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GUEST EDITORIAL: IN SEARCH OF PURPOSE

The initial EEC Treaty had the objective of establishing a common market and of progressively approximating the economic policies of the Member States, in order to promote economic stability, higher standards of living and closer mutual relations. Article 2 of the Treaty said so explicitly. The activities of the Community as set out in the further provisions of the Treaty, such as the abolition of internal customs duties and quantitative restrictions, or the adoption of common policies with regard to matters such as agriculture and transport, were intended to achieve these purposes.

These purposes may have been ambitious, but they had a degree of clarity which enabled politicians, administrators and lawyers to perceive the frame of reference for the work of the Community institutions. The regulations adopted in the early 1960s, for example, on competition, on free movement of workers, and on intervention systems for cereals and for dairy products, were subject to the requirements resulting from the general purposes of the Treaty. There was a close link between secondary legislation and primary aims. The perspective of a European common market seemed a pre-eminent political guideline for gradually giving shape to a European Economic Community.

The definition of the purposes of the Treaty also had another and perhaps more far-reaching consequence. The courts were able to interpret Treaty provisions in the light of their purposes as defined by the Treaty itself. In 1962, when the Community was barely five years old, the Court of Justice already started to use this method of interpretation. Once this step had been taken, the same method was also applied for interpreting regulations, directives and decisions. A famous example occurred in 1964, in an innocuous case called *Unger*.[1] The Court had been asked to interpret the concept of "worker or assimilated person", which determined the scope of application of the EEC regulation on the coordination of systems of social security for migrant workers. Rather than relying on the legal sense of this concept in national systems of social security, the Court defined the meaning of the term by appealing to the significance of the regulation for the free movement of workers, which is, itself, an essential element of the common market to be established by the Treaty. This judgment helped to set the tone for later developments: a line of case law was introduced which remained an important

1. Case 75/63 [1964] ECR 177.

part of the judicial contribution to the evolution of Community law. The *Cassis de Dijon* judgment of 1979, and its momentous follow-up, were indeed founded on this same type of reasoning. The common market implies free movement of goods, and free movement of goods involves the liberty of traders to import products validly manufactured in a different Member State according to rules and standards applicable in that State.

This development was helped by a second characteristic of the Treaty: it had a strong internal coherence. By stating first its objectives, next the Community activities considered as the necessary instruments for achieving these objectives, and then gradually elaborating each of these instruments, the Treaty embodied a kind of hierarchy of rules of a sort which is normally lacking in international conventions. Such an arrangement facilitates the work of lawyers and judges, as it paves the way for finding solutions to problems not expressly envisaged by the wording of the Treaty. The process of economic integration initiated by the establishment of the common market raised a great number of practical problems that could hardly have been foreseen by the drafters of the Treaty. The Treaty provided, however, a framework in which these problems could find their place. The importance of such a framework was amply illustrated by cases on health checks for imported foodstuffs, on currency restrictions for travelling citizens and on the use of trade marks and copyright for the fragmentation of the common market.

Much of the initial clarity has meanwhile been vanishing. The Single European Act of 1986 already created a certain confusion by providing measures for arriving at an "internal market" for the Community, without giving any clue as to the relationship between this "internal market" to be achieved by 1992 and the "common market" to be established by the EEC Treaty. The Treaty concerning the European Union of 1992 ("Maastricht") added a detailed framework for intergovernmental cooperation in the field of foreign and security policy and in the fields of justice and home affairs. Somewhat mysteriously, the new Treaty provided that these two new "pillars" of the European Union and the European Community (as the EEC was rebaptized) were submitted to "a single institutional framework", but the normal procedures of decision-making and of judicial protection in use in the Community were not to be applied to the two new "pillars". As a result, the Union Treaty developed two different sets of mechanisms without, however, devising a clear dividing line between the two fields of application. In some areas, such as migration, both systems – that of the Community and that of one of the new "pillars" – seemed to apply. The initial coherence had gone. And it didn't come back in later revisions of the treaties either. Purposes and activities were added, for example, on the protection of the environment, but they did not fit in the existing framework, and did not provide a new one either.

The Treaty establishing a Constitution for Europe makes matters worse. The text of the constitution starts by defining the "values" of the Union (human dignity etc.: Art. I-2) and then provides that the object of the Union is to promote these values, as well as peace and the welfare of the peoples (Art. I-3(1)). In a vague echo of the EEC Treaty, the constitution goes on to say that the Union offers its citizens an area of freedom, security and justice without internal frontiers as well as "an internal market" where competition will be free and undistorted (Art. I-3(2)). And the provision continues by recounting what kind of things the Union will encourage, oppose, promote and respect.

The promotion of peace is a very honourable aim, quite worthy of being pursued; and it certainly sounds much better than establishing a common market. That is, however, only a moderate relief to the lawyers. They wonder what their new frame of reference will be now that the old one is to be superseded. At first sight, that might be good news for opponents of judicial creativity, as judges could, in their perception, become more modest if they have little to go by when faced with new and unforeseen problems. The question is, however, whether such an assumption would not be based on an over-simplification: these new problems will turn up nevertheless. Even if rule-giving authorities do a perfect job (a rare occurrence) "*mille questions inattendues*" will arise, as Monsieur Portalis put it in his remarkable introduction to the French *Code civil* more than two centuries ago. And these thousand questions must be solved; many things will indeed be "*nécessairement abandonnées à l'empire de l'usage, à la discussion des hommes instruits, à l'arbitrage des juges*", to continue the same quotation.[2] Questions of application and interpretation of Treaty texts and of Union legislation will necessarily arise. They can, however, be more confidently left to judicial discretion when this discretion is circumscribed by the Treaty itself and enclosed in a coherent set of purpose-oriented provisions.

One of the charming characteristics of the future is that we know so little about it. Summer 2005, when these lines were written, prospects for the Constitutional Treaty looked bleak. For some years, therefore, the Nice version of the European treaties will probably remain in force. Before the next step is taken, it may be a good idea to reopen the debate on aims and purposes. There are certainly political arguments for such a debate: one of the reasons for the negative attitudes of parts of the European population to the constitutional treaty seems to consist of the indeterminate character of the EU and the fear it engenders that the further development of the Union is unpredictable. Some rethinking may also be necessary, however, from a legal

2. From the "Discours préliminaire" of 24 thermidor of the year VIII.

point of view. At present, it is very difficult to find the link between the different components of the Union. The process of economic integration responds to influences and patterns that are different from those of military cooperation and foreign policy. The latter forms of collaboration can be devoted to a great many purposes, not just to one or two. The treaties give no guideline for the purposes to be served by, for example, foreign policy; and perhaps, such a subject is not suitable for being submitted to clear definitions of its aims and objectives. It might, of course, be possible to lump everything together by defining one overriding objective, for example, the idea of a political community or of a confederal entity. That seems, however, highly unlikely in the present political climate.

Under these conditions, there is something to be said for making a complete separation between the process of economic integration, on the one hand, and the different forms of purely inter-governmental collaboration, on the other. The Union could then rejoin its initial clarity of purpose in economic, monetary and commercial matters. The distinction might also be conducive to a (long-needed) revision of the institutional system, since military operations and diplomatic activities require entirely different methods of decision-making from those used, for example, for the management of competition policy or the customs union. Autonomous institutions can only work well if there is a clear relationship between the proclaimed purposes and the necessary activities. That is, after all, why there is more room for autonomous institutions in the process of economic integration than in the field of defence and foreign affairs.

Such a solution would certainly have its disadvantages. First, the model is less simple than it appears at first sight: for some subjects, such as environmental policy or matters of criminal law, it is difficult to determine on which side of the dividing line they should find their place. Some political dealing will be necessary to achieve the necessary clarity. Secondly, the suggestion may look like a step backwards in the European integration process (back to a somewhat beautified "Maastricht"), and we do like the idea of going forward. The question is, however, whether taking such a risk is not preferable to continuing the present psychological, political and legal confusion. Immobilism may well constitute the main danger for the integration process. Making some simple but fundamental choices could help to cure that malady.

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