‘weak programme’ that holds the treaties to be one among many inter-State agreements, and sees the law as no more than an instrument serving diplomatic missions and the European Council. In other words, the ‘institution of Europe’ designates the contingent *historical* production of a stable relationship, under the auspices of a ‘strong programme’ between a set of actors and elite groups who participate, directly or indirectly, in the development of autonomous Community institutions and policies. The treaties’ ‘strong programme’ and the ‘weak field’ of law-based Europe: in this first section we will see how these two features form the groundwork for the growing autonomy of the Community political order.

The first chapter, presented hereafter, follows Community institutions and policies as they start up in Luxembourg, Strasbourg and Brussels, tracing the formation of in-house legal doctrines to serve the institutional strategies of various ‘entrepreneurs’ of the ‘European task’. The second chapter analyses the emergence, at the intersection of these European edifices, of a legal field whose ‘denizens’ act as ‘brokers’ for this transnational institutional sphere as it takes shape. This analysis of legal and judicial spaces as a ‘weak field’ in European policies will enable readers to follow the arguments in chapter three and see how a full-blown political metaphysics of Europe was built up, inscribing in one framework all the heterogeneous and sometimes conflicting groups, institutions and policies that make up the European entity.¹¹

¹⁰ On the notion of a weak field applied to the study of transnational spaces, see Stéphanie Mudge, Antoine Vauchez, ‘State-building on a Weak Field. Law, Economics and the Scholarly Production of Europe’, *American Journal of Sociology*, September 2012.

¹¹ Cf. Antoine Vauchez, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity*, *op. cit.* and *L’Union par le droit*, *op. cit.*

CHAPTER 1. THREE MARKETS, ONE COMMUNITY. STRATEGIES TO INSTITUTIONALIZE THE ROME TREATIES

The four institutions that were officially constituted on 1 January 1958 to carry out the creation of the Common Market – ‘an Assembly, a Council, a Commission, a Court of Justice’ as succinctly announced in article 4 of the EEC Treaty – were born in a somewhat hazy context. The precedent furnished by the ECSC provided a marker for exploring this terra incognita, but this parallel was not always adequate. The ‘supranationalism’ that was meant to be the specific hallmark of the institutional system created under the Paris Treaty was poorly regarded since the failure of the European Defence Community, so much so that it was close to being ‘subject to a ban’ at the beginning of the 1960s.¹² This notion did not seem readily transposable to the Treaty of Rome under which the EEC Commission had no federal vocation, and not even the executive capacity held by the ECSC High Authority. In the absence of trail markers, the most seasoned constitutionalists and political scientists were disturbed by the institutions created under the Rome Treaties. The words used to describe them were certainly familiar, but the objects they referred to were only distantly related to the political, administrative, economic and judicial forms in national spheres habitually designated by this same terminology. The Court of Justice of the European Communities, for instance, appeared to be merely an ersatz of a supreme jurisdiction, and it was a far stretch from the European Parliamentary Assembly to the genuinely transnational parliamentary representation that some observers hoped to see emerge in Strasbourg. Even the Common Market, which this whole institutional apparatus was developed to serve, looked to be a figment of the imagination as long as the economies of the six Member States remained almost exclusively under national regulatory frameworks. The labels attributed to the new institutions that were set up in Brussels, Luxembourg and Strasbourg looked more like ‘pseudonyms’ than titles corresponding to established practice.¹³ The awkwardness was palpable: commentators felt obliged to have recourse to multiple rewordings (‘quasi-legislative’, ‘quasi-Constitution’, etc.), quotation marks and neologisms in order to qualify the organs whose effective functions ‘are not to be found where the analogy with the State model would lead one to expect them’.¹⁴ For those accustomed to the classic architecture of national constitutional edifices, reading the treaties caused a perpetual ‘mental refocusing’.¹⁵ Let’s take a look: here

¹² Pierre Pescatore, ‘Le traité CECA. Origine et modèle de l’unification européenne’, in CECA (1952-2002), Luxembourg, Office des publications officielles des Communautés européennes, 2002, pp. 181-188, p. 184. For a general perspective see Jule Bailleux, ‘Comment l’Europe vint au droit’, *Revue française de science politique*, vol. 60, n°2, pp. 295-318.

¹³ Fernand Dehousse, *L’avenir institutionnel des Communautés européennes*, Centre européen universitaire, Nancy, 1967, p. 9.

¹⁴ Fritz Munch, ‘Prolégomènes à une théorie constitutionnelle des Communautés européennes’, *Rivista di diritto europeo*, 1961, p. 127-137, p. 130.

¹⁵ Pierre Pescatore, ‘Les objectifs de la Communauté européenne comme principes d’interprétation dans la jurisprudence de la Cour de justice’, in *Miscellanea Ganshof van der Meersch*, Brussels, Bruylant, 1979, pp. 325-363, p. 331.

the executive has two branches, the legislative function eludes the Parliament, no organ has an exclusive function, and no function is exercised by just one organ, etc. The baroque features of these institutional arrangements could make the specialists almost dizzy. Could one really talk of ‘political oversight’ in the case of an essentially consultative European Parliamentary Assembly? Could an institution lacking any legislative function be called a parliament? Further still, how could the Commission truly be an ‘executive branch’ of the Communities when at the same time it shared a ‘legislative function’ with the Council? What sort of Court could have the attributions of an administrative jurisdiction to oversee the legality of Community acts, those of a Constitutional Court to ensure the balance of power between institutions, and those of an arbitrage tribunal to resolve conflicts arising from the creation of the Common Market? The most sceptical critics denounced the optical illusion of political institutions that scarcely masked the forceful return of governments in the Community decision process; the most indulgent critics saw a confusion of roles characteristic of all international organizations. All, however, pointed out the dearth of traditional landmarks (separation of powers, specialized functions, parliamentary system, etc.) and the absence of criteria shared by the countries for making judgements, thus underscoring the many uncertainties that weighed on this phase of the implementation of Community institutions.¹⁶

Our subject here is this newborn Europe emerging from the Rome Treaties, this short historical sequence where these institutions can be seen as they take shape and discourse, trying out all sorts of pathways and identities. It is true that at first not many political or social actors took an interest in the Rome Treaties, preferring the national echelon as the most suitable for achieving their objectives. Nonetheless the first microcosms of Community political, administrative, legal and market practitioners began to form at the heart of the new institutions, or in their immediate periphery, with the intention of giving supranational flesh and bones to the words and fiction of the treaties. These entrepreneurs of Europe, the first ‘tenants’ of these Community institutions, sought – for various reasons – to protect the institutions from the pressures of inter-State manoeuvres. Far from representing a single group or project (neo-liberal,¹⁷ federalist or otherwise), these enterprises took on features as varied as the national power structures from which they derived and the transnational networks (political, economic, legal, etc.) to which they were connected. They were members of parliament, entrepreneurs, ambassadors, commissioners, high-level civil servants from executive branches, often practitioners of legal professions, but also law professors, judges and

¹⁶ Piers Ludlow, ‘Value, Flexibility and Openness. The Treaty of Rome’s Success in Historical Perspective’, in Julio Baquero Cruz, Carlos Closa Montera, eds., *European Integration in Historical Perspective from Rome to Berlin (1957-2007)*, Peter Lang, 2009, pp. 17-39.

¹⁷ While there were indeed, for example, transnational neo-liberal networks that actively participated in drafting and implementing the Rome Treaties, the institution of Europe was a much more complex and protean process. See François Denord, Antoine Schwartz, *L’Europe sociale n’aura pas lieu*, éd. Raisons d’agir, 2009.

auditors of the Court, or business lawyers. Their professional and institutional projects were relatively independent of each other, and sometimes even contradictory, reflecting the diversity of the social spaces in which they unfolded. From an administrative point of view, the aim was to cast the foundations of a genuinely supranational bureaucracy that would be a structure, legal and judicial tools in hand, ensuring respect for ‘the broad Community interest’, rather than an international secretariat charged with the technical aspects of setting up common markets. In a more political outlook the objective was to establish the basis of a European parliamentary system by affirming the authentically parliamentary nature of the European Assembly. From a judicial perspective it was the truly ‘jurisdictional’ character of the Court of Justice that was at stake, a court that many saw as no more than an instance for international arbitration. Economically speaking the issue was to breathe life into the ambitions for a common market, with Brussels as the guarantor and regulator of open trade and free competition.

As we follow the mechanisms of the making of institutions, we see that this first generation of entrepreneurs of Europe did not have to imagine, as did the post-war pan-European advocates, the possible outlines or ideals of a European project, embodied in a corresponding number of draft Constitutions, assembly resolutions and other declarations of intent, but henceforth had to bring institutions and policies into existence and make them work properly. In this respect, everything remained to be invented: as set forth in the treaties the roles, the scope and the rank of the various institutions were relatively vague. From the start there was an agonistic dimension, due to the lack of precision in the Rome Treaties regarding the rules of conduct for ‘policies’ that were essentially stated in terms of objectives, and the relatively indeterminate operational boundaries of each of the ‘institutions’, and each institutional group had to mark its status and define its missions. In the absence of a unanimously recognized scope of action and lacking leverage to act within the Member States themselves, the success of these various enterprises would play out to a large extent on the only terrain that gave them legitimacy when confronting diplomats and ministers – the terrain of the treaties themselves. The Rome Treaties thus became the central object of value for a group of judges, commissioners, members of parliament, entrepreneurs and European business lawyers for whom this shared paper foundation anchored and gave support to their claims of competency. Thus these initial entrepreneurs of the community of Europe were led to produce a set of house doctrines that interpreted the European treaties as giving a degree of autonomy, even if relative, to the various Community sites where they exercised their activity. The institutional strategies that accompanied the creation of the European Economic Communities from 1 January 1958 onwards involve the construction of a series of narratives and legal rationalizations surrounding the treaties. In this context the law was not an esoteric discourse produced by actors concerned exclusively with the legal stakes, but constituted a fundamental vector for institutional undertakings that were highly diverse in terms of their ends and the values they conveyed. This study follows the deployment of this work both within and at the margins of the

Commission, the Parliamentary Assembly, the Court of Justice and Common Market.

-1- CLAIMING OBJECTIVITY. THE EUROPEAN COMMISSION AND THE TREATIES' POLICE

If there is one opinion shared by the first commentators on the Rome Treaties, it is the view that these new texts sacrificed to a large extent the driving role of the Community Executives that was cherished by Jean Monnet. Citing the failure of the ECSC, the French delegation to the negotiations for the Rome Treaties was careful to avoid constructing two new Executives – the EEC and Euratom – according to the supranational model of a High Authority endowed with significant decision-making power. Accordingly, the Community administrative services that on 1 January 1958 took up their quarters at the intersection of the Avenue de la Joyeuse Entrée and the Rue de la Loi in Brussels had a low profile. ‘Executive’ without executive powers, ‘administration’ without enforcement powers, the president of the first EEC Commission, Walter Hallstein, had this laconic comment: ‘it is not the power of decision that essentially characterizes the role of the Commission in the institutional system of the treaty [...]’.¹⁸ But this was not all. On top of the institutional weakness came a fragmented European bureaucracy that was henceforth three-headed. In practice three ‘Community Executives’ – the High Authority, the EEC Commission and the Euratom Commission – now coexisted. Furthermore, they were geographically dispersed, the High Authority remaining in Luxembourg while the other two set up in Brussels, the provisional capital of the new Communities. Without shared administrative services (with a few exceptions) or a unified status for civil servants (the first dating from 1968), there were very few institutional ties that could ensure coordination during the first ten years following the adoption of the Rome Treaties. Adding to the confusion, up to the merger of the Executives on 1 July 1967 a muted rivalry smouldered between the ECSC High Authority in Luxembourg and the emerging Brussels pole of the EEC Commission and Euratom, each seat claiming to embody the true Community ambition.¹⁹ While the formation of a transnational bureaucracy thus seemed greatly jeopardized, the political path towards a ‘European government’ did not appear to be any more practicable. Following a diplomatic line already taken during the negotiations for the Rome Treaties, the French government refused to see these Executives as anything other than ‘international secretariats’ in charge simply of coordination. This was strikingly confirmed by the French Fouchet projects of 1961-62 that

¹⁸ Walter Hallstein, *Débats de l'Assemblée parlementaire commune du 23 juin 1958*, 1959, p. 159.

¹⁹ See Daniela Preda, ‘Hallstein e l'amministrazione pubblica europea’, in *Storia Amministrazione Costituzione, Annale dell'Istituto per la Scienza dell'Amministrazione Pubblica*, n°8, 2000, pp. 79-104.

envisaged the creation of a fourth community, which for the government led by Michel Debré would be a fully ‘political’ one.²⁰

Impossible administration, improbable government, the Community Executives entered into the decision-making process on the basis of an institutional identity founded on a claim of ‘objectivity’, in light of the positions deemed to be motivated by ‘politicians’ politics’ or even narrow ‘nationalist’ considerations of the Member States’ representatives.²¹ Here we can track the invention of this novel institutional pathway, seen in the politico-administrative enterprise that grew out of the encounter between an EEC Commission president who was an ardent advocate of a constitutional reading of the treaties, and a legal department in charge of a legal oversight activity that substituted for the administrative oversight that the Community institutions did not possess. Together they founded the Executives’ mission of objectivity – watching over the Communities’ general interest – on the fictional grounds of a ‘Constitution-treaty’, a unified and objective standard, independent of the States. It was now their task to enforce this standard. Playing on the fuzzy internal boundaries between an ‘administration’ (the directors general) and a ‘political’ entity, with singularly similar missions and competency, and also socio-economic profiles,²² these Europe entrepreneurs devised the equation of a Commission that affirmed its leadership on the playing field of the law.

a) The Constitutional Doctrine of Herr Professor Hallstein

This propensity to define the emerging Community administration in terms of objectivity and law is undoubtedly related to the profile of the first commissioners and top civil servants of the three Community Executives (ECSC, Euratom, EEC). In both categories the appointees were in most cases law graduates, and indeed often directly experienced in legal professions.²³ This preference for the law was emblematically personified by the first president of the EEC Commission, Herr Professor Hallstein, a zealous theoretician. Indeed, the former law professor and vice-chancellor of the University of Frankfurt, who purportedly made a point of keeping the title of professor in all circumstances, saw the president’s role as an intellectual magisterium, to the point that the German press often reproached him

²⁰ On this topic see Marie-Thérèse Bitsch, ‘Les institutions communautaires face au projet d’union politique (1958-62)’, in *La construction européenne. Enjeux politiques et choix institutionnels*, Peter Lang, 2007, pp. 125-143, p. 126.

²¹ Pierre Pescatore, *Le droit de l’intégration. Emergence d’un phénomène nouveau dans les relations internationales selon l’expérience des Communautés européennes*, Leiden, Sijthoof, 1974, p. 80.

²² Didier Georgakakis, Marine de Lassale, ‘Genèse et structure d’un capital institutionnel européen. Les très hauts fonctionnaires de la Commission européenne’, *Actes de la recherche en sciences sociales*, n°166-167, 2007, pp. 38-53.

²³ During the period 1952-1967 50% of the commissioners held law degrees, and 22.5% were in legal professions. See Andrew MacMullen, ‘European Commissioners: National Routes to a European Elite’, in Neil Nugent, ed., *At the Heart of the Union. Studies of the European Commission*, Macmillan, 2000, pp. 28-50.

for his ‘professorial attitude’ and ‘juridical turn of mind’.²⁴ In the course of his travels he gave many conferences at American and European universities: he was present, among others, at the congress of the International Law Association in Hamburg in August 1960, at Harvard University in 1962, at Padua University in March 1962, at the *Max-Planck Institute* in July 1963, and the *Académie des sciences morales et politiques* in Paris in 1963, at the Royal Institute on International Affairs in London in December 1964, at the British Institute of International and Comparative Law in March 1965, at the *Institut d’études juridiques européennes* at the University of Liège in June 1965, etc.. It is true that Walter Hallstein had a number of academic titles to his credit. Before his surprise nomination as head of the German delegation charged with negotiating the Treaty of Paris in 1950, he had followed an exclusively academic career, from the University of Berlin where he studied international private law, to the University of Frankfurt from 1941 onwards, with stints at the University of Rostock where he taught from 1931 to 1941 and at Georgetown University (Washington D.C.) in 1948-1949.²⁵ Far from severing his ties with German law faculties, Hallstein’s entry into politics as the head of the Foreign Affairs Secretariat of federal Germany (1952-1957) led him choose the law, and particularly German legal doctrine, as the preferred terrain for his political undertakings. His former assistant has underscored Hallstein’s passionate commitment to the idea of the Law: ‘if the jurist Hallstein speaks of the Community as a creation of the law and of legality, it is because he sees the law not only as a means to realize the ideal of the Law, but also as a tool for harmonizing the law for all the people living in the European states’.²⁶ Even more explicitly, over his years at the *Auswärtiges Amt*, Hallstein helped define the ‘legal doctrine’ of German diplomacy, exalting the constitutionality of the European commitments made by the Federal Republic of Germany that had been born a few months earlier under the sign of a limited sovereignty.

²⁴ Wilhelm Grewe, ‘The Lawyer as Diplomat’, *Society of International Law Proceedings*, vol. 54, 1960, pp. 232-236, p. 233.

²⁵ On Walter Hallstein, see the contributions compiled in Wilfried Loth, William Wallace, Wolfgang Wessels, eds., *Walter Hallstein. The Forgotten European?*, Macmillan Press, 1998. See also Corrado Malandrino, ‘Tut etwas Tapferes’: *Compi un atto di coraggio: l’Europa federale di Walter Hallstein (1948-1982)*, Bologna, Il Mulino, 2005.

²⁶ Ernst Steindorff, ‘Der Beitrag Walter Hallstein zur europäischen integration’, in Ernst Steindorff (ed.), *Probleme des Europäischen Recht. Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, Klostermann, Frankfurt am Main, 1966, p. 3.

The *Auswärtiges Amt* and its Jurist-diplomats and Constitutional Doctrine

Regarding constitutional doctrine, Hallstein could call upon a handful of jurist-diplomats who were active both in the European talks that marked the 1950s and in the main German academic journals devoted to law. Among these were Carl Friedrich Ophüls, professor of international public law who had been legal advisor to the German delegation to the ECSC negotiations, then to the European Defence Community, and who headed the 'Europe' department at the Foreign Affairs Secretariat throughout the 1950s before he became the first ambassador of the FRG to the Communities in 1958, thus accompanying Walter Hallstein to Brussels; Karl Carstens, who joined the Foreign Affairs Secretariat in 1954 before becoming a law professor in 1960, then Secretary of State for Foreign Affairs between 1960 and 1964, thereby pursuing a long political and academic career that led him to the presidency of the Federal Republic of Germany (1979-1984); Wilhelm Grewe, also a professor of international law, legal advisor to Konrad Adenauer, subsequently head of legal affairs, and later political affairs at the *Auswärtiges Amt* during the 1950s, and finally the German ambassador to Washington in 1962, and then to NATO. Others members of this group were former colleagues and assistants at the Frankfurt law faculty, including Ernst Steindorff who had been Hallstein's assistant at the University of Frankfurt and his intern in 1950-51 during the Paris Treaty negotiations, and who was at the time a professor and also legal advisor to the European Commission and first president of the German chapter of the International Federation for European Law (Fédération Internationale pour le Droit Européen, or FIDE); international law professor Hermann Möslers, his colleague at the University of Frankfurt who headed the legal department of the *Auswärtiges Amt* from 1949 to 1954 before being appointed by the German government to the European Court of Human Rights in 1959, and then to the International Court of Justice in 1976.²⁷

Collectively they upheld the 'constitutional' character – i.e. ranking above federal law and directly applicable – of the entire set of European commitments contracted during the 1950s by the German Federal Republic. This was already the case at the signing of the European Convention on Human Rights in 1950 when the German delegation, led by Walter Hallstein, invoked the 'constitutional' character of the convention.²⁸ It was again the case in the days following the signature of the ECSC treaty, when these jurist-diplomats took to

²⁷ On this group and its academic activism, see Billy Davies, *Resisting the European Court of Justice. Germany's Confrontation with European Law (1949-1979)*, Cambridge, Cambridge University Press, 2012.

²⁸ On this point see Stéphanie Hennette-Vauchez, *Divided in Diversity. National Legal Scholarship(s) and the European Convention of Human Rights*, Working Paper, Robert Schuman Centre - European University Institute, 2009.

the columns of the main German journals of law to support the idea that a 'European structure of a constitutional nature' had been born – running counter to dominant German legal doctrine.²⁹ Dispersed after the signing of the Rome Treaties – they became professors, president of the EEC Commission, ambassador to the European Communities, director of political affairs for the German foreign affairs ministry, etc. – this small group of jurist-diplomats maintained close ties with president Hallstein, as is attested by their contributions to the *Festschrift* that honoured Hallstein in 1966 on the occasion of his 65th birthday.³⁰ In the various positions that they occupied at the turn of the decade 1950-1960 they continued to espouse in chorus the constitutionalist interpretation already applied to earlier European treaties, positing the Treaties of Rome as a veritable Constitution, i.e. an objective and autonomous legal structure from which there could be no derogation.

In his new functions at the head of the EEC Commission Herr Professor Dr. Juri. Walter Hallstein reiterated the constitutional doctrine forged by German diplomats during the 1950s, extolling this time not the imperious nature of the international commitments of the FRG that aspired to full membership in the 'international community', but rather the figure of a Commission invested with a mission of guardian of the objective constitutional order created by the treaties. It is true that in reading the speeches made by the president of the Commission we find a constant preoccupation with proving the political character of the Rome Treaties: '[...] the existing European Communities are called "economic". But the work of the European Communities is not economic. It does not integrate the decisions of producers, employers and workers, farmers, bankers and shopkeepers. It is the economic policies, the social policies of the States that are integrated and merged [...]. Our Communities are thus themselves already the beginnings of a real and full "political Union".'³¹ But this 'political union in the area of the economy'³² is grounded in an objective and incontrovertible source, i.e. the constitutional character of the Rome Treaties that confer upon it the status of 'Community in law', the prime foundation of its legitimacy: 'the Communities resemble a constitutional construction much more than a classic sort of

²⁹ Carl Friedrich Ophüls, 'Juristische Grundgedanken des Schumanplans', *Neue Juristische Wochenschrift*, 15 April 1951, p. 288-292; Hermann Möslers, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl', *Zeitschrift für Ausländisches Recht und Völkerrecht*, vol. 14, 1951, pp. 3-22; Ernst Steindorff, 'Schuman-Plan und Europäischer Bundesstaat', *Politisches Archiv*, 20 May 1951, pp. 3955-3986.

³⁰ Ernst Steindorff, ed., *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, Vittorio Klostermann, Frankfurt am Main, 1966.

³¹ Walter Hallstein, 'L'unité de l'action européenne (discours du 15 Octobre 1964 aux VII^{ème} états généraux des communes d'Europe)', Centre de recherches européennes, Lausanne, 1965, pp. 10-11.

³² Walter Hallstein, 'The European Economic Community', *Political Science Quarterly*, vol. 78, n°2, June 1963, p. 165.

international organization, because their objectives are to be fulfilled by institutions endowed with sovereign rights'.³³ The same is true for the Community Executives themselves, as the 'Hallstein doctrine' links the political authority of the Commission to the affirmation of their legal functions. An architect of a 'German-style' bureaucracy – permanent, hierarchical and specialized³⁴ – but also an advocate of the political functions of the Commission, Hallstein thus saw the latter as the guardian and at the same time the spokesperson for this objective constitutional order that in his view was ordained by the Rome Treaties.

b) *A Ministry of Law*

This 'Hallstein doctrine' was strongly relayed in the ambitions displayed by the legal department under the aegis of its then-director Michel Gaudet, a department that was in a pivotal position in the heart of the newborn Community administration³⁵. Nothing predisposed this jurist steeped in State law to embrace the supranational doctrine of the German law professor. Son of a lawyer at the *Conseil d'Etat*, a graduate of the Paris Law Faculty and the *Ecole libre des sciences politiques*, appointed to the French Council of State in 1942, Gaudet followed in the footsteps of his colleagues at the *Conseil d'Etat*, alternating positions in French administrative court as *auditeur*, and the *maître de requêtes*, and positions in government service as legal advisor to the French protectorate in Morocco (1945) and as cabinet secretary to the Secretary of State for the Economy and Finances Léon Tinguay du Pouët (1946-1947). This background explains Gaudet's appointment as head of the legal department of the High Authority, upon the recommendation of Maurice Lagrange, his colleague at the *Conseil d'Etat* and a collaborator of Jean Monnet. However, despite his identity of '*serviteur d'Etat*', Michel Gaudet progressively gained influence in Luxembourg as a guardian and promoter of the 'supranational spirit' of the Communities, in the course of a 'conversion' process that has been efficiently described by Julie Bailleux³⁶. As she describes, Michel Gaudet was immediately upon his arrival in Luxemburg part of a small circle of very close collaborators of Jean Monnet, thereby acquiring a role lawyers rarely play in international organizations. In addition, after the departure of his godfather in EC institutions (June 1955) and of many of his closest

³³Walter Hallstein, 'Zu den Gründlanden und Verfassungsprinzipien der Europäischen Gemeinschaften', in *Zur Integration Europas, Festschrift für Carl Friedrich Ophüls*, op. cit., p. 5.

³⁴ See Daniela Preda, 'Hallstein e l'amministrazione pubblica europea', art. cit.

³⁵ In the framework of my *Habilitation à diriger des recherches* defended at the Sorbonne (Political science Department, March 2010), I have started the exploration of the Legal service of the Community Executives, whose role had been so far neglected to the benefit of studies on the ECJ. Its study has now gained momentum and an important new works have been produced recently that are only partly accounted for in this section: see in particular the recent Ph.D defended in June 2012 by Julie Bailleux, *Penser l'Europe par le droit. L'invention du droit communautaire en France (1945-1990)*, Université Paris 1-Sorbonne, 595 p., June 2012. Also, Morten Rasmussen has recently suggested a history of the genesis of the High Authority's Legal department in 'Establishing a Constitutional Practice of European Law. The History of the Legal Service of the European Executive (1952-1965)', *Contemporary European History*, 21 (3), 2012, pp. 375-397.

³⁶ Julie Bailleux, *Penser l'Europe par le droit*, op. cit.

collaborators (François Duchêne, Max Kohnstamm or Pierre Uri), Michel Gaudet remains one the last, if not the last, representative of Monnet's legacy within ECSC institutions, all the more than he has kept a very strong relationship with Jean Monnet over this years. His designation by the new president of the High Authority, René Mayer, as the institution's representative in the group assigned to write the Rome Treaties, marks another step in his conversion into a staunch promoter of pan-European ideals.³⁷ Undoubtedly helped by the initial organization of the High Authority as an 'task administration' (*administration de mission*) where the members of the ECSC Executive and high-level civil servants worked closely together in 'working groups',³⁸ under Michel Gaudet the legal department acquired a linchpin position.³⁹

There is much evidence, however, that this position was threatened when the two new European Communities were to be set up. At that time still director of the legal department at the High Authority, Michel Gaudet immediately saw the dangers inherent in a three-way partition of the department in the wake of the splitting up of the Communities. In the weeks following the entry into force of the Rome Treaties on 1 January 1958 Gaudet addressed many notes to the colleges of the three Executives, even as the organizational charts of the new Euratom and EEC Commissions were being drawn up, hastily but sheltered from government influence.⁴⁰ He directed the *Collège's* attention to the risks of 'sterile divergence' and 'useless and prejudicial opposition' in the interpretation of the three treaties that would arise from the creation of three separate legal units with distinct interests and potentially competing briefs.⁴¹ In any case, there could be no doubt that such a division would only weaken the Community legal specialists, whose authority 'in-house' rested precisely on their capacity to invoke the unequivocal and objective legal character of the treaties. Gaudet's *Note sur l'organisation d'un service juridique commun aux trois Communautés* submitted in late January 1958 constitutes a tightly formulated argument in favour of the creation of a 'single corps of jurists' endowed externally with the right to exclusively represent the three Executives before the Court of Justice, and internally with complete control over the interpretation of the law when queried by the general directorates.⁴² A few months later in October 1958, in an in-house memo Gaudet further insisted

³⁷ Michel Gaudet, interview with Gérard Bossuat, INT 603 of 14th April 1988, *Voices of Europe Collection*, *Archives historiques des Communautés européennes* (available online).

³⁸ On this initial structuring see Francesco Bonini, 'Studi, materiali e prospettive per una storia delle amministrazioni comunitarie', in *Storia Amministrazione Costituzione, Annale dell'Istituto per la Scienza dell'Amministrazione Pubblica*, n°8, 2000, pp. 57-67, p. 57.

³⁹ Dirk Spierenburg, Raymond Poidevin, *Histoire de la Haute autorité de la CEEA. Une expérience supranationale*, Brussels, Bruylant, 1993.

⁴⁰ See Katia Seidel, *The Process of Politics in Europe. The Rise of European Elites and Supranational Institutions*, Macmillan, 2010.

⁴¹ Service juridique de la Haute Autorité, 'Concours susceptible d'être apporté aux nouvelles Communautés européennes', Texte n°2, 4 February 1958, p. 3, in CEAB1/956 HAEU.

⁴² Michel Gaudet, Legal department of the High Authority, "Note sur l'organisation d'un service juridique commun aux trois Communautés", 26 January 1958, 12 p., p. 1 in CEAB1/956 HAEU.

that ‘all documents’ submitted to one of the three colleges should first go through the legal department, in the name of the necessary consistency in interpreting the treaties.⁴³ This project was ambitious in scope, but it had three vital supporters among the EEC commissioners: Walter Hallstein, Hans van der Groeben and Jean Rey, respectively president of the Commission, commissioner in charge of talks with his counterparts at the EEC and at Euratom on the subject of setting up joint services, and commissioner in charge of the ‘Legal Group’. All three held Ph.Ds in law or were law professors and believed the Commission to be ‘by its very nature an état-major of economists and jurists’.⁴⁴ In fact, the idea of a joint legal department shared between the three Communities was rapidly accepted by the Communities and the members of the High Authority.⁴⁵ In lieu of the three departments initially envisioned (or worse still, myriad ‘mini legal departments’ under each DG), a single body of jurists was thus constituted as a *counterweight* to the three-headed organization of the Communities. Pleading for the necessary ‘independence’ required for an objective analysis of the treaties,⁴⁶ the legal department was in addition placed in an ‘extra hierarchical’ position outside of the administrative structure, answering directly to the commissioners, and not to the secretariat-general, as is usually the case in international organizations. In this way the department escaped the particularly rigid hierarchical organization that was coming into existence at the same time. What is more, the department used this cross-structural and generalist position to legitimate its role in framing and reining in the ambitions of the various directorates-general. Thus the requisite ‘consistency of interpretation of the treaties and in the defence of the Executives before the Court’ meant that the legal department was to be ‘consulted on all issues of interpretation of the treaties, on all drafts of legal instruments for the Executives, and in particular on proposals to be submitted to the EEC/EAEC’.⁴⁷ This ambitious plan was not a dead letter, if we are to judge by the testimonials that describe Michel Gaudet as an ‘11th commissioner’.⁴⁸ Gaudet reports, ‘In my experience of the sessions of the High Authority, and later of the EEC Commission in the 1960s, the legal department was present at all the meetings of the executive. [...] We were constantly asked [...] “Does the Treaty allow this?”, “Can the Treaty be interpreted in this way?”’.⁴⁹

The legal department was the only joint administrative service from 1958 up to the merger of the Community Executives in 1967 (with the exception of the

⁴³ On this document dated October 1958 see Antonio Grilli, *Le origini del diritto dell’Unione europea*, Il Mulino, 2010, pp. 215-220.

⁴⁴ Jean Rey, ‘Les juristes et le Marché commun’, *Journal des tribunaux*, 1961, pp. 1-2.

⁴⁵ Service juridique, ‘Service juridique commun aux trois Communautés’, letter dated 15 February 1958, 4 pages, Archives historiques des Communautés européennes, CEAB 1/956.

⁴⁶ Michel Gaudet, *Note sur l’organisation...*, *op. cit.*, p. 4.

⁴⁷ Michel Gaudet, ‘Note relative aux tâches et à l’organisation du Service juridique’, 26 November 1958, CEAB1-956 HAEU.

⁴⁸ Jean-Marc Sohier, quoted in Michel Dumoulin *et alii*, eds., *La Commission européenne 1958-72*, *op. cit.*, p. 225.

⁴⁹ Michel Gaudet, Interview with Gérard Bossuat, *INT 603 of 14th April 1988*, *op. cit.*

information department and of the statistics office),⁵⁰ and established itself as one of the principal sources of legal thinking regarding the Rome Treaties. This was all the easier that the service had few or no competitors, as the Council of Ministers and the European Parliamentary Assembly had at best just a handful of legal advisors. Only the secretariat-general of the EEC Commission, under Guy Mollet's former cabinet secretary Émile Noël, appeared to be in a position to counter Michel Gaudet's ambitions. But, in addition to the fact that the two directors 'were emperors who treated each other with circumspection [...] and who knew that they had to treat each other with circumspection',⁵¹ up until the merger of the three Executives Émile Noël had only a partial vision of the Communities, that of the EEC Commission. This non-standard and extra-structural department could also count upon a team of 'State jurists' who were well versed in administrative matters. In a context in which the recruiting process was in most cases still exonerated from the rules of competitive entry examinations, giving the department heads broad freedom to choose their collaborators, in hiring their staff over the years Michel Gaudet and his deputy director Robert Krawielicki tended to prefer the profile of State jurists who had served in government administrations and/or international organizations. Both men had spent nearly all their previous career in public service – the French *Conseil d'Etat* for Gaudet, and the FRG Justice Ministry for Krawielicki – and they left only meagre pickings for lawyers, fiscal advisors or business jurists, professions that were nevertheless directly qualified to help set up the Common Market. Most of young recruits in the legal department were men who had in common their background in public service, either national (academics, magistrates, legal advisors in ministries, etc.) or international (judges at the Saar International Tribunal, auditors at the Court of Justice, etc.).⁵²

At the crossroads of the common markets and supported by jurists disposed to think of Europe as an institutional affair, from the outset the legal department built its doctrine on the promotion of the unity of law spanning the three Community treaties. The legal unity of the treaties was in fact an obsession at the joint legal department. Indeed Michel Gaudet had already invoked, as the basis of his call for a single legal department, the need for 'a unity of spirit in the interpretation of the treaties and in the effort to construct the European edifices', unity that he saw as 'the most appropriate method when the task at hand is to create one body of law common to six countries whose traditions are quite

⁵⁰ Treaty instituting a single Council and a single Commission of the European Communities, signed in Brussels on 8 April 1965 with effect on 10 July 1967.

⁵¹ Gérard Olivier (member of the legal department during this period), *Interview with Gérard Bossuat and Myriam Rancon*, INT 714 of 4 December 2003, Archives historiques des Communautés européennes, pp. 35-36.

⁵² Among the 24 members who worked in the legal department between 1952 and 1965 the academic profile of 'pure jurist' remained marginal (2 out of 24), and only three had worked as lawyers or legal advisors in companies. By contrast 17 came directly from State service or international organizations.

different'.⁵³ Accordingly Gaudet, who was at the time still director of the ECSC legal department, sought to bridge the gaps between the ECSC and EEC treaties, that differed greatly in many respects: the 'institutional relationships between the independent Executives on the one hand, and the Councils, the Assembly or the Court on the other hand', 'the determination of the international legal personality of the Communities and of their rights and obligations in the international sphere', and 'the legal issues related to employees' status' – all these are 'fundamental legal questions common to the three Executives [which] must be addressed jointly from the outset'.⁵⁴ Likewise, the legal department took it upon itself to promote ways to achieve the coordination, harmonization and in fine the unification of statutes, functions and treaties. For instance the legal department called for the merger of the Communities in the early 1960s, and pleaded for adoption 'by the three administrations [...] of a single corps of civil servants for the Communities'.⁵⁵ Thus, even though they grappled with a set of sectoral issues (nuclear power economics, agriculture, anti-competitive entente and concentration, etc.), the Community jurists worked to build Europe as a single institutional entity, a purveyor not only of economic analysis, but equally, or even more, of legal solutions. As jurists of the *res publica* faced with the construction of a common market, in the course of internal consultations, briefs to the Court and articles of doctrine they built up a system of 'Institutions' with a capital 'I' that Michel Gaudet never failed to insert. When Gaudet asked the rhetorical question, 'Can't the Communities just 'do business' and leave out all institutional stuff? Perhaps a more matter-of-fact approach might spare all the talk – including my own – on organization, transfer of powers and democracy, which after all is not a necessary contribution to the success of the common market!', he quickly added that 'this learned audience knows better than that. To you a common market means much more than a mere trade agreement [...]. This complex job cannot be accomplished without proper Institutions [...] indispensable for establishing, ruling and operating a common market.' And if the institutional logic embraces more than just the management of the common markets, it is because it is anchored in 'the more noble and more essential task [of] completing and implementing Community law as it stands in the 'Treaties''.⁵⁶ The mission of 'overseeing the application of the dispositions of the present Treaty and the dispositions taken by the institutions on the basis of this 'Treaty' (EEC Treaty, article 155) became, in the notes compiled by the legal department, a veritable 'treaty oversight' that took the Community Executives well beyond the task of organizing the Common Markets.⁵⁷ In this

⁵³ Michel Gaudet, Legal department of the High Authority, 'Note sur l'organisation d'un service juridique commun aux trois Communautés', 26 January 1958, p. 1 in HAEU CEAB1/956.

⁵⁴ Legal department of the High Authority, 'Concours susceptible d'être apporté aux nouvelles Communautés européennes', Texte n°1, 4 février 1958, p. 2, in HAEU CEAB1/956.

⁵⁵ Michel Gaudet, 'The Challenge of the Changing Institutions', *Common Market Law Review*, n°3, 1965-66, pp. 143-157, p. 150.

⁵⁶ *Ibid.*, p. 144.

⁵⁷ Legal department of the European Executives, Note to MM. Sassen and Rey, 19 October 1961, p. 2, BAC 118/1986-932.

framework the identification of ‘presumed offences’ that the legal department could then refer to the Court of Justice (via an action for failure to fulfil an obligation) became an essential lever of the Executives’ authority, consolidating by law their role as guardian of the treaties. This strategy affirming the political status of the Commission emphasized, in the ‘Hallstein doctrine’, the guardianship of the treaties and more broadly of the ‘general Community interest’. The implantation of a legal department, placed at the intersection of the Community Executives, was an essential vector for this strategy, and concretely deployed a legal enforcement of the treaties, endowing this authority with objectivity.

-2- A COLLECTIVE EXPERT IN INSTITUTIONAL REFORM. THE EUROPEAN PARLIAMENT AND THE LEGAL ENGINEERING

There is little outward splendor about the Strasbourg Assembly. It sits in a building borrowed from the Council of Europe; it is served by ushers borrowed from the parliaments of the six member states still wearing their national uniforms; it even had to christen itself, having been born with the bland name of ‘Assembly’. Its administrative services located in Luxembourg migrate to Strasbourg at session time. Its standing committees are peripatetic – sitting in Strasbourg, Luxembourg or Brussels. Its legal powers are limited.⁵⁸

This is how the European Parliament appeared to a visitor at its sessions in 1959. Endowed with essentially consultative powers, relegated to the margins of the Commission-Council couple where the bulk of the Communities’ ‘legislative power’ was concentrated, the European Parliamentary Assembly was a pale copy of national parliaments. It is true that Parliamentary Assembly differed from other consultative European assemblies (Council of Europe, WEU, NATO) in that it possessed an embryonic parliamentary control of the Executives, via its power to adopt a vote of no-confidence against the Commissioners’ College. But in the framework of the Rome Treaties it was the Council that was the principal seat of the ‘legislative power’, and this power of censure was largely illusory. This ambiguity was reflected in the qualification of this entity, that the treaties did not want to name as an authentic ‘Parliament’.⁵⁹ One of the most attentive American observers at the European Communities saw this assembly as a cross between a national parliament and an international assembly like the General Assembly of the United Nations, adding somewhat viciously, that ‘its powers over the budget are inferior to those of the United Nations Assembly which determines the budget

⁵⁸ Eric Stein, “The European parliamentary Assembly: techniques of emerging ‘political control’”, *International Organization*, vol. 13, n°2, 1959, pp. 233-254, p. 233.

⁵⁹ By a resolution dated 30 March 1962, a veritable ‘*petit coup d’Etat*’ in the words of Fernand Dehousse, the parliamentarians of the ‘European Parliamentary Assembly’ claimed the appellation of ‘European Parliament’ that had been refused in the French and Italian translations.

of the organization'.⁶⁰ This initial uncertainty was compounded by a 'fundamental difficulty'. In the words of Pierre-Henri Teitgen, one of the figureheads of this early European parliamentarianism, how can one 'bring into existence and develop a political control regarding a specialized action such as that of the Community?'.⁶¹ This equation was not fundamentally altered by the signing of the Rome Treaties: the new members of parliament were concerned about the impossible political future of an 'Assembly dedicated to such technical, scientific and economic work', and they exhorted each other to escape from this trap of technicity. 'When we study our tables, when we draw up diagrams and pose financial problems, let us be careful not to neglect human feelings,' was the plea of an Italian Christian-Democrat MP.⁶² How could a political institution be created when the subject matter was technical and economic through and through? A solution to this problem was proposed by a group of jurist-politicians specialized in the law and already initiated in the workings of political venues and European parliaments, as well as being closely tied to European law schools (Pierre-Henri Teitgen, Fernand Dehousse, Marinus van der Goes van Naters, among others). They intended to use institutional engineering and deploy an expertise in possible European institutions to build the Parliament's political authority. This subject was of prime importance, judging by the fact that 'political stimulus' of Europe, to use the common expression of the time, was a preoccupation of the chanceries throughout the decade following the signing of the Rome Treaties. From the controversies over the 1960 French proposal for a political Community known as the 'Fouchet plan' and the negotiations for the merger of the institutions of the three Communities, to the Hallstein proposals, revision of the treaties was a subject of nearly uninterrupted discussion up to the 'empty chair' crisis.⁶³ Armed with the many recognized legal experts in its ranks, partly law academy and partly legal commission, the European Parliamentary Assembly came into its own as a laboratory for institutional thinking.

a) The Jurist-politicians of Law

The institutional pathway thus taken by the European Parliamentary Assembly leads us to evoke the premises of a first transnational policy, in which the jurist-politicians of law are a key figure. With the creation of the Consultative Assembly of the Council of Europe in August 1949, parliamentary assemblies took their place alongside diplomatic conferences, technical secretariats and other courts of justice in the basic institutional toolkit furnished by the European treaties in the

⁶⁰ Eric Stein, 'The new institutions', in *American Enterprise in the Common Market*, Ann Arbor, University of Michigan Law School, 1960, pp. 55-56.

⁶¹ Pierre-Henri Teitgen, *Rapport fait au nom de la Commission des affaires politiques et des relations extérieures de la Communauté sur les pouvoirs de contrôle de l'Assemblée commune et leur exercice*, ECSC Common Assembly Doc. n°5, November 1954.

⁶² Enrico Roselli, *Débats du mardi 24 juin 1958*, Assemblée parlementaire commune, 1958, p. 172.

⁶³ Jean-Marie Palayret, Helen Wallace, Pascaline Winand, eds., *Visions, Votes and Vetoes. The Empty Chair Crisis and the Luxembourg Compromise Forty Years On*, Brussels, PIE Peter Lang, 2006.

post-WWII period: assemblies were created under the ECSC in 1952, the Nordic Council in 1953, the WEU in 1954, NATO in 1955 and last but not least in the framework of the Benelux countries in 1957. From plenary sessions to the working groups of various commissions and committees, a full palette of transnational parliamentary activity began to take form. A British member of Parliament reported that ‘a member of a large country will be a member of three committees, possibly chairman of one, and a member of his political group. Between September 1957 and the first three months of 1959, he attended a total of 69 meetings and spent 191 days outside his own country on European work’.⁶⁴ The work load grew very quickly at the new European Parliamentary Assembly born of the Rome Treaties, occupying members’ schedules to the extent that it became difficult to belong to more than one assembly simultaneously. This was all the more true that this supranational politics took hold not only in the parliamentary setting, but was paralleled in the nebulous supranational politics of the European Movement. As noted by one observer, ‘it is not only the formal attendance at plenary or bureau meetings, or committee sessions which counts, but also the necessary informal meetings, the need to study documents, often acting as rapporteur to a committee and in some cases the wish to keep contacts with the European Movement, in order to prevent the growth of a rift between the ‘official’ and the ‘non-official’ forces working for Western European federation’.⁶⁵ In academic colloquia and European conventions, in parliamentary committees and general meetings, a small group of parliamentarians who specialized in this transnational politics came into existence. It is worth noting that the major political figures in Europe, from Winston Churchill to Edouard Herriot, who initially showed a strong presence at the podium of the Council of Europe Consultative Assembly, gradually deserted these venues, either through absenteeism or by not seeking to renew their mandate. Their place was taken by parliamentarians who had less sharply marked political profiles, but who often possessed a technical expertise in European matters that came into its own in the sectoral commissions of the European assemblies, to the point that Fernand Dehousse worried about ‘national representations that are less and less representative’.⁶⁶ This disengagement fostered first and foremost the emergence of jurist-politicians of law at the front ranks of European parliamentarianism. By their presence in universities where they held chairs, in the numerous conferences in which they participated and the articles of doctrine that they continued to write,⁶⁷ as in the first political-party networks in Europe,⁶⁸ they set the initial

⁶⁴ Kenneth Lindsay, ed., *European Assemblies. The experimental period 1949-1959*, London, Stevens and Sons, 1960, p. 90.

⁶⁵ Ivo Daalder, ‘The Netherlands’, in Kenneth Lindsay, ed., *European Assemblies, op. cit.*, p. 125.

⁶⁶ Fernand Dehousse, *L’avenir institutionnel des Communautés européennes*, Nancy, Coll. Conférences européennes, Centre européen universitaire de Nancy, 1967, p. 14.

⁶⁷ Marinus Van der Goes van Naters, ‘Les fondements du droit parlementaire européen’, *Nederlands tijdschrift voor international recht*, 1956, pp. 324-341.

framework for this new transnational parliamentary activity. As has been noted by Julien Weisbein, the sociability that took root in the pan-European political nebula 'is defined more by status and quality (top civil servant, expert, intellectual, politician, etc.) than by their numbers or by the population they represent', so that 'the action takes place in a discreet fashion similar to that found in the diplomatic paradigm (production of expert knowledge, more or less informal negotiations, etc.)'.⁶⁹ Naturally, not all of the 142 parliamentarians who gathered for the inaugural session of the European Parliamentary Assembly on 19 March 1958 were capable of becoming experts or European Community politicians. But a virtuous dynamic of accumulation existed between these two roles, as shown by Antonin Cohen when he indicates that political centrality, as measured by the number of European parliamentary mandates occupied, increases with the amount of legal capital.⁷⁰ This is particularly the case for the French professor of public law and co-founder of the MRP Pierre-Henri Teitgen, for the Dutch socialist lawyer and Doctor of Law Marinus van der Goes van Naters, and the Belgian professor of international law and senator Fernand Dehousse. These three each held multiple positions in the highest ranks of the European parliamentary assemblies during the 1950s and 1960s. Teitgen was a member of the Council of Europe Assembly (1948-58) and the ECSC Assembly (1952-1958). Van der Goes van Naters was vice-president of the Council of Europe Assembly (1949-59), member of the ECSC Assembly, then of the Joint Assembly of the European Communities (1952-67), and vice-president of this assembly's political commission in the mid-1960s. As for Dehousse, he was a member of the Council of Europe Assembly from 1952 to 1961 and served as its president from 1956 to 1959, and was a member of the ECSC Assembly and then of the European Parliament (1952-1971). Their central role in the parliamentary assemblies can also be gauged by the fact they were frequently chosen to be rapporteurs for various committees, 'a position that carries great political importance and considerable prestige, and [for which] elections are hotly disputed'.⁷¹ Spanning these different transnational parliamentary venues in which they often held the post of president or vice-president, they were the actors of an early form of professionalization in the European political sphere.

⁶⁸ On the activity of these first transnational partisan networks see the work of Wolfram Kaiser on the Christian Democrats, *Christian Democracy and the Origins of European Union*, Cambridge, Cambridge University Press, 2007.

⁶⁹ Julien Weisbein, 'Les mouvements fédéralistes ou les entrepreneurs déçus d'une Europe politique (années 1950-1990)', in Olivier Baisnée, Romain Pasquier, eds., *L'Europe telle qu'elle se fait. Européanisation et sociétés politiques nationales*, CNRS Editions, 2007, pp. 35-54, p. 40.

⁷⁰ Antonin Cohen, 'L'autonomisation du 'Parlement européen'. Interdépendance et différenciation des assemblées parlementaires supranationales (1950s-1970s)', *Cultures et conflits*, 85-86, Spring 2012, pp. 13-33.

⁷¹ Ernst Haas in Institut d'Etudes Juridiques Européennes, *Le Parlement européen. Pouvoirs, élections, rôle futur*, Liège, colloquium at the University of Liège, p. 221.

Fernand Dehousse and his Politics of Law

The links that were formed between institutional expertise and political authority at the heart of European parliamentarianism can be seen, in a nutshell, in the activism of Fernand Dehousse in the course of the 18 months of talks on the draft European Constitution that was to accompany the construction of the European Defence Community (EDC). Born in 1906, Dehousse has pursued a multifaceted always moving across the political, diplomatic and academic fences: a member of the Belgian delegation to four of the six first general assemblies of the United Nations, an associate member of the *Institut de droit international* since 1947, and a member of Permanent court of arbitration, Fernand Dehousse was at the same time an active militant of the European Movement, member of the *Union européenne des fédéralistes* and of the *Mouvement socialiste pour les Etats-Unis d'Europe*. Professor of international law at the University of Liège, he was successively secretary-general of the *Comité d'études pour la Constitution européenne* (also called the 'Jurists' committee') constituted in May 1952 within the European Movement; chairman of the experts' group on international law formed in July 1952 to study the different European Constitution drafts;⁷² rapporteur for the Political Community project to the Constitutional Commission (Co-Co) created within the ad hoc assembly (charged with preparing a draft treaty on the European Political Community); and lastly, rapporteur on the reform of EC institutions to the second congress in The Hague in October 1953. His contemporaries readily recognized that Dehousse occupied a 'strategic position' acquired in the course of his itinerary crossing back and forth between pan-European movements and European parliamentary instances.⁷³ In any event this broad range of experience gave him a veritable authority over the reform of European institutions. In a portrait of Dehousse that can in many respects also be read as a self-portrait, Pierre-Henri Teitgen extolled the virtues of the Belgian senator, 'the professor rich in practical experience, the politician faithful to his doctrine, the jurist who is concerned for the fate of Justice, [...] and the combativeness of the militant', all qualities that mark the facets of this first political capital acquired by Europe.⁷⁴

This small group of parliamentarians helped elevate institutional mechanics to the rank of high art serving this emerging transnational politics. The importance of the 'Report' form, whether elaborated by committees of specialists, parliamentary commissions or European Movement working groups, clearly marked the success

⁷² Philippe Carlier, 'Fernand Dehousse et le projet d'Union politique', in *The European Integration from the Schuman Plan to the Treaties of Rome*, Baden Baden, Nomos Verlag, 1993, pp. 365-377.

⁷³ Robert Bowie, Carl Friedrich, eds., *Studi sul federalismo*, Milan, Comunità, 1959, pp. xxxix.

⁷⁴ Pierre-Henri Teitgen, 'Préface', in Fernand Dehousse, *L'Europe et le monde. Recueils d'études, de rapports et de discours 1945-1960*, LGDJ, 1960, p. xv.

of the ‘expert’ level of knowledge of Europe grounded in a claim to a form of objectivity. This was not new in the international sphere, as the Geneva multilateralism of the 1920s had likewise fostered the deployment of an a-political register.⁷⁵ European parliamentarianism provided a particularly propitious environment for this development, however. The absence or weakness of internal opposition at the Assembly was certainly a contributing factor; the Communist parties were excluded up until 1969, as was the populist movement of French politician Pierre Poujade, and the Gaullist parties had only a handful of representatives before 1962. As a result, the various European assemblies formed a space with few deep divisions that was particularly favourable to the emergence of a depoliticized knowledge-based register. With the development of parliamentary commissions, and more particularly the political affairs and institutional commissions of the Assembly of the Council of Europe and the ECSC Assembly, reports bloomed and flourished. Fernand Dehousse said as much when he rejoiced that in a European Parliament that ‘has little political activity, certain reports point it in this direction’.⁷⁶ Relying on analyses of different institutional options in Europe that sought to be methodical, systematic and even scientific, these reports claimed an objectivity that would rise above the narrow viewpoints of States and political groups and defuse the highly charged political debate on Europe. The two Teitgen reports, the first on the European Convention on Human Rights presented 9 September 1949 before the Legal Affairs Commission of the Consultative Assembly of the Council of Europe, and the second on strengthening the functions of the Parliament in the institutional system under the Treaty of Paris presented 14 November 1954 before the Political Affairs Commission of the joint ECSC Assembly, and the Dehousse report on the project for a political Community drawn up in September 1952 for the Co-Co, are models of the genre. The Consultative Assembly of the Council of Europe soon gained a reputation for its ‘debates of an academic nature’, often ‘confused, but of a high calibre’, as one vice-president of the ECSC Assembly commented, not without irony.⁷⁷ Indeed, the rapporteurs were obliged to defend themselves against the charge of ‘examining problems on an academic and abstract level’ and had to declare that ‘politicians [were guided] by a genuine concern for political effectiveness’.⁷⁸ It remained nonetheless that their conclusions were based on ‘in-depth study’ of Community precedents, of the dynamics of supranational politics or of traditional conceptions of the rights of persons, etc. By thus displaying their capacity to construct realistic institutional proposals for a future political Europe,

⁷⁵ On this point, see Guillaume Sacriste, Antoine Vauchez, ‘The Force of International Law. Lawyers’ Diplomacy on the International Scene in the 1920s’, *Law and Social Inquiry*, vol. 32, n°1, 2007, pp. 83-107.

⁷⁶ Fernand Dehousse, *L’avenir institutionnel des Communautés...*, *op. cit.*, p. 12.

⁷⁷ Cited in Franco Piodi, *Vers un Parlement unique. L’influence de l’Assemblée commune de la Ceca sur les traités de Rome*, Parlement européen, 2007, p. 206.

⁷⁸ See Fernand Dehousse, *Rapport établi au nom de la Commission des affaires politiques et des questions institutionnelles sur l’élection de l’Assemblée parlementaire européenne au suffrage universel direct*, European Parliamentary Assembly, session documents, 30 April 1960, doc. n°22.

the reports and their rapporteurs outlined an art of European politics in which rational knowledge of the treaties and institutional mechanics played a central role.

b) European Parliamentarianism and EC Institutional Unity

The political and institutional unity of Europe was the first cause espoused by this art of European politics. The European Parliament itself had narrowly escaped the three-way partition that traversed the Community edifice born of the Rome Treaties. The negotiators at the intergovernmental conference held at Val Duchesse in June-July 1956 had initially agreed upon the creation of a new assembly that would be in charge of the two new Common Market and Euratom communities, in addition to the ECSC Assembly and that of the Council of Europe. Fernand Dehousse, at the time president of the Assembly of the Council of Europe, and the two other presidents Hans Furler of the ECSC Assembly and René Pleven of the Western European Union (WEU), together led the riposte of the European assemblies that sought to create a European Assembly. Dehousse instigated a joint meeting of the bureaux of the three assemblies in February 1957, and obtained a meeting with the six foreign affairs ministers chaired by Paul-Henri Spaak. In the face of the ministers' opposition, the assembly presidents had to give up their initial plan to merge the four assemblies (ECSC, Council of Europe, WEU and the Common Assembly of the two new Communities) which was postponed 'until a later time'.⁷⁹ The worst was avoided, however, because they obtained in extremis a single assembly for the three communities (EEC, ECSC, Euratom). Although functioning under three distinct legal regimes and three different types of powers, depending on the community, the European Parliamentary Assembly was, like the Court of Justice, a link between the three communities. Irrefutably the weakest of the four institutions that emerged from the Rome Treaties, the European Parliamentary Assembly found its first raison d'être in the institutional unity of the communities, deeming that 'it falls within its purview as a parliamentary institution, common to the three Communities, to see that this unity is progressively achieved'.⁸⁰ This enterprise was spearheaded by the Committee for Political Affairs and Institutional Issues which saw itself from the outset as 'the prime locus of a discussion on the future of our institutions and on the development of our European politics'.⁸¹ This commission soon emerged as the most 'political' and generalist of the commissions, first in the order of protocol, guided by experienced parliamentarians (over half of the 26 members had belonged to the ECSC Common Assembly) and heavily endowed with legal expertise (half of the members had studied law). The 12 other commissions were

⁷⁹ On this point, see the discussion in Franco Piodi, *Vers un Parlement unique. L'influence de l'Assemblée commune de la CECA sur les traités de Rome*, European Parliament, 2007, pp. 35-38.

⁸⁰ Résolution sur la coordination des trois Communautés du 27 juin 1958, *Annuaire de l'APE*, 1958-59, pp. 538-39.

⁸¹ Battista, *Débats*, Wednesday 12 October 1960, p. 9.

assigned to the different domains of the Communities' sectoral competence (transport, energy policy, internal market, trade policy, agriculture, institutional rules, etc.). Leaving aside the thorny issue of the 'single seat' of the Communities, and the touchstone proposal to institute universal direct suffrage (immediately taken up by Fernand Dehousse), the commission's first reports were devoted to the institutional unity of the Communities and the outcomes at stake. Pushed by two MPs, Charles Janssens and Marinus van der Goes, both doctors of law, the question was on the agenda as early as June 1958. The two pointed out the faulty coordination, redundancies and other malfunctions resulting from the three-way partition, all of which were unacceptable in light of the statements 'that, I hope, that you all know [that] our Treaty is a 'Constitution'; [and] I believe we are all in agreement on this point'.⁸² The focus on coordination soon led to work to prepare the 'merger of the Communities' which was the topic of successive parliamentary reports under the impetus of members such as Marinus van der Goes, Maurice Faure or Fernand Dehousse, paving the way for the treaty ultimately signed in April 1965.⁸³ Alas, the political aspirations of these jurist-politicians were largely dashed, as these projects were rapidly quashed by the Member States. The Six reached agreement on the merger of institutions in February 1964 on the basis of 'continuing institutions'. The numerous institutional projects envisioned within the Parliament and the Commission both, with a view to associating the two supranational institutions in a joint political 'stimulus' (constituting distinct financial resources for the Commission budget and reinforcing the powers of Parliament, notably in budgetary matters) came to naught.⁸⁴ What was worse, the 'Luxembourg compromise' that put an end to the 'empty chair' crisis even condoned a marginalization of the Parliament-Commission couple, compared to the essential role acquired by the European Council and the Permanent Representatives Committee (Coreper). Even so, while this body of institutional expertise failed to influence the treaty revision process that remained in the hands of diplomats, it nonetheless defined the European parliamentary institution, the authority of which was now linked to the exercise of an intellectual oversight regarding institutional reform.

-3 – A SUPREME COURT? THE EUROPEAN COURT AND CONSTITUTIONAL DOCTRINE

The new Court of Justice of the European Communities (CJEC) entered into activity on 7 October 1958, replacing the ECSC Court of Justice. It was not born under favourable auspices, and the prognosis of observers was not particularly

⁸² Marinus van der Goes, *Débats du 24 juin 1958*, European Parliamentary Assembly, 24 June 1958, p. 167.

⁸³ Marinus van der Goes, *Note sur l'unité des trois Communautés*, Archives du Groupe socialiste au Parlement européen, Florence, 22/07/1959 - 16/10/1959.

⁸⁴ Piers Ludlow, 'De-Commissioning the Empty Chair Crisis. The Community Institutions and the Crisis of 1965-66', in Jean-Marie Palayret, Helen Wallace, Pascaline Winand, eds., *Visions, Votes and Vetoes*, *op. cit.*

optimistic, judging by the opinion voiced by the American political scientist Stuart Steingold when he visited Luxembourg in the early 1960s. ‘There is a great chance’, wrote Steingold, ‘that the Court will function more as an arbitration tribunal than as a court’.⁸⁵ Just as it was no simple matter to exercise parliamentary politics with the technical difficulties tied to implementation of the common market, it was likewise not easy to ferret out ‘the pure gold of constitutional issues under the heaps of scrap iron and coal’.⁸⁶

a) *The Impossible Court of Justice*

The preceding ECSC Court of Justice, flatly called the ‘coal and steel court’,⁸⁷ had been for the most part restricted to the role of an economic court specialized in judging litigation under a trade agreement, and did not inspire optimism. This Court affirmed ‘as early as possible and with a certain ardour’ an economic doctrine that was marked by ‘enthusiasm for a competitive market’ and a belief in the ‘general efficacy of the rationalizing pressure of natural market forces’.⁸⁸ By contrast it had a reserved attitude in the register that most suits supreme courts, that of broad legal principles. How could it act otherwise, knowing that the Court of Justice of the ECSC had to rule on the acts of the High Authority, an institution defined by one of its creators as a ‘manager’, an ‘expert’, a ‘banker’, a ‘referee’?⁸⁹ All the evidence indicates that, apart from the presiding judge and the two advocates-general who were meant to embody the *ratio juris*, the six other members of the Court were appointed – as is usually the case for arbitration courts – on the basis of their technical expertise in the area of the treaty, in this instance economics. As noted by Antonin Cohen, the composition of the ECSC Court of Justice gave pride of place to economists, labour union representatives and high-level civil servants specialized in economic law. On the bench were Petrus Serrarens, a figurehead of the international Christian labour movement, lawyer and former member of parliament, Louis Delvaux who had worked in various positions in banking, Jacques Rueff, professor of economics and former member of the economic and financial secretariat of the Society of Nations, and Adrianus van Kleffens, a Dutch jurist who had served before the war as head of the foreign trade department at the economic affairs ministry.⁹⁰ With this roster the ECSC Court of Justice strangely resembled the High Authority,⁹¹ the

⁸⁵ Stuart Scheingold, *Law and politics in Western European integration*, University of California–Berkeley, Ph.D dissertation, 1963, pp. 29-30.

⁸⁶ Pierre Pescatore, *La Cour en tant que juridiction fédérale et constitutionnelle*, pp. 520-558, p. 522.

⁸⁷ Henri Rolin, ‘La Cour du charbon et de l’acier’, *Journal des tribunaux*, June 1951.

⁸⁸ Stuart Scheingold, *Law and Politics in Western European Integration*, Ph.D dissertation, University of California–Berkeley, 1963 pp. 362-363.

⁸⁹ Paul Reuter, *La Communauté économique du Charbon et de l’Acier*, LGDJ, 1957, p. 47.

⁹⁰ Antonin Cohen, ‘Dix personnages majestueux en longue robe noire amarante. La formation de la Cour de justice européenne’, *Revue française de science politique*, publication pending, 2010.

⁹¹ *Ibid.*

Community judges drawing their legitimacy from their proximity to those who were to be judged, as is true for referees, and not from their distance, as is the case for national magistrates. The governments thus agreed with the two major European labour confederations to reserve a seat for a trade unionist on the Court, as they had done for the High Authority.⁹²

Furthermore, the experience gained with the ECSC Court of Justice apparently did not convince the negotiators of the Rome Treaties that a European *jurisdiction* was absolutely necessary. Citing the essentially technical and economic nature of the Economic Communities, the French delegation, in the person of Georges Vedel, the delegation's expert on institutional questions, initially pleaded for the constitution of a simple arbitration panel deemed to be better suited to the economic and technical scope of the Treaties of Rome.⁹³ Although the Court of Justice was in fine retained in the treaties, its capacity to produce authentic jurisprudence was far from enacted. Not only because the Court ruled on cases of little legal import, but also because it was not evident that the Court would be able to construct a single corpus of jurisprudence, valid for the three Communities, given the major institutional differences between the ECSC and the two other Communities. The risk of a three-way division in Community jurisprudence was evoked in early commentary. In a letter written to an American lawyer on the eve of the entry into force of the Treaties of Rome, Michel Gaudet expressed his fear 'that the establishment of two new Communities could be of a nature to delay, if not halt, the progressive transformation of the Court of the Communities into a truly federal court [...]. In the face of divergent and even opposing views coming from the two Communities, what will the judges do? Will they attempt to impose a conception for the three Communities, and if so to what extent will federalism prevail?'.⁹⁴ In a public query regarding the path that would be followed by a court confronted with three very different institutional balances, in 1958 Maurice Lagrange worried about the direction of the Community jurisdiction: 'Will the Court opt to maintain the interpretation of the treaties in its original framework (three-way partition) or on the contrary will it seek to establish a rapprochement in order to propose identical solutions to similar problems?'.⁹⁵

This concern about the capacity to construct a one and single judicial point of view on the three Community treaties was undoubtedly justified, seeing that the new CJEC was driven by political divisions. The court was not exempted from the

⁹² Cf. Letter from H. G. Buiters, secretary-general of the Secrétariat syndical européen, and J. Kulakowski, secretary of the European organization of the *Confédération internationale des syndicats chrétiens*, to the members of the Councils of the European Communities, 1 August 1958, CM2/1958/548, p. 2.

⁹³ In a note written 11 September 1956 to prepare the French communication to the meeting of the delegation heads, Georges Vedel, Foreign Affairs legal advisor, challenged the very idea of a Court of Justice for a common market whose technicity 'would more appropriately and more efficiently relate to arbitration'. On this point, see the many insights given by Anne Boerger-de Smedt in 'Negotiating the Foundations of European Law (1950-1957). The Legal History of the Treaties of Paris and Rome', *Contemporary European History*, 21 (3), 2012, pp. 339-356.

⁹⁴ Letter from Michel Gaudet to Donald Swatland, 31 December 1958, cited by Julie Bailleux, *Penser l'Europe par le droit*, *op. cit.*

⁹⁵ Maurice Lagrange, 'Le rôle de la Cour de justice...', *art. cit.*, p. 33.

various political blockages that hamper the capacity of international courts to embody the judicial ideals of impartiality and independence to the same degree as national high jurisdictions. Since the birth of the Permanent Court of International Justice, international jurisdictions have all complied with the same nearly diplomatic imperative that ties their legitimacy to a balance between the powers within the courts' make-up, or in the euphemistic terms of the Statute of the International Court, 'representation of the main forms of civilization and of the principal legal systems of the world'. The CJEC was no exception to this rule. The 'savvy 'diplomatic equilibrium'' reached following the Treaty of Paris balancing 'the principle of equality between countries (one judge per country) and the unwritten but fundamental principle of parity between France and Germany' was thus renewed, with a few minor adjustments, in the months after the signature of the Treaties of Rome.⁹⁶ As for other international courts, this geographical weighting was seen as an essential condition ensuring the viability of the CJEC. Pierre Pescatore, who was then director for political affairs in the Luxembourg foreign affairs ministry, remarked that it would be 'impossible in the long term to maintain communities ties as tightly as stipulated by the Treaties [...] if the Member States are unable to have the conviction that the Court of Justice includes for each case, at the very least, one member with direct knowledge of the national law and of the particulars of the national interests involved'.⁹⁷ Even more threatening for the judicial legitimacy of the CJEC, this dependence on the dynamics of international politics also manifested itself in an inequality between parties in the Community process. While the Member States are not required to justify their 'interest in bringing an action' in order to file suit with the Court, individual persons must be 'directly and individually' concerned in order to mount an attack on a Community decision (article 173 of the EEC treaty), leading the former minister and Belgian lawyer Marcel Grégoire to write of 'the pathetic protection of individual rights in the Common Market' in the Belgian daily *Le Soir* dated 3 October 1957. Worse still, individual suits are simply ruled out when the contested decisions relate to the 'legislative' activity of the Council of Ministers. Appointed directly by the Member States, well connected in national and transnational political and diplomatic circles, the CJEC judges showed restraint, according a political sanctuary to the inter-State decision-making process. Without such a sanctuary, protected from judicial meddling by individuals, the political consensus upholding international treaties would have been jeopardized. Former member of the French Council of State and legal advisor to Jean Monnet during the negotiations of the Treaty of Paris, the advocate-general of the Court Maurice Lagrange said as much when he underscored the 'extremely grave consequences that would follow from even a partial annulment of texts that [have] 'quasi-

⁹⁶ Maurice Lagrange, 'La CJCE du Plan Schuman à l'UE', *Mélanges Fernand Dehousse*, 1979, pp. 127-137, p. 129.

⁹⁷ Pierre Pescatore, in Institut für das Recht der Europäischen Gemeinschaften, *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Cologne, C. Heymanns, 1965, p. 614.

legislative character' and [have] been adopted with considerable difficulty, and sometimes after a compromise reached in the Council'.⁹⁸ This eminently political prudence was the justification for the court's self-limitation, as attested by remarks made by the president of the court in the wake of the 'empty chair' crisis.

People have regretted that in last year's differences between France and its partners, the legal implications of the French absence in the Council was never submitted to the Court. That is much too legal an approach; it would have been the definite end of the Communities as Communities if the opposing parties had gone to law and asked a ruling of the Court on details that were no more than the juridical top of a political iceberg. Under the existing conditions, the capacity of the legal framework to support the weight of such controversies is yet only a limited one – just as political science teaches us that no constitution has the unlimited ability to withstand any social or political disintegration.⁹⁹

Fully cognizant of the political imperatives that weighed on inter-State relationships, the Community judges allowed themselves only a limited scope of intervention in disputes concerning the Communities.

b) A Contested Interpreter

Thoroughly enmeshed in the dynamics of international politics and constrained by the essentially economic mission of the European Communities, the Court initially struggled to affirm a recognized authority for the interpretation of the Rome Treaties. Even without discussing here the disdain of some international jurists who continued to call for the transformation of the court into a mere chamber of the International Court of Justice,¹⁰⁰ it must nonetheless be observed that the Court of Justice was kept at a distance regarding the disputes of legal and political interpretation that grew up around the new treaties. National jurisdictions were reluctant to recognize it as a genuine 'interlocutor' in this area.¹⁰¹ It would be nearly three years after the Treaty of Rome took effect before the Court was notified of its first appeal referral, and close to a decade before the national origins of these referrals began to diversify (until the end of the 1960s almost all such appeals came from the Netherlands).¹⁰² Oral history accounts report that the

⁹⁸ Conclusions of the advocate-general Maurice Lagrange, *Confédérations nationales des producteurs contre Conseil des CEE, Affaire 16-62, 14 décembre 1962*, in European Court of Justice, *Reports of cases before the Court*, Curia, Luxembourg, 1962, p. 486.

⁹⁹ André Donner, *The Role of the Lawyer in the European Communities*, Chicago, Northwestern University Press, 1968, p. 63.

¹⁰⁰ JPA François, 'La juridiction européenne dans la communauté internationale', in *Mélanges Rolin*, 1964, pp. 95-103.

¹⁰¹ On this point see Karen Alter, *Establishing the Supremacy of European law*, *op. cit.*

¹⁰² The procedure initially foreseen in article 177 allowed a national court to rest its judgement on the interpretation of a point of Community law by the Court of Justice of the European Communities.

judges broke out the champagne each time a new appeal was notified.¹⁰³ And when the ‘dialogue’ was finally engaged, it was expressed in terms of rejection. National supreme courts, the guardians par excellence of the judicial ideal, regarded this new jurisdiction with suspicion. When the highest-ranking magistrates of the six Member States came to Luxembourg for the first time in June 1965, some did not hide their irritation, as manifested by the president of the French *Cour de cassation* who queried his European counterparts in highly undiplomatic language: ‘How does one explain that everyone – this seems to me to be a principle of democracy, if I may employ the term – is not placed on an equal footing when addressing the Community Court?’ This defiance is also found in the first judicial decisions concerning the new treaties: ranging from the order handed down by the fiscal court of the Palatinate emphasising that the treaties did not conform to the Basic Law of Germany (November 1963) and the ruling of the Italian Constitutional Court in the case *Costa vs. ENEL* that denied any primacy of Community law (March 1964), to the decision by the French Council of State (*Shell-Berre*, June 1964) affirming its own competence to interpret the Rome Treaties in the event of a ‘clear act’, the Member States’ jurisdictions were loath to consider the ECJ as a full-fledged member of ‘court society’.

Just as the national supreme courts openly displayed their scepticism regarding the ECJ, the political actors in the Community listened only distractedly to the Court and only occasionally referred to its authority to decide the inter-institutional conflicts that emerged in the interpretation of the Treaties of Rome. Indeed it was not until December 1961, close to three years after the new treaties took effect that the Court pronounced its first verdict pertaining to the Rome Treaties.¹⁰⁴ In practice the inter-institutional conflict that grew up was settled for the most part outside of the Court’s jurisdiction. This was the case in 1959 in the dispute that sought to resolve whether it was possible for the Euratom Commission to claim ‘implicit competencies’ in addition to those explicitly granted it under the treaties. Rather than referring to the Court to resolve this legal dispute, a conciliation panel was ultimately set up between the Euratom Council and the Euratom Commission to find a political compromise between the institutions.¹⁰⁵ And when there was recourse to the Court, it was, apparently, in the framework of broader political negotiations, with the result that a significant proportion of cases initially submitted to the Court were withdrawn because the conflict had been resolved upstream of the Court (12 cases out of 47 for the period 1952-1960).¹⁰⁶

¹⁰³ Anecdote reported in, among others, Catherine Barnard, Elenor Sharpston, ‘The Changing Face of Article 177 References’, *Common Market Law Review*, vol. 34, 1997, pp. 1113-1171, p. 1117.

¹⁰⁴ *Commission de la CEE contre gouvernement de la République italienne*, Affaire n°7-61, in *Recueil de la jurisprudence de la Cour*, Luxembourg, Curia, vol. VII, 1961, p. 633.

¹⁰⁵ On this episode see Eric Stein, ‘The New Institutions’, in *American Enterprise in the Common Market*, *op. cit.*, p. 75.

¹⁰⁶ Stuart Scheingold, *op. cit.*

c) Judicializing of the European Court

The judicialization of the European Court, namely its approximation to national standards of justice, was not a simple matter. Its longstanding advocates were for a long time in the minority in Luxembourg. The advocate-general Maurice Lagrange, Jean Monnet's former legal adviser in the drafting of the Paris treaty, was the main spokesperson for this cause in Luxembourg. Over a period of ten years in Luxembourg, Maurice Lagrange (1900-1986) transformed his function of advocate-general into a veritable chair of Community law, linking narrowly the debate over the nature of the Court (in part constitutional he would claim) and that over the nature of the Rome treaties (quasi-constitutional)¹⁰⁷. In one of the very first cases brought before the Court, the *Fédéchar vs. High Authority* case in which he was facing one of the most eminent internationalists of the time, professor Henri Rolin, who was defending the Belgian coal federation, Lagrange clearly invoked the *specificity* of the Treaty of Paris to distinguish the CECA Court of Justice from ordinary international jurisdictions. He regarded the latter to be 'more timid when it came to departing from a literal interpretation [of the treaties]': 'our Court is not an international jurisdiction, but the jurisdiction of a Community created by six States, along lines that are much closer to those of a federal organization than to those of an international organization'.¹⁰⁸ The Court did not follow his opinion, however.

Judge and Jurisconsulte: Maurice Lagrange

Born in 1900 from a father who was member of the *Conseil d'Etat*, himself appointed to French administrative Supreme court, Lagrange spent most of his career there, leaving the Council's seat in *Palais Royal* only to assist with a certain bureaucratic zeal the Vichy government in the administrative implementation of the status of Jews in public service.¹⁰⁹ Appointed as a '*conseiller d'Etat*' in 1945 (he had only received a small administrative sanction – a 'blame' – a year before for his role in Vichy), Maurice Lagrange is chosen to second Jean Monnet in the drafting of the Paris Treaty. The only one of the nine members of the ECSC Court of Justice to have taken part in the Treaty of Paris negotiations, Jean Monnet's former legal advisor was from the outset the herald of a 'constitutional' reading of the jurisdiction which was on all

¹⁰⁷ On this point, see Lauren Clément-Wilz, *La fonction de l'avocat général près la Cour de justice des Communautés européennes*, Bruxelles, Bruylant, 2011.

¹⁰⁸ Conclusions of the advocate-general Maurice Lagrange, *Fédération charbonnière de Belgique c. Haute autorité de la CECA*, affaire n°8/55, in *Recueil de la jurisprudence de la Cour*, Luxembourg, Curia, vol. 1, 1955, p. 263.

¹⁰⁹ On Maurice Lagrange in Vichy, see Marc-Olivier Baruch, *Servir l'Etat français. L'administration en France de 1940 à 1944*, Fayard, 1997, pp. 325-326; and Laurent Joly, *Vichy dans la 'solution finale'. Histoire du commissariat général aux questions juives (1941-1944)*, Paris, Grasset, 2006, pp. 89-92.

points opposed to the status of specialized economic jurisdiction to which many actors in Europe seemed to want to limit the court.¹¹⁰ As early as November 1953, in a discourse at the *Ecole nationale d'administration* (ENA), he states in clear terms 'the supranational feature of ECSC powers'¹¹¹. In the course of the 60 findings that he delivered, from the ruling in *France vs. High Authority* in 1954 to the ruling in *Costa vs. ENEL* in July 1964 (he left the Court in October of the same year),¹¹² Lagrange paved the way for a 'judicialization' of the Court, elevated to the rank of supreme jurisdiction of a specific constitutional order. This undertaking was not without its ambiguities. As seen above, the former Council of State member fully recognized the political limits of the Community jurisdiction that did not allow individuals to participate in overseeing the 'Community law'. Neither did he accept the constitutionalism of the German doctrine, pointing out the ambiguities of the constitutional wording. He warned that 'one must be wary of analogies that go too far', because 'if in some respects our Court does in effect have the role of a constitutional judge in the Communities, the treaties do not attribute to the Court the full attributes of such a judge'.¹¹³ But, embodying by his function as advocate-general and his experience in French administrative jurisprudence the exigencies that are specific to 'general principles of law' in an assembly long dominated by the preoccupations of sectoral law, Lagrange worked, in his findings and doctrinal articles, to prise the Court free of the internationalist and economic gangle in which it seemed condemned to remain. His strategy rested on an interpretation of the Community treaties as a unique and specific 'constitutional order'. He had already laid down markers with respect to the Treaty of Paris. As early as his first findings delivered in the first *France vs. the ECSC High Authority* case in 1954, he promoted a teleological interpretation 'in relation to the Treaty as a whole' and in particular to its 'philosophy'.¹¹⁴ He was not followed by the Court that preferred a more textual method of interpretation. With this extensive reading of the Treaty of Paris as a treaty-Constitution, Lagrange was one of the spokespersons for the 'dissidents' of international law who were proponents of a supranational reading of the European Community in the 1950s and into the 1960s.

¹¹⁰ On this point see the discussion by Antonin Cohen, 'Dix personnages majestueux en robe noire amarante...', *art. cit.* that evokes 'the architect of a silent revolution'.

¹¹¹ Cf. Julie Bailleux, *Penser l'Europe par le droit, op. cit.*

¹¹² Rosa Greaves, 'The first advocate-general: Maurice Lagrange', in Noreen Burrows, Rosa Greaves, eds., *The Advocate General and EC Law*, Oxford, Oxford University Press, 2007, pp. 59-88.

¹¹³ Conclusions of the advocate-general Maurice Lagrange, *N.V. Algemeine Tarnsport Van Gend en Loos contre administration fiscale néerlandaise*, Affaire n°26-62, in *Recueil de jurisprudence de la Cour*, Luxembourg, Curia, vol. IX, 1963, pp. 85-86.

¹¹⁴ Conclusions of the advocate-general Maurice Lagrange, *Gouvernement de la République française contre Haute autorité de la CECA*, Affaire n°1-54, in *Recueil de jurisprudence de la Cour*, Luxembourg, Curia, vol. 1, 1955, pp. 53-55. On these first ten decisions and the role played by Maurice Lagrange, see the discussion by Antonin Cohen, 'Dix personnages majestueux en longue robe amarante...', *art. cit.*

His position, long in the minority, was once again echoed within the Court however, in the years following the adoption of the Rome Treaties. At this time there was a notable shift in the Community judiciary array that became more preoccupied with ensuring the judiciary legitimacy of the institution. The '*groupe juridique*' in charge of drafting the Rome Treaties in the Spring of 1957 had managed to obtain a higher standard of juridical requisites for the judges, that would henceforth be aligned with those of the judges of the International Court of Justice for which 'a recognized juridical or judiciary competence' is required.¹¹⁵ The choice of candidates was still left in fine to the sovereign appreciation of each of the Member States, but the latter now seemed to agree on raising the level of legal training of their candidates. Just a few months after the entry into force of the Rome Treaties Louis Joxe, secretary-general of the Quai d'Orsay, wrote in a telegram to his *chargé d'affaires* in Bonn of the need to require 'an improvement in the composition of the Court'.

I would be obliged if you could indicate to the federal government that we are highly preoccupied by the insufficient quality of the Court in its current composition [...] there is no reason for a trade unionist to sit on a Court of Justice charged with interpreting the treaties; training as a trade unionist gives no qualification to be a good judge of European treaties. This principle must therefore be rejected and a seventh judge's seat attributed to someone who is truly competent, in replacement of the present trade unionist. [...]. It will be advisable to have the Italian government understand that it should designate only candidates of great personal value; for your information I point out that this is not the case at present.¹¹⁶

The 'trade-unionist-judge' practice came to an end with the departure of the Dutch judge Petrus Serrarens, former secretary-general of the International Confederation of Christian Trade Unions. This departure and the progressive withdrawal of the economist-judge Jacques Rueff who was retained by other functions in Paris (see chapter 2), reflect this perspective that considerably reinforced the juridical capital of the collective Community judiciary. With one exception, the five new judges appointed between 1958 and 1962 had pursued almost exclusively careers in law. In 1958, Andreas Donner, a young professor of administrative law and son of a very high-ranking Dutch magistrate, and Nicola Catalano, legal advisor to the Italian State and former member of the ECSC legal department, joined the Luxembourg court. In 1962 Roberto Monaco, head of the

¹¹⁵ This was not the case for the ECSC treaty that required only that judges be recruited 'among persons of recognized independence and competence' (article 32). On this episode see Pierre Pescatore, 'Les travaux du 'groupe juridique' dans la négociation des traités de Rome', *Studia diplomatica*, 1981, pp. 159-178, p. 167.

¹¹⁶ French Ministry of Foreign Affairs to Mr. Leduc, French chargé d'affaires in Bonn, 20 June 1958, in Commission de publications des documents diplomatiques, *Documents diplomatiques français: 1958*, vol. 1, Imprimerie nationale, p. 810. I would like to thank Kiran Patel for indicating this document to me.

legal department of the Italian foreign affairs ministry and eminent professor of international law at the university La Sapienza in Rome, and Alberto Trabucchi, an undisputed authority on Italian civil-law doctrine, were appointed to the Court. Robert Lecourt, also appointed in 1962, stands out in this group. He came to the Court after a top-level political career in the MRP party throughout the Fourth Republic in France (he served notably as justice minister), but he held a doctoral degree in law and had exercised as a lawyer for nearly 15 years in Paris and Rouen. All the appointees were confirmed jurists, but nonetheless deeply attached to the Community project. Steeped in a *jus naturalis* juridical culture, the judge Albert Trabucchi, brother of a Christian-Democrat minister, extolled the *jus commune* of which the Community treaties would be an expression. Robert Lecourt, who today is elevated to the rank of a 'second Robert Schuman' for his role at the head of the Court (1967-1976),¹¹⁷ was a former member of the *Nouvelles Equipes Internationales* network, the transnational network of Democrat-Christians. Coming to the Court in the very same year in which the MRP ministers left the Gaullist government due to a profound disagreement over European policy, Lecourt put a missionary spirit into his function. Nicola Catalano, formerly at the legal department of the High Authority, soon revealed himself to his colleagues at the Court as 'possessed by the European idea and an idea that has shone like a flame through all his activity'.¹¹⁸

Henceforth the ideas of a Maurice Lagrange, extolling the authentically judiciary, and even constitutional, character of the Court of Justice, found new support in Luxembourg in the years following the implementation of the Rome Treaties. The new judges were equally attached to the causes of law and the European Community, and in their turn invested themselves in the construction of an in-house doctrine. Indeed, in a setting in which litigation remained limited, the doctrinal path was seen as an additional component needed to affirm the Court's institutional identity. This was all the more true that the Court reigned undisputed over the interpretation of the 'authentic' signification of its rulings. Exciting little interest in national legal and judiciary circles, and therefore acting in a semi-public sphere, the Court's own staff (recorders, auditors, judges) were often the only ones, or nearly so, who took the trouble to chronicle the Court's jurisprudence in law journals. Via the twin pathways of rulings and commentary on the rulings, the judges and their assistants tended to monopolize discussion of the Court. They did not all necessarily follow Maurice Lagrange on the constitutional path, when he wrote, 'the Court appears as clearly invested with a mission of a constitutional nature, and, insofar as the Treaty system is likened to a federal system, it is permissible to state that the role of the Court is likewise

¹¹⁷ Pierre Pescatore, « Robert Lecourt (1908-2004) », *Revue trimestrielle de droit européen*, n°3, July-Sept. 2005, pp. 989-996, p. 990.

¹¹⁸ Andreas Donner, *Audience solennelle du 8 mars 1962 à l'occasion du départ de M. le juge Nicola Catalano et de la prise de fonctions de M. le juge Alberto Trabucchi*, Curia, 1962, p. 18.

assimilated to that of a federal judge'.¹¹⁹ But they join with him in exalting a Court whose mission was henceforth to emphasize the legal and political unity of the three Communities. With prudence the advocate-general Roemer concedes in findings handed down in May 1960 that 'it is not possible to speak of a legal unity of the three Communities', but he immediately added that 'their spiritual unity constitutes a reality that calls for a greater juridical unification'.¹²⁰ The Court's jurisprudence followed him wholeheartedly, affirming in its ruling the principle of 'the operational unity of the [three] European Communities', justified by the great common vision of European unification for which the Luxembourg court wished to be the interpreter. The ECJ was no longer the arbitration court to which Community actors only occasionally had recourse. Instead it was emerging as a supreme court with the ambition of resolving the various economic, administrative and constitutional conflicts inherent to the functioning of a federal regime.

-4- A SUPRANATIONAL MARKET? LAWYERS AND THE EUROPEAN ECONOMIC CONSTITUTION

What exactly was this 'common market' in the name of which so many institutions were set in to motion? Did the normative ideal inscribed in the treaties suffice to give birth to an 'institution' in the meaning given to the term in the sociology of economics since Karl Polanyi, i.e. a relatively unified set of rules and social conventions pertaining to the forms and actors of economic exchange? There is room for a reasonable doubt. Like any other social institution, the 'market' cannot be created by decree, no more than it emerges spontaneously from the development of economic exchange.¹²¹ While the Rome Treaties are particularly precise about the 'dismantling of customs and tariffs' and the constitution of a free-trade zone for the circulation of people, capital, goods and services, for which the treaties provide a detailed roadmap, they are by contrast singularly vague about the development of a form of Community economic regulation in Brussels. To use the terms consecrated in European studies, while 'negative integration' is well orchestrated in the texts, the concrete mechanisms of 'positive integration' (harmonization of legislation, competition policy, etc.) that determine a true industrial and financial 'markets merger' remain a distant perspective, even if some had already seized upon it for strategic reasons.¹²² The 'institutional market', this new type of law-based market diametrically opposed to the Manchesterian laissez-faire market, that Jacques Rueff had enthusiastically detected as incipient in the

¹¹⁹ *Ibid.*, p. 36.

¹²⁰ Aff. 27-59, 10 May 1960, Rec. 1960, vol. VI, p. 847.

¹²¹ See the work of Neil Fligstein and Iona Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union', *American Journal of Sociology*, July 1996, pp. 1-33.

¹²² In a way similar the 'strategic constructivism' deployed by the Commission in relation to the 1992 agenda and the setting up of the single market, described by Nicolas Jabko, *L'Europe par le marché? Histoire d'une stratégie improbable*, Presses de Sciences Po, 2009.

Rome Treaties, had only a sketchy existence.¹²³ The actors in the economy of the European Six did not seem to pay much attention at first to the EEC treaty dispositions regarding the regulation of ententes and concentrations (articles 85-86). Either they preferred, like French employers, to see nothing more than a loose coordination of national policies in this area, or they sought to minimize as much as possible this aspect of the treaties, in the manner of the French government which at the time was hostile to any reinforcement of the competencies held by the European executives.¹²⁴ All in all the legal instruments for the organization of economic markets (patents, property rights, taxation, State subsidies, etc.) remained in the hands of the States whose sovereignty in matters of economic regulation was intact.

Far from creating a *single* market, the Common market left the legal, professional and institutional structures of the national economies untouched. For proof, we have the example of professions devoted to giving advice (legal, fiscal, patrimonial etc.); these firms continued to be structured around national professional orders and deontological rules that differed greatly from one country to the next. There were, nonetheless, 'reformers' in each of these professions who saw early on the opportunities that the Common Market afforded for the 'modernization' of the legal structures in the national economies. This first impetus spurred various interest groups, employers in particular, to open offices and bureaux in Brussels.¹²⁵ But the hopes placed in the Common Market were soon dampened. The reform-minded segments of the legal professions rapidly had to rein in their ambitions. Hopes for a speedy modernization of the legal structures in the economy via the Community were dashed by two failures. For one, the plan to create a status of 'European commercial company' initially backed by the Commission was quickly mired down in disagreements between various Members States. Secondly, under the auspices of the Consultative Commission of European Bar Associations set up in Brussels in 1961, the tenors of the bar in the different countries exerted a coordinated pressure to postpone sine die the adoption of a directive concerning the rights of lawyers to establish offices within the boundaries of the six Member States. Thus it seemed that neither regulation of the economy nor the advisory professions would be able to take on a European dimension and form the foundation of a large single European market.

It was essentially in Brussels that the outline of an embryonic and truly supranational market was sketched out, involving two groups of actors equally inclined to take the Rome Treaties as the basis of a supranational regulation of the European economies. There were multinational corporations, in particular those

¹²³ Jacques Rueff, 'Une mutation dans les structures politiques: le marché institutionnel des Communautés européennes', *Le Monde*, 9-10 February 1958, p. 5.

¹²⁴ Laurent Warloutet, *Le choix de la CEE par la France*, *op. cit.*, p. 563.

¹²⁵ Guillaume Courty, Hélène Michel, 'L'espace du lobbying européen. Morphologie et logiques de recrutement des représentants d'intérêt', *Les professionnels de l'Europe*, Colloque MISHA Strasbourg, 5-6-7 November 2008.

based in the United States, who were ready to bet on the emergence of a new regulatory echelon in Brussels and who flocked to the Belgian capital. And there were the high-level civil servants of the Competition DG who were laying the groundwork of an anti-trust policy that was centralized in the hands of the Commission. Between these two poles there emerged a generation of young lawyers who were American or trained in the United States, and with close ties to the new European administration. At the intersection of the bar and academia, legal counsel and litigation, Community institutions and ‘third-party countries’ (for the most part the United States), these lawyers represented the ideal contour of a Community market, i.e. both (partially) freed from the national regulations of States, and inscribed in a supranational legal and economic order based on free trade. Driven by the Competition DG of the EEC Commission and the first multinational corporations that set up offices in Brussels, this embryonic market-based Europe found in the lawyer both a seasoned practitioner and a zealous theoretician.

a) ‘Brussels’ as a New Marketplace

The first signs of economic regulation by the Community as such began to appear. In the temporary quarters of the new EEC Commission a small group of high-level civil servants in the Competition DG, who shared an ordo-liberal faith, devised a European system to oversee concentrations and ententes. The profile of the first commissioner in charge of competition policy had something to do with this orientation. Hans van der Groeben was a jurist of long-standing ordo-liberal convictions, a former ‘Schuman Plan’ bureau chief in a German Ministry of the Economy dominated at the time by ordo-liberal notions,¹²⁶ member of the pan-European Europa Union movement and deputy head of the German delegation charged with negotiating the Common Market (1956-1957) to which he gave a markedly liberal stamp.¹²⁷ In Brussels he formed a small team of civil servants and advisors, all of whom came from this movement which was then in its golden years in Germany. Hermann Schumacher, director of the Ententes and Monopolies office, Ernst Albrecht, his cabinet secretary, and Ernst-Joachim Mestmäcker, his special advisor, all had close ties to this milieu: the first was the son of an ordo-liberal economist, and the third had obtained his doctorate with one of the figureheads of German ordo-liberalism, Franz Böhm, a former colleague of Ludwig Ehrhard when the latter worked for the Anglo-American Bizone.¹²⁸ They had in common lengthy legal studies (in some cases including a

¹²⁶ On the weight of ordoliberalism at the Economy Ministry of the FRG under the direction of Ludwig Ehrhard (1949-1963), see B. Löffler, *Soziale Marktwirtschaft und administrative praxis. Das Bundeswirtschaftsministerium unter Ludwig Ehrhard*, Stuttgart, Steiner, 2002.

¹²⁷ On his contribution to the neo-liberal orientation of the treaties, see François Denord, Antoine Schwartz, ‘L’économie (très) politique des traités de Rome’, *Politix*, vol. 23, n°89, 2010, pp. 35-56.

¹²⁸ On this group see Katia Seidel, ‘DG IV and the Origins of a Supranational Competition Policy: Establishing an Economic Constitution for Europe’, in Wolfram Kaiser, Brigitte Leucht and Morten

doctorate), publishing in 1958 a joint commentary of the European treaties, *Kommentar zum EWG-Vertrag* that was destined to become a reference work in German. They were also undoubtedly marked by the decade of debate over the German anti-trust law that led to the creation of the *Bundeskartellamt* (BKA) an independent administrative authority with considerable power, and they shared a ‘constitutional’ view of competition policy.¹²⁹ The ‘free-market interventionism’ that they advocated depended on a fully independent authority entrusted with the power to ensure, in law and under a quasi-jurisdictional procedure, the liberal economic order, by attacking practices that restricted competition. This was exactly the mission of the German BKA, a veritable tribunal protected from political pressure that starting in 1958 undertook very close surveillance of industrial ententes in Germany. It seems that German ambassador to the EC, the renowned international law professor Carl Friedrich Ophüls, who used to promote at the secretariat of the *Auswärtigen Amt* the constitutional nature of the Paris treaty, is the first to move this constitutional reading in the domain of European economic integration, mentioning as early as 1962 the existence of a ‘European Economic Constitution’¹³⁰. He was followed in particular way by Ernst-Joachim Mestmäcker, the legal adviser of the *commissaire* von der Groeben, who become one of the *doctrinaire* of this view¹³¹. Thus, contrary to the dominant interpretation among top civil servants, law professors and employers in France who saw in articles 85-86 of the Rome Treaties no more than a simple roadmap that would have to bend to political winds and to particular national circumstances, the *ordo-liberals* of the Competition DG held these same articles to be truly a European ‘economic constitution’ that laid the groundwork for supranational regulation that would be fully independent of the Member States. As Hans van der Groeben himself said in a speech before the European Parliament, in their eyes ‘the economic order is not established by itself, but only through an adjustment of the economic order of competition’.¹³² Only this objective and binding order could free this essential policy from the tutelage of States deemed

Rasmussen, eds., *The History of the European Union: Origins of a Trans- and Supranational Polity 1950-72*, London, Routledge, 2008.

¹²⁹ Readers are referred to the important work done by David Gerber, ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the ‘New’ Europe’, *American Journal of Comparative Law*, vol. 42, n°1, 1994, pp. 25–84, and by Christian Joerges, ‘The Market without the State? The ‘Economic Constitution’ of the European Community and the Rebirth of Regulatory Politics’, *European Integration online Papers (EIoP)*, Vol. 1, 1997.

¹³⁰ Carl Friedrich Ophüls, « Grundzüge Europäischer Wirtschaftsverfassung », *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 124, 1962, pp. 136-166.

¹³¹ See in particular his contribution to the Festschriften on honor of the most prominent ordoliberal legal scholar, Franz Böhm : Ernst-Joachim Mestmäcker, « Offene Märkte im System Unverfälschten Wettbewerbs in der Europäischen Gemeinschaft », in Kronstein und Mestmäcker, eds, *Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70 Geburtstag von Franz Böhm*, Karlsruhe, Verlag C. F. Müller, 1965, pp. 345-391.

¹³² Hans van der Groeben, ‘La politique de la concurrence, partie intégrante de la politique économique dans le marché commun’, speech delivered before the European Parliament, 16 June 1965, quoted in François Denord, Antoine Schwartz, *L’Europe sociale n’aura pas lieu*, Raisons d’agir, 2009, p. 72.

excessively sensitive to social and economic interests. With the benefit of divisions among European employers and the Member States, and singularly of the isolation of the French government in its refusal to endow the Commission with new powers,¹³³ van der Groeben managed to impose his views in the course of 1961, with a regulation (17/62) that confers upon the Commission quasi jurisdictional powers to oversee ententes. This regulatory text, which was slated to remain in effect in its main dispositions up to the 1/2003 regulations, erected a centralized oversight system that left little room to national authorities when confronting ententes ‘affecting free circulation’ (article 85).¹³⁴ An ambitious notification system obliged enterprises to directly inform the Commission of their ententes, in effect bypassing national authorities. The Commission alone had the authority to grant exemptions to the principle that banned ententes, as the French government had been able to obtain only a purely consultative committee of representatives of the Member States. Rule 17 consecrated a major success for the ‘constitutional’ reading of the treaties, conferring an effective juridical scope to articles 85 and 86, under the authority of an institution that was largely independent of the Member States. The specific identity of the Competition DG was built on this paradigm to a point that it became for three decades the province of jurists who had worked with Hans van der Groeben. Personalities such as Ernst Albrecht, Manfred Caspari and Claus-Dieter Ehlermann succeeded each other at the head of this directorate almost without interruption from 1967 to 1995, and were respectively cabinet secretary, cabinet member and a colleague who incidentally took over the leadership of *Kommentar zum EWG-Vertrag* when van der Groeben retired.

During these same years a multitude of multinational corporations took offices not far from the Commission’s premises. The months following the enactment of the Rome Treaties saw a veritable rush to the Belgian capital by investors, American in particular. Already enhanced by the success of the World’s Fair in 1958, now ‘provisional capital’ of the institutions of the Common Market, Brussels emerged as an essential pole for the internationalization strategies of major corporations. Driven by the spectacular economic growth of the United States during this time, a wave of investment swept across all of Europe in the 1950s and 1960s. This American foreign investment flowed primarily to the European Community, rising from \$970 million in 1958 to \$2,063 million in 1962.¹³⁵ Just as in Europe economic modernization meant tackling the ‘American challenge’, in the United States business internationalization seemingly had to go through the Europe of the Six: ‘going international’ entails coming to grips with the many problems of doing business both with and within the European Common Market’.¹³⁶ Need we recall the best-selling book written by Jean-Jacques

¹³³ See Laurent Warloutzet, *Le choix de la CEE par la France*, *op. cit.*, pp. 507-644.

¹³⁴ Hubert Buch-Hansen, Angela Wigger, ‘Revisiting 50 Years of Market-Making: The Neoliberal Transformation of EC Competition Policy’, *Review of International Political Economy*, vol. 16, n°4, 2009.

¹³⁵ Mira Wilkins, *The Maturing of Multinational Enterprise: American business abroad from 1914 to 1970*, Cambridge, Harvard University Press, 1974, p. 331.

¹³⁶ Arthur Selwyn Miller, ‘Foreword’, in *Doing Business in the Common Market*, co-sponsored by George Washington University and Commerce Clearing House, Inc., 1963, p. iii.

Servan-Schreiber who tried to raise the alarm of a 'Common Market Europe that has become a new Far West for American business'.¹³⁷ An American author relates that American corporations concluded no fewer than 530 acquisitions and 582 joint-ventures in the Six Member States between 1958 and 1965.¹³⁸ Responding to the extremely advantageous fiscal measures set up by the Belgian government, American investors were particularly drawn to Brussels.¹³⁹ They were all the more inclined to do so that the most international segments of the American elite – lawyers members of the international chapter of the American Bar Association, professors and lawyers members of the International Law Association, or the economic networks of the American Chamber of Commerce in Brussels,¹⁴⁰ all three closely tied to the State Department that championed the Community cause –¹⁴¹ vaunted the major opportunities of the Common Market to both businessmen and lawyers.

A New Capital for Business Law?

In the early 1960s the practitioners of business law held their large international conferences in Brussels, consecrating this city as a new international venue. The International Law Association held its bi-annual convention in Brussels in 1962, attended by many high-level Commission bureaucrats. Financed in part by the large multinational corporations that were then emerging (Shell, British Petroleum, Iran Petroleum, US Steel Foundation, Lever), the members of this association had been, since the inter-war period, the jurists (law professors and lawyers) from Western countries who were most closely tied to international trade (Walter Hallstein was a member). In 1963 the Antitrust Law section of the American Bar Association held a very large conference over four days, straddling Luxembourg and Brussels and attended by the full array of top Community personalities who came together for this operation to promote the potential of competition policy in the Common Market. Alongside the vice-presidents of the Commission (Robert Marjolin) and the High Authority (Albert Coppé) and the president of the ECJ (Andreas Donner) were the Competition commissioner and his director general (Hans van der Groeben and Peter

¹³⁷ Jean-Jacques Servan-Schreiber, *Le défi américain*, Denoël, 1967, p. 23

¹³⁸ Sigmund Timberg, 'Antitrust in the Common Market: Innovation and Surprise', *Law and Contemporary Problems*, Vol. 37, n°2, Expansion of the Common Market, Spring 1972, pp. 329-340.

¹³⁹ American investment in Belgium represents 1.9% of GDP, compared to 1.1% in France and in Germany; cf. Eric Stein, *American Enterprise in the European Common Market*, Ann Arbor, University of Michigan Press, 1960, p. 29.

¹⁴⁰ See Maria Green Cowles, 'The EU Committee of AmCham: The Powerful Voice of American Firms in Brussels', *Journal of European Public Policy*, Vol. 3, n°3, 1996, pp. 339-358.

¹⁴¹ On the State Department networks and their diplomatic action regarding the construction of Europe see the recent work by Kenneth Weisbrode, *The Atlantic Century: Four Generations of Extraordinary Diplomats who Forged America's Vital Alliance with Europe*, Da Capo Press, 2009.

Verloren van Themaat), the directors of the legal departments in the European Executives, and numerous Community civil servants.¹⁴²

b) Business Lawyers and the Brussels Enclave

Between these two microcosms, the multinational corporations established in Brussels and the Competition DG, sprouted an entire generation of American and Belgian lawyers. They were all educated in East Coast law schools and were at the same time closely linked to the EC institutions, in this way setting themselves up as natural intermediaries in the first Community market that was thus dominated by the ‘American way of law’.¹⁴³ Indeed, American lawyers arrived in Brussels close on the heels of American corporations at the end of the 1950s. Between 1958 and 1965 all the major Wall Street firms opened offices in the Belgian capital: Baker & McKenzie (1958), Cleary Gottlieb (1960), Simons and Simons (1962), Archibald (1963), Couderts Brothers (1965), Dewey Ballantine, Dilley and Custer, White and Case (1967), Clifford Chance (1968), etc.. Until then for the most part concentrated in Paris that between the world wars had served as the European headquarters for many New York law firms (in part due to the presence of the international arbitration commission in the French capital), these firms now saw the ‘new Eldorado’¹⁴⁴ in Brussels and redeployed an internationalization strategy that was still in its infancy. ‘They saw the notification procedures (rule 17/62) before the Commission,’ recalls a Belgian lawyer, ‘and they said to themselves that there would be an American-style market there.’¹⁴⁵ They encountered many obstacles in their Brussels adventures, however. Fearing unfair competition from these expatriate American lawyers, the Council of the Brussels Bar Association restricted considerably their freedom of action in the European capital: not allowed to put up a professional nameplate, banned from pleading before a Belgian court, required to apply for a professional activity card that was granted parsimoniously. This protectionist regime was coupled with a de facto ban on pleading before the European Court of Justice, as only members of the bar of one of the ‘small Europe’ countries were accepted in Luxembourg. In this context the development strategy of the American law firms also involved co-opting local lawyers who could act as permanent representatives of American branches in Brussels. Many Belgians therefore tried their luck in these American law firms that set up in the European capital after 1958 and sought to bring in European recruits who, as

¹⁴² Section of antitrust law, American Bar Association, ‘Conference on Antitrust and the European Communities. Brussels Sept. 23-25, Luxembourg, Sept. 25-26. Program’, 8p., CEAB 1, n°24, 1963.

¹⁴³ Yves Dezalay, Bryant Garth, ‘Re-structuring States by Exporting Law: American Law Firms and the Genesis of a European Legal Market’, in Hanne Petersen *et alii*, eds., *Paradoxes of European Legal Integration*, Ashgate, 2008, pp. 76-88.

¹⁴⁴ Interview n°3, Brussels, October 2008.

¹⁴⁵ *Ibid.*

indicated by the founder of Cleary Gottlieb himself, ‘had, without exception, the most distinguished record in the European law schools where they had earned their diplomas, and most of whom had also attended an American law school, and English university or the Inns of Court, where they excelled’.¹⁴⁶ The future pillars of European competition law, Jean Blondeel, Walter van Gerven, Jean-Pierre de Bandt, Ivo van Bael and Michel Waelbroeck trained in the Cleary Gottlieb firm for the first two, at Frank Boas for the third, and at Dewey Ballantine for the last. Their recruitment was not by chance: they had graduated from one or another of the five law faculties that existed in Belgium, and they also had finished their training in the crucible of American legal excellence, i.e. at Harvard (Jacques Blondeel, Jean-Pierre de Bandt, Jean-Pierre Lagae, Hinnekens, Pierre Osterweil), New York University (Michel Waelbroeck), the University of Chicago (Walter van Gerven) and the University of Michigan (Ivo van Bael). Belgium thus had a pool of lawyers trained on the other side of the Atlantic thanks to a major university exchange system set up by the Belgium American Educational Foundation immediately after the World War I.

This Belgian-American microcosm could not have numbered more than a few dozen people, in a Brussels bar that registered more than 1,000 lawyers. But it appeared very much as a threat to the hierarchs of the Brussels Bar Council who were little inclined to accept this ‘extra-territorial enclave’ in the very heart of the Belgian capital. In taking up quarters in the Belgian capital these lawyers – with their multiple facets and professional roles – transgressed ‘the extreme punctiliousness manifested by the national legislator in the organization of the legal professions (lawyers, barristers, solicitors, bailiffs, notaries, etc.)’.¹⁴⁷

Cleary Gottlieb, the first European Law Firm

Let us consider the American firm Cleary Gottlieb, one of the first to set up in Brussels and where several generations of Belgian lawyers trained. This example is undoubtedly a singular one due to the close relationship between Jean Monnet, the first president of the High Authority, and one of the lawyers in the firm George Ball, a eminent member of the foreign policy establishment.¹⁴⁸ Ball was a former general counsel to the post-war French Supply when Jean Monnet was the director of this public entity in charge of negotiating the buying of war furniture in the name of the French government

¹⁴⁶ Leo Gottlieb, *Cleary, Gottlieb, Steen & Hamilton. The First Thirty Years*, New York, Cleary Gottlieb, 1993, p. 243.

¹⁴⁷ Conseil de l'Ordre, ‘Installation des juristes étrangers à Bruxelles’, *Ordre des avocats. Barreau de Bruxelles*, March 1968, p. 47.

¹⁴⁸ On the connections between Jean Monnet and George Ball, see in particular Hannah Gurman, *The Dissent Papers. The Voices of Diplomats in Cold War and Beyond*, Columbia, Columbia University Press, 2012, pp. 119-127.

in Washington (1945-46). Later on, George Ball takes an active part in the launching of a new Wall Street law firm. Through his close ties with Jean Monnet (who has moved back to France as the head of the *Commissariat général au Plan*), his new firms, Cleary Gottlieb, becomes the representative of French government's economic and financial interests in the United States in the framework of the Marshall Plan. Retained in 1953 by Jean Monnet (now head of ECSC High Authority) to take charge of the interest of the High Authority, the American firm did not limit itself to giving legal advice, but had a much broader role as a broker between the Communities and the American elite, one that was more akin to the role lawyers play in the United States well beyond a strictly legal scope (legal advice, public relations, lobbying, etc.). The firm negotiated the loans that the Community contracted with American banks, founded and directly managed the EEC information office in Washington D.C., drew up briefs for 'key members of Congress and of the Executive Department', saw to it that 'the itineraries of qualified representatives of the Community who visit the United States include meetings with small groups of key members of American financial institutions',¹⁴⁹ 'organized the visits of American personalities to Luxembourg', etc. It was 'most ardently' wished, within the Luxembourg institutions, that 'given the distance from Washington', 'Mr. Ball, in whom we have the utmost confidence, should have there the global responsibility of our representation to the United States'.¹⁵⁰ Trusted by Jean Monnet and his successors, to the point that he took part directly in High Authority meetings when he was in Luxembourg,¹⁵¹ George Ball and his law firm were in the position of the 'High Authority's authorized agent',¹⁵² assigned 'tasks of a political nature',¹⁵³ and acted throughout the 1950s as a veritable platform for EEC interests in the United States.¹⁵⁴

This questioning of the traditional roles of the lawyer, preferring the particularly broad spectrum of tasks taken on by the American-style lawyer, was possible because these young lawyers had all the characteristics of 'young Turks': if they could without too much risk disregard the bans of the Brussels bar, that saw in the law firms an unfair competition, if their infringement did not raise a scandal, it was

¹⁴⁹ Law Firm Cleary, Gottlieb, Friendly and Ball, *Report to the president of the High Authority on the European Coal and Steel Community in American opinion*, 10 February 1955, p. 6. CEAB 05-316 HAEU.

¹⁵⁰ Legal department, Note to MM. Balladore Pallieri *et alii*, 11 December 1957, in CEAB 05-316 HAEU.

¹⁵¹ Procès-verbal de la 282^{ème} réunion de la Haute autorité, Luxembourg, 28 September 1955, CEAB 05-316.

¹⁵² Piero Malvestiti, Letter to George Ball, 1 p., 27 October 1960, in CEAB5-922, HAEU.

¹⁵³ Division des relations extérieures, Note pour Messieurs les membres de la Haute autorité, 3 November 1958, p.1, in CEAB5-316, HAEU.

¹⁵⁴ The appointment of George Ball in 1961 as deputy cabinet secretary for economic affairs under President Kennedy marks the end of this period. After resigning from this position, George Ball would actually become chairman of the board at Lehman Brothers International.

because they remained, by their families and/or university mentors, the 'heirs' of various Belgian political and/or legal dynasties. They were relatives and/or protégés of the Belgian 'grand masters' of European and international law at the time (Henri Rolin, de Visscher father and son, Walter Ganshof van der Meersch, George van Hecke), and they benefited from the indulgence often granted to unruly heirs, to the extent that, in the terms of one of them, 'one didn't dare consider me to be a traitor [to the Brussels Bar]'.¹⁵⁵ This group included Walter van Gerven at Cleary Gottlieb, son of a senator and former president of the bar in Dendermonde, who had studied under Jossé Mertens de Wilmars (himself a lawyer, senator, president of the European Movement in Belgium, and future judge and president of the Court of Justice of the European Community); Michel Waelbroeck at Dewey Ballantine, son of a high-level civil servant at the International Labour Board, first cousin once removed and protégé of the Socialist senator and top international law professor Henri Rolin, and also one of the students closest to Walter Ganshof van der Meersch, professor and attorney general at the Court of Cassation, who would join the European Court of Human rights in 1973; John Kirkpatrick, great-grandson of Gustave Rolin-Jaequemyns, minister of the interior and founder of the Institut de Droit International, as well as cousin to Michel Waelbroeck; lastly Bavo Cool, also at Cleary Gottlieb, son of August Cool, a central figure in Belgian Christian trade unionism and at the time president of the European organisation of Christian trade unions.

The Community lawyers quickly imposed themselves as unavoidable intermediaries between the multinational corporations and the Competition DG. They were in fact the permanent staff of these first Brussels offices, if only because the 'European tour of duty of the American lawyer'¹⁵⁶ was a stint of only a few years (about three years) that was not long enough to build up real expertise in Community law, and even less so in Belgian law that was nonetheless often required in the first cases that had to do with the constitution of distribution and export networks. At the end of the 1960s, with the ebb of American firms disappointed by the development of the Commission's economic powers that they found too modest, these lawyers became the true bridgeheads of multinational corporations in Brussels. Pooling both their expertise in European business law and their address books of American contacts and clients, these Belgian lawyers soon founded the first two law firms specialized in Community law. A first group of former students from the Catholic University of Louvain joined the firm of seasoned international lawyer George Van Hecke who had been their teacher, forming the firm Bandt-Van Hecke-Lagae & Van Bael, in 1969; some former students at the Free University of Brussels (ULB) came together in 1965 to create the firm Liederkerke Waelbroeck Kirkpatrick. Structured along the lines of American law firms, they became indispensable relays for clients outside of the

¹⁵⁵ Interview n°1, Florence, October 2008.

¹⁵⁶ Leo Gottlieb, *Cleary Gottlieb, op. cit.*, p. 200.

Community. As recalls one of these lawyers, ‘those who came to us were non-Europeans, [...] they were in need of new lawyers for their business in Europe, and they tended to seek them in Brussels. French companies called exclusively upon French lawyers’.¹⁵⁷ In addition, English firms ‘were slow to get involved in European law, and therefore they sent me their cases. They liked having someone in Brussels, we had a geographic advantage’.¹⁵⁸ Henceforth they appeared as the natural legal correspondents for multinational enterprises from outside of the Community. ‘We had splendid cases’, recalls one lawyer, ‘lots of people went to see Waelbroeck, he was very well-known in the United States and in England’.¹⁵⁹

Inevitable relays for multinational corporations in Brussels, they also had close relationships within the political and government spheres of the Community. Members of a prestigious lineage, an inseparable mesh of family and professional ties that linked them to the major internationalist figures in post-war Belgium, they were very early on familiar with the forums, actors and debates of Community legal matters, as they were successively the students, university assistants and interns of these internationalist jurists. Even before coming to Dewey Ballantine, both Michel Waelbroeck and his cousin John Kirkpatrick (also descended through his grandfather from the Rolin-Jacquemyns family) had done internships at the firm of their former professor and ‘cousin’ Henri Rolin, while the latter was in charge of the defence of the influential Belgian steel mills federation *Fédéchar* before the ECJ, or the Belgian State before the International Court of Justice in the important *Barcelona Traction* case (1969). The young Michel Waelbroeck also assisted another former professor and mentor at ULB, Walter Ganshof van der Meersch, when as prosecutor general at the Court of Cassation he prepared his findings in the *Fromageries Franco-Suisses Le Ski* case (27 May 1971) that marked the beginnings of the shift of the Belgian Court of Cassation towards the doctrine of the primacy of Community law. The young lawyer and professor, Walter van Gerven, for his part clerked with George van Hecke, the highly reputed dean of the law faculty and the Catholic University of Louvain under whom he had studied, and then worked as an assistant. Van Hecke had himself studied at Harvard in the 1920s, and was at the time one of the most famous international anti-trust lawyers, notably at the Court of Justice before which the Commission and corporations often made use of his services. These Community lawyers provided this supranational milieu with an initial meeting place for developing a structure around the Common Market – the university. Often pursuing careers both in law schools and at the bar, they had solid connections in the academic world. ‘There were close contacts between the Free University of Brussels and the Commission’, recalls one of the actors, ‘People were invited to give courses in the Evening Conferences and continuing education programmes. There were civil servants from the Commission there’.¹⁶⁰

¹⁵⁷ Interview n°3, Brussels, October 2008.

¹⁵⁸ Interview n°2, Brussels, October 2008.

¹⁵⁹ Interview n°4, Brussels, October 2008.

¹⁶⁰ Interview n°2, Brussels, October 2008.

Placed between the multinational corporations and the Commission, the American and Belgian lawyers were in a position to jointly lay the groundwork for a European business law that was just in its beginnings. It was no easy task, however; although rule 17/62 (and its supplement, rule 17/65) supported by Hans van der Groeben had indeed laid down the basis of a Community regulatory system, very few decisions had been handed down, by either the Commission or the Court. To make matters worse, the notification system advocated by the Competition DG very quickly revealed the limitations of the directorate, incapable of handling the flow of notifications, that numbered over 36,000 in less than one year. Against this backdrop the *Grundig-Consten* case took on great importance in the world of competition, and the various stages of this litigation constituted a full-blown judiciary saga, from the ruling by the Commercial Court of the Seine in 1962 and the European Commission decision in 1964, up to the judgement pronounced by the Court of Justice in July 1966. This case, pertaining to the legality of an exclusive contract for the French market between the manufacturer Grundig and a distributor, Consten, was the vertical inauguration of articles 85 and 86 of the Rome Treaties. It was the occasion for the first sanctions handed down by the Competition DG, more than two years after approval of rule 17. It was also the occasion for a first decision from the Court of Justice on the fundamental substance of the rule; previously the Court had only incidentally considered this part of the treaties. In this way the *Grundig* case concretely tested the ambitions of the actors – multinational corporations, law firms and the Competition DG foremost among them – who had since 1958 wagered on the emergence of new European regulatory space in Brussels. In November 1966, just a few months after the Court's ruling, a colloquium organized by Michel Waelbroeck with an American lawyer, Homer Angelo, gave an idea of the expectations placed in the Court. The 164 participants in the audience who were invited to discuss 'Patents and brands under competition law in Europe and the United States' included 23 professors and 71 multinational corporations (secretaries general, heads of patents' departments, etc...). For the most part, these enterprises had offices in Belgium, Petrofina, the Belgian Oil Federation) to multinational 'American' (Coca Cola, Shell, General Motors, Phenix Works, Procter and Gamble, Pfizer Europe, I.T.T. Europe, Philips) and European companies (Pechiney, Unilever, Pétroles d'Aquitaine, Petrochim, Nestlé). Also in attendance were 19 civil servants from the Commission, mostly from the Competition DG (and, to a lesser extent, from the legal department), 12 American lawyers with offices in Brussels, 17 lawyers at Brussels Appellate Court, and 12 lawyers from other European countries¹⁶¹. All were there to discuss the outlook for the Commission and the Court. With its declaration that 'the Community competition regimen does not tolerate abusive

¹⁶¹ Homer Angelo, Michel Waelbroeck, eds., *Brevets et marques au regard du droit de la concurrence en Europe et aux Etats-Unis. Colloque organisé les 15 et 16 novembre 1966*, Brussels, Presses universitaires de Bruxelles, 1968.

use of rights proceeding from national rights for brands that would counter the Community law on ententes' the Court did not disappoint this audience. The Court thus confirmed the full sovereignty and supremacy of the Commission to oversee 'agreements likely to affect trade between Member States' and attested its capacity to call into question national economic regulations (in this case patent law) when these regulations impeded the proper functioning of free competition. The condemnation of the exclusive contract, in the name of its incompatibility with free circulation, had the sound of a first victory,¹⁶² and soon became the keystone of a legal and economic doctrine that made free competition a core definition of the Common Market.¹⁶³ Immediately raised to the rank of 'landmark in the law of the European Communities'¹⁶⁴, this decision at the same time bolstered the Competition DG that found a way to handle its work overload¹⁶⁵, and confirmed the Brussels lawyers who had anticipated the formation of a supranational regulatory system at the intersection of the Court and the Commission.

The Commission, the Parliament, the Court and the Common Market thus found in the construction of 'in-house legal doctrines' an essential lever for their institutionalization strategies. These strategies comprised in particular the invention of a series of transcendancies – 'Community of law', 'Constitution', 'the general Community interest' – and teleologies – 'the economic union', 'integration', 'the ever-closer union of peoples', etc. – concepts that helped found the various components of this new European temporal power. They forged the 'legal armour', the 'general economy' and the 'institutional balance' that constituted a coherent, complete and finalized juridical system. They outlined a European reality that integrated the three Communities, the various treaties and the multiple public policies that were enacted in their name. However, this omnipresence of the law did not in itself form the legal identity of the nascent Community polity. There was still far to go, from these multiple uses of the law to the genesis of a genuine 'institutional programme' under the treaties. This study must delve in deeper to understand the contexts and the spaces from which emerged a common paradigm for actors with very different positions within this transnational institutional space. This will be the subject of the next two chapters. In Chapter 2, devoted to the historical conditions that saw the formation of a

¹⁶² Competition litigation was very rare, only four decisions were handed down by the Commission between 1964, date of the *Grundig-Consten* ruling, and the end of the transition period for the industrial common market, in July 1968; cf. Laurent Warloutzet, *Quelle Europe économique pour la France?*, *op. cit.*, p. 626.

¹⁶³ Philippe Maddalon, *La notion de marché dans la jurisprudence de la Cour de justice des communautés européennes*, Paris, LGDJ, 2007.

¹⁶⁴ Ernst Steindorff, 'The Grundig-Consten Case, a Landmark Decision of the European Court of Justice on Common Market Antitrust Law', *American Journal of Comparative Law*, vol. 15, n°4, 1966, pp. 811-822.

¹⁶⁵ The principles established by the Court of Justice were explicitly used as the basis for a Rule proposed by the Competition DG a month later (26 August 1966) that enabled the DG to set aside a significant proportion of the 32,000 authorization applications it had received.

European legal terrain, we see how this space functioned as a crossroads for the political, economic, administrative and academic constructions of Europe.