EUROPEAN PARLIAMENT

AND

EUROPEAN COURT OF JUSTICE

EVOLUTION OF ECJ JURISPRUDENCE WITH REGARD TO UPHOLDING THE RIGHTS AND ENHANCING THE ROLE OF PARLIAMENT

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This study was carried out at the request of the Committee on Legal Affairs and Citizens’ Rights in the European Parliament’s Directorate – General for Research by the trainee lawyers Christine Rathke, Gunnar Jungk (MLE) and Holger Schappeler (ZES) under the supervision of Klaus H. Offermann and was checked by members of the European Parliament’s Legal Service.

The concluding analysis and appraisal was written by Professor Jiirgen Schwarze, Institute of Public Law, Department of European and International Law, University of Freiburg.

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Evolution of ECJ jurisprudence with regard to upholding the rights and enhancing the role of Parliament

A. Introduction

Since the origins of the European Communities the European Parliament has been endowed with limited powers by comparison with the other institutions. Parliament's right of involvement was initially rooted in the budgetary sector and its role in the Community legislative procedure was otherwise confined to delivering non-binding opinions.

Its members have been elected by direct universal suffrage since 1979 and, from that time onward, Parliament began to press ahead with the expansion of its own rights. On the basis of various amendments to the Community treaties it was able to enhance its supervisory rights and its rights of participation under the legislative procedure. Major treaty amendments were brought about by the Single European Act of 1 July 1986 and the Maastricht Treaty of 7 February 1992 (Treaty on European Union, hereinafter: TEU), which entailed a significant enlargement of Parliament's supervisory and participatory rights in the area of primary law.

The continuous strengthening of Parliament's position in the interplay with the other Community institutions did not however derive simply from treaty amendments. The jurisprudence of the European Court of Justice (ECJ) was of decisive importance in developments to date.

The following will investigate what influence the jurisprudence of the ECJ as creator and upholder of 'institutional balance' has had with regard to upholding the rights and enhancing the role of the European Parliament. The presentation and analysis will firstly list the jurisprudence concerning the upholding of Parliament's rights by focussing on the area of case law in which the ECJ has dealt specifically with the rights of Parliament as laid down in the Community treaties. In addition, the ECJ jurisprudence relating to the enhancement of Parliament's role that goes beyond simply upholding Parliament's status quo in the treaties will be presented.

Nevertheless, the powers of Parliament in the present state of integration are not yet sufficient to do justice to the European Union's claim to be democratic. This survey gains topicality against the background of the 1996 Intergovernmental Conference at which Parliament was also called on to submit proposals to eliminate - any remaining - democratic deficit and at which the representatives of the Member States had to answer the question as to whether and how Parliament's role in the Union machinery can be further enhanced.

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1 For the names of the institutions after the Maastricht Treaty took effect, see Commission resolution of 17 November 1993 (not available in English).
B. Evolution of jurisprudence with regard to internal organizational powers

In the first 25 years of its existence Parliament saw no fundamental need to make use of the opportunities provided by the treaties to impose its view of the law with the aid of the ECJ.4

I. Parliament’s seat

As regards defining the limits of Parliament's right to organize its own affairs, the ECJ had its first opportunity to clarify matters in the area of the procedure surrounding the issue of Parliament's seat in 1983:

1. 'Luxembourg v Parliament', (Seat I), Case 230/81, Judgment of 10 February 19835

The ECJ's judgment was concerned with the question of the seat and working place of Parliament. Under Articles 216 ECT, 189 EAECT and 77 of the Treaty establishing the European Coal and Steel Community the seat of the institutions of the Community is determined by common accord of the governments of the Member States. To date, however, the latter have not taken a decision on the seat of the institutions but simply adopted on 8 April 1965 a decision on the provisional location of certain institutions and departments of the Communities when ratifying the Treaty establishing a Single Council and a Single Commission of the European Communities. This decision states that Luxembourg, Brussels and Strasbourg are to remain the provisional places of work of the institutions of the Communities. The General Secretariat of Parliament and its departments should accordingly remain in Luxembourg.

After the Member States failed to comply with a request by Parliament to take a decision on its seat by 15 June 1981, Parliament adopted on 7 July 1981 a resolution on the improvement of its working conditions. Paragraph 3 reads as follows:

'... decides, pending a final decision on a single meeting place of the European Parliament, (a) to hold its part-sessions in Strasbourg, (b) to organize the meetings of its committees and political groups as a general rule in Brussels.'

The annulment proceedings brought by the Grand Duchy of Luxembourg were directed against this resolution of Parliament.

In its judgment the Court decided that neither through its decision to hold its part sessions in future in Strasbourg nor through the decision to hold the meetings of its committees and political groups as a general rule in Brussels had Parliament exceeded its powers in the context of its autonomy.

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6 Hereinafter: ECSCT.
7 The presentation and analysis of the judgment is confined in this section simply to the ECJ's decision on substantive law. Procedural questions - particularly as to the admissibility of such proceedings - are discussed in the context of passive legitimation.
Parliament was entitled under the internal organizational powers granted to it under Articles 25 ECSCT, 142 EECT and 112 EAECT to take appropriate measures to ensure the due functioning and conduct of its proceedings. However, the limits were laid down for Parliament in the requirement of sincere cooperation on the part of the Member States and the Community institutions contained in Article 5 E(EE)CT.

The Court emphasized that, as long as it did not have a single seat or simply one place of work, Parliament must be in a position to maintain in the various places of work outside the place at which its Secretariat was located the infrastructure that was essential to ensure the fulfllment of the tasks entrusted to it by the treaties in all those places. However, the Court added that the transfer of staff must not exceed the set limits since any decision to transfer the General Secretariat of Parliament or other departments wholly or partially, de jure or de facto would breach the decision of 8 April 1965. Since Parliament's resolution of 7 July 1981 stayed however within the above limits, the annulment proceedings were dismissed.

2. 'Luxembourg v Parliament' (Seat II), Case 108/83, Judgment of 10 April 1984

On the question of the seat, Parliament adopted on 20 May 1983 a further resolution dividing up the staff of the Secretariat between the places of work stipulated in the resolution of 7 July 1981 so that services mainly concerned with the functioning of part-sessions are based permanently in Strasbourg and those mainly concerned with committees are permanently based in Brussels. This resolution was declared null and void by the Court's judgment of 10 April 1984 after proceedings were brought by the Grand Duchy of Luxembourg. In the Court's view, Parliament had, by continually dividing up and transferring Secretariat staff, sought to transfer the latter de facto from Luxembourg and thereby exceeded its powers.

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This judgment of the Court also dealt with the question of creating and maintaining the necessary infrastructure in the various meeting places. In this procedure France challenged Parliament’s resolution of 24 October 1985 deciding to have a building constructed in Brussels with a room providing seating for not less than 600 people. In the preamble Parliament pointed out that on the existing premises it was impossible for two of the larger political groups to meet at the same time. It was also completely out of the question for a special or additional plenary session to be held in Brussels during a week largely devoted to committee or group meetings.

The applicant contested primarily possible scheduling of such plenary sessions which saw Parliament overstepping its powers.

After a detailed presentation of the various positions of the governments of the Member States on the quest on of the seat of the individual institutions, the Court referred back to its judgment of 10 February 1983 according to which Parliament was required when deciding on its internal organization to respect the responsibility of the governments of the Member States for fixing the seat of the institutions while at the same time the Member States had to recognize that Parliament was solely responsible for deciding its internal organization and the proper functioning of Parliament’s activities should not be hampered by the decisions of the governments. Consequently Parliament was not barred in the exercise of its internal organizational powers from holding plenary sessions away from Strasbourg where such a decision was an exception to the rule and useful for Parliament’s work.

In the Court’s view Parliament did not exceed the limits of its powers with the contested resolution and thus the action brought by the French Republic was dismissed.

II. Actions brought by officials

Parliament appeared before the ECJ even prior to 1979 in approx. 80 cases involving officials under procedures pursuant to Articles 179 EECT and 152 EAECT. Contrary to the wording of Articles 179 EECT and 152 EAECT, an action by a staff member was to be brought not against the ‘Community’ but against the relevant appointing authority”. In some of these procedures involving the staff regulations the Court had the opportunity to make general statements on the institutional role of Parliament. For example, in Case 1/5511 the Court emphasized Parliament’s autonomy in the matter of its internal organization. The Court sees the limits to this right of Parliament to administer its own affairs as being drawn solely by the Community treaties12. This principle proclaiming Parliament’s autonomy was derived from Article 142 E(EE)CT13.

A major advance was made in this area with the Court’s judgment in Case 208/8014. This request for a preliminary ruling dealt with the question as to whether the travelling expenses paid to MEPs were subject to national taxation.

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13 See Geiger, Kommentar zum EGV, concerning Article 143, para. 1.
Within the narrow confines of its statute the Court allowed Parliament a broad right of participation in this procedure\textsuperscript{15}, for example, by not limiting Parliament's involvement to submitting information but allowing a detailed written and oral opinion to be delivered.

The Court considered the fixing of the travel allowance as a matter covered by Parliament's right to organize its own affairs\textsuperscript{16}. The Member States were required by Article 5 E(EE)CT to abstain from any measure that could interfere with the functioning of the institutions of the Community.

III. **Analysis**

Outstanding importance attaches to this jurisprudence from the ECJ as far as the recognition of Parliament's internal rights is concerned. Within the limits fixed by the Community treaties it ensures that Parliament can uphold its institutional achievements and also accords Parliament wide powers in the matter of organizational autonomy.

The argument over Parliament's right to manage its own affairs is continued in Case C-345/95 'French Republic v European Parliament' in which the Court is required to re-examine the issue of Parliament's place of work on the basis of the Edinburgh decision of 1992.

C. **Information supplied by Parliament pursuant to Article 21, second paragraph of the ECJ statute (EEC) in connection with preliminary rulings under Article 177 ECT.**

I. **Legal bases**

The 'privileged' Member States and Community institutions and hence Parliament as well also enjoy a special status in that they are entitled at any time to submit appropriate written observations and statements where requests are made for preliminary rulings (Articles 20 and 21 of ECJ Statute (EEC)) without being required to demonstrate a 'legitimate interest' in the intervention\textsuperscript{17}.

II. **Examples of case law**

1. **'Lord Bruce v Aspden', Case 208/80**

The Court asked Parliament for information because the tax treatment of Parliament's reimbursement of travel and subsistence expenses to Members of the European Parliament (hereinafter: MEPs) was at issue. This also affected therefore the internal functioning of Parliament which is protected by Article 5 EECT from interference by the Member States and/or their authorities (in this case, tax authorities). Furthermore, Article 8 of the Protocol on the Privileges and Immunities of the European Communities prohibits the imposition of administrative restrictions, including those arising from taxation rules, on the free movement of MEPs. Member States must also respect Parliament's lump-sum system of reimbursement, i.e. without individual accounting for costs actually incurred, as an internal organizational measure. Should these allowances be too high or in reality constitute partly

\textsuperscript{15} See Schoo. "Das Europäische Parlament und sein Verfassungsgericht - Von der Vormundschaft zur Volljährigkeit", in: Europäische Grundrechte-Zeitschrift, 1990, p. 252 (527). See also C.II.1. below for Parliament's intervention in procedures pursuant to Article 177 ECT.

\textsuperscript{16} See footnote 14 (2219).

\textsuperscript{17} Joined Cases 56 and 58/64 Consten v Commission [1966] ECR 299.
disguised remuneration, the Member States would be entitled to subject this portion to national income tax.

2. 'Roviello v LVA Schwaben', Case 20/85

Parliament was asked for information in this dispute because it was partly concerned with clarifying the question as to when Parliament needed to be reconsulted in legislative procedures (here, a regulation). It was able to contribute in this 'indirect' manner to a regulation and/or some of its individual provisions being declared null and void since at that time it did not yet enjoy the right to institute proceedings of its own (Article 173 EECT). In the oral proceedings Parliament set out its position by referring to numerous resolutions of its own and reports of committees according to which renewed consultation was required where (1) the Commission proposal or Council measure envisaged contained a material alteration of the proposal on which Parliament had expressed its view and (2) that alteration was not manifestly in accordance with the wishes of Parliament. For the purposes of defining 'material alteration' it referred to the Court's jurisprudence in the 'Chemiefarma'\(^{18}\) and 'Battaglia'\(^{19}\) cases and the specific explanations given there. It was finally proved successfully that the alteration that had been made affected the scope of the matter to be regulated by limiting the field of application and was hence to be regarded as 'material'.

The Court endorsed this view and declared the provision in question to be null and void.

3. 'Wybot v Faure and others', Case 149/85

Parliament was asked for information to help answer a question submitted by the Paris Court of Appeal concerning Article 10 of the Protocol on the Privileges and Immunities of the European Communities. With its answer concerning the application of Article 19 of the protocol and its own practice in the matter whereby it applies all year round to MEPs since there is no interruption of the session or of their activity, Parliament made a decisive contribution to its interpretation and thus significantly influenced the Court's subsequent identically worded decision. It therefore helped clarify the concept of 'during the sessions of the Assembly' thereby also contributing to the uninterrupted immunity of MEPs and securing their status. Furthermore, Parliament's internal organizational powers (Community law) were again clearly demarcated vis-a-vis the influence of national law since, even in the absence of Treaty provisions, fixing the duration of the session falls solely under the internal organizational powers of Parliament.


4. ‘Le Pen and Front National v Arndt and others’, Case C-201/89

In this dispute the Court had to decide on two important questions concerning the non-contractual liability of Parliament that had been referred to it by the Colmar Court of Appeal. The first question was whether the ECJ had exclusive jurisdiction under Articles 178 and 183 EECT to rule on an action for non-contractual liability arising from the distribution of a defamatory publication on the premises of Parliament. The second question was whether the distribution of a publication by a political group in Parliament entailed the latter's non-contractual liability.

After hearing Parliament and its written answers to questions put to it, the Court answered both questions in the negative thereby clearly helping to demarcate the imputation of acts by Parliament's political groups to Parliament as a Community institution. There is no provision in Parliament's Rules of Procedure nor is there any rules of Community law whereby acts of a political group could be imputed to the European Parliament as a Community institution and could give rise to the latter's non-contractual liability**.

III. Analysis

Through its oral and written statements and/or information supplied in connection with preliminary rulings, Parliament contributed to a clear demarcation of powers and responsibilities of the Institution, its Members and the political groups. It also provided important practical indications for securing the status of MEPs and expressed its view at an early stage (Case 20/85) on the need for renewed consultation under the Community legislative procedure, which was duly taken into account in the jurisprudence of the Court.

D. Observations submitted by Parliament to the ECJ in connection with opinions pursuant to Article 228 (6) ECT

I. Legal bases

Although there is no provision in Article 107(1) of the Court's Rules of Procedure for a request for an opinion to be served on Parliament and hence it could not be "officially" informed thereof, Parliament was allowed by the Court, at its own request and for the first time in proceedings connected with an opinion, to deliver its observations. As legal basis the Court clearly made analogous use of Article 21, second paragraph, of the Court's statute (EEC) since this was not a legal dispute in the usual sense and hence there were no parties to the case. Nevertheless, Parliament enjoys a comparable position to that of a non-party since under Article 107(1) of the Court's Rules of Procedure, it does not belong to the institutions on which the request for an opinion is served.

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** Case C–201/89 [1990] ECRI–1183, paragraphs 14 and 15 of judgment
II. Examples of case law

1. Opinion 1/92 (EEA)\(^{21}\)

The Court was asked by the Commission to deliver an opinion on the institutional machinery of the EEA. In this case, Parliament was at its request given leave for the first time to submit observations, whilst the Council and the Member States made no use of their right. Parliament was able to demonstrate satisfactorily that its participation in the decision-making process was affected by the alteration to the institutional arrangements. Parliament had regretted in its observations that the Commission had referred only one aspect - albeit an important one - of the institutional machinery of the EEA to the Court which should have been asked to consider the institutional machinery as a whole and, more specifically Parliament's role in the decision-making procedure. The powers conferred on Parliament in the EEA agreement were at odds with the democratic principle set out in the preamble.

Parliament was especially critical of the compatibility of the revised system of judicial review with the EEC Treaty because the compromise contained such major shortcomings as to render an interpretation complying with the Treaty extremely difficult.

Furthermore, the procedures were so complicated and the demarcation lines so vaguely drawn that the renegotiated texts needed to be revised simply on the grounds of legal certainty and on account of the difficulties in determining the law applicable to a given situation.

The Court did not take on board these observations of Parliament in the subsequent opinion.

2. Opinion 2/92 (OECD)\(^{22}\)

At the request of Belgium, the Court was asked for an opinion on the competence of the Community or one of its institutions to participate in the third revised decision of the OECD Council on national treatment of foreign-controlled undertakings. In these proceedings too, Parliament was given leave at its request to submit observations. It stated that it was taking part in the proceedings solely with a view to protecting its rights and powers in the Community decision-making process and deferred to the judgement of the Court so far as concerned the admissibility of the request for an opinion. It made particular reference to the dual legal base employing Articles 57 and 113 ECT which was necessary because the implementation of the Community policy on the taking up and pursuit of activities by self-employed persons involved the conclusion of external agreements which ensured the balanced development of that policy. The Member States should therefore participate in the third OECD decision alongside the Community. This view was also taken by the Court in its final opinion.

\(^{21}\) Opinion 1/92 [1992] ECR I – 2821

\(^{22}\) Opinion 2/92 [1995] ECR I – 521
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3. Opinion 1/94 (WTO - GATS, TRIPs)

The Commission made a request to the Court pursuant to Article 228 (6) ECT for an opinion on the competence of the Community to conclude the agreement establishing the World Trade Organization and, in particular, the General Agreement on Trade in Services (GATS) and the agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods (TRIPs).

Here too Parliament was asked to submit observations. It concentrated primarily on the implied powers to conclude GATS that could possibly be derived from provisions of a general nature in the EC Treaty (Articles 100a and 235). Any recourse to Article 235 ECT could not in any way be interpreted as prejudicing its freedom to refuse to give its assent if it deemed the agreement to be unacceptable having regard to the objectives of the Treaty and the interests of Community citizens. It accordingly proposed that the Court should answer the Commission's questions as follows:

- declare that the Agreement establishing the WTO must be concluded on the basis of the second subparagraph of Article 228 (3) ECT;
- declare, independently of the foregoing, that Article 113 ECT did not constitute an adequate legal basis;
- declare that, if recourse were had to Article 235 ECT or to the case law of the Court, such recourse could under no circumstances be interpreted as giving rise to any legal obligation on the part of Parliament to give its assent even where the conclusion of the Agreement, having regard to its content, would be unacceptable to it.

Even though the Court did not in its opinion share all Parliament's legal positions, its observations were nevertheless incorporated in the reasoning of the Court on an equal footing with those of the other institutions.

III. Analysis

Parliament thus made further headway in establishing its entitlement to participate in proceedings of the ECJ through generous interpretation of the latter's statute and/or rules of procedure. This is all the more significant in that the proceedings arising from requests for opinions seek to clarify difficult legal questions relating to the right choice of legal basis for the Community's legislative procedure, so enabling Parliament's form of involvement to be established already at a preliminary stage.

E. Intervention by Parliament

I. Legal bases

Intervention is regulated in the respective statutes of the ECJ (Articles 37 (EEC), 38 ( EAEC) and 34 and 41, second paragraph (ECSC)) and in the additional provisions in the two sets of rules of procedure (Article 93 of the Rules of Procedure of the ECJ and Articles 115 ff. of the Rules of Procedure of the Court of First Instance (CFI)).

This means that Parliament as a Community institution belongs, along with the Member States, to the privileged intervenors since they may "at any time" without stating reasons intervene in a case pending before the ECJ/CFI. In such cases the Courts take note of their participation without hearing the parties beforehand.

II. Examples of case law


Parliament's involvement in proceedings before the ECJ originated in the "Isoglucose case", in which Parliament intervened in the proceedings on behalf of two artificial sugar producers. Parliament intervened pursuant to Article 37 of the Court's statute (EEC). This right of intervention was initially challenged by the Council as defendant because Parliament had no interest in the outcome of the case and by intervening would, as it were, be placed in the position of an applicant party, although this right did not exist for Parliament under Article 173(1) EEC. However, by decision of 16 January 1980 the Court allowed Parliament's intervention on the basis of Article 37, first paragraph, of the ECJ's statute (EEC). The justification was based mainly on the wording of Article 37 of the statute which refers to the institutions of the Community to which Parliament belongs pursuant to Article 4 (1) E(ECT).

The Court emphasized that the admissibility of Parliament's intervention did not depend on evidence being produced of a particular interest in the matter.

With the authorization of intervention on an equal footing alongside the other Community institutions, Parliament had made a first successful step towards full involvement in proceedings before the ECJ.

2. Further interventions

However, Parliament made only reluctant use of this means of explaining its position to the Court. As a general rule it has intervened only to uphold its own rights, for example, as intervenor in the following cases:

- Case 48/81, Germany v Commission, "Budgetary powers of Parliament"
- Case 73/82, Council v Commission, "Budgetary powers of Parliament"
- Case 131/87, Council v Commission, "Hormones"
- Case 16/88, Commission v Council, "Legislative powers-budgetary rights"
- Case 300/89, Commission v Council, "Titanium dioxide".

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25 See Case 138/79
F. Passive involvement in legal proceedings (passive legitimation)

I. Initial position in the EEC Treaty

Originally Parliament was according to the Treaties in the version of Article 173 EECT not entitled to appear either actively or passively in proceedings. Intervention, however, is only a weak instrument for securing recognition of Parliament's own interests in the ECJ. The Treaty's failure to take account of Parliament in proceedings before the Court was nevertheless no longer acceptable given the changing role of Parliament in the institutional machinery of the Community as a result of the first direct elections in 1979. The ECJ has consistently developed the passive and active legitimation of Parliament under Article 173, first paragraph, EECT by landmark interpretations of the Treaties. The Court's key decisions along this path are set out below.

II. Evolution of jurisprudence

1. 'Grand Duchy of Luxembourg v Parliament', Case 230/81

As already explained above, this Court judgment dealt with the question of Parliament's seat. In addition to the substantive decision on Parliament's powers, a procedural decision on the admissibility of actions against Parliament was also required.

In Parliament's view the action was inadmissible because neither Article 38 ECSCT nor Articles 173 EECT and 136 EAECT make provision for a right of action. The applicant held that recourse to Article 38 ECSCT was excluded only where specific and exclusive recourse was to be had to the EECT or the EAECT. Alternatively, the action was admissible on a broad interpretation of Articles 173 EECT and 136 EAECT because, with Parliament's increased powers, gaps should be avoided in the system of legal protection.

The Court in its decision adhered to the wording of Article 38 ECSCT whereby:

- 'the Court may, on application by a Member State or the Commission, declare an act of the European Parliament or of the Council to be void.'

The power of a Member State to bring an action against measures of the Parliament relating to that Treaty is not open to doubt in the Court's view. Nevertheless, that power is restricted by the third paragraph of Article 38 ECSCT to grounds based on lack of competence or infringement of an essential procedural requirement. Since Parliament was an institution common to the three Communities it was acting uniformly when it adopted a resolution relating to its operation as an institution and the organization of its secretariat. The right of action pursuant to the first paragraph

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27 For the sake of uniformity no differentiation will henceforth be made between the concepts of the capacity to sue and be sued on the one hand and active and/or passive legitimation on the other. It is true that a uniform definition of this concept is rejected in some quarters since active and/or passive legitimation are actually concerned with questions of substantive law (...). However, the ECJ does not make this distinction and examines active legitimation as a condition of admissibility (e.g. in Case 13/83 Parliament v Council [1985] ECR 1513 ff. (1587)).

28 In Case 108183 set out above, Luxembourg v. Parliament, [1984] ECR 1945, the objection of inadmissibility was withdrawn by Parliament.
of Article 38 ECSCT was applicable to measures relating simultaneously and indivisibly to the spheres of the three Treaties. With regard to the alternative submission made by the applicant, the Court held that there was no need to consider the question whether the principles appertaining to observance of the law required that Articles 173 EECT and 146 EAECT be interpreted as meaning that Parliament may be a party to proceedings before the Court.

2. 'Les Verts' v Parliament, Case 294/83, Judgment of 23 April 1986

The recognition under Community law of the passive legitimation of Parliament by the Court was achieved on the basis of the actions brought by the French political party 'Les Verts - Parti écologiste' against Parliament.

The issue at stake in these actions was Parliament's competence for electoral campaign financing. In the run-up to the second direct elections in 1984 Parliament decided that the funding for information campaigns should be allocated by plenary with one third being paid only after the elections. In addition, 62% of the appropriations earmarked for the 1982 to 1984 financial years were to be paid to Members already represented in Parliament and only 31% to groupings outside Parliament.

The applicants brought six actions challenging that part of Parliament's decision earmarking only 31% of the appropriations for groupings not yet represented in Parliament. Except for Case 294/83, the actions were dismissed as inadmissible by the Court pursuant to the second paragraph of Article 173 EECT. The Court justified the dismissal of these cases not with Parliament's incapacity to be sued but with the absence of direct effects on the applicant of Parliament's measures connected with the budgetary procedure.

In Case 294/83 the applicant put forward seven submissions. One of them criticized Parliament's lack of competence for such a scheme for reimbursing expenses since the Member States were anyway responsible pursuant to Article 138(2) EECT. Secondly, this scheme of reimbursement breached the principle of equality of opportunity for groupings outside Parliament.

The defendant contended in these proceedings with reference to passive legitimation that the acts of Parliament could not be challenged pursuant to the first paragraph of Article 173 EECT. It is true that Parliament had initially argued here that Article 164 EECT required Article 173 to be interpreted as meaning that Parliament had to be counted among the institutions whose acts were open to challenge.

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However, Parliament moved further and further away from this view during the proceedings and stated during the oral procedure that, on a broad interpretation of Article 173 EECT, it should also be recognized as having the power to challenge acts by other institutions: active and passive legitimation could not be separated from one another. Until such time as the defendant was granted the first, the second had to be ruled out\(^{31}\).

In his opinion of 4 December 1985 Advocate-General Mancini favoured Parliament's passive participation in proceedings in this case in the interests of ensuring the greatest measure of legal protection possible. An interpretation confined to the wording of Article 173 EECT would in his view run counter to the general scheme of the Treaties. By way of justification he referred to the case law of the Court in Case 230/81\(^{32}\) in which recognition of Parliament's passive legitimation is justified by the need to avoid lacunae in the legal protection provided by the Court. In this judgment the Advocate-General saw an opening for affirming Parliament's capacity to be sued over and above the wording of Article 173 EECT. In justification of a broad interpretation of Article 173 EECT that goes beyond the actual wording he adduced the judgment in Case 25/62\(^{33}\):'

'Moreover provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on the point, a limitation in this respect may not be presumed.'

The Advocate-General then went on to deal with Parliament's contention that passive and active legitimation were inseparably linked. In his view, the grounds on which Parliament's decisions were subject to judicial review likewise justified Parliament being accorded active legitimation to challenge acts by the other institutions. This would mean that Article 173 EECT would need to be read in a way which accorded with the more widely drafted Article 175 EECT.

In Case 294/83 the Court confirmed the admissibility of actions against Parliament under Article 173 EECT. Both the passive legitimation of the defendant and the active legitimation of the applicant applied in these annulment proceedings. As a leading consideration the Court held that neither the Member States nor the Community institutions were exempt from review of whether their acts were in conformity with the Community Treaties. This scrutiny had been established on the basis of a complete system of legal protection comprising Articles 173, 184 and 177 EECT under which the Court was entrusted with reviewing the legality of the acts of the institutions.

On this basis, the Court interpreted Article 173 EECT beyond its actual wording as meaning that it was possible under the general scheme of the Treaty to institute direct proceedings against all those acts of the institutions which were intended to produce legal effects. The fact that Parliament was not specifically mentioned as one of the institutions whose acts could be challenged under Article 173 EECT was due to the circumstance that the original version of the EEC Treaty conferred upon it only advisory powers and powers of political supervision but not the power to adopt measures intended to produce legal effects vis-a-vis third parties. Article 38 ECSCT showed that acts of Parliament were not in principle immune from actions for annulment.

\(^{31}\) See opinion of Advocate-General Mancini of 4 December 1985 (19861 ECR 1341 ff. (1348).


An interpretation of Article 173 EECT which excluded the acts of Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system.

As regards the passive legitimation of Parliament, the Court concluded that an action for annulment may lie against measures adopted by Parliament intended to have legal effects vis-a-vis third parties.

3. 'Budgetary procedure', Case 34/86, Judgment of 3 July 1986

An explicit confirmation of this jurisprudence concerning the passive participation of Parliament in annulment proceedings was given by the Court with this judgment. In this case five Member States and the Council had instituted proceedings against Parliament’s overstepping of its budgetary powers with the aim of declaring the general budget for the 1986 financial year null and void. The main submission of Parliament as defendant was that the budget could not be declared void on account of the absence of judicial review under Article 173 EECT, since the declaration by the President of Parliament pursuant to Article 203(7) EECT was not an act open to challenge.

In his opinion of 2 June 1986 Advocate-General Mancini explained that the uncertainty as to whether the Court was empowered under Article 173 EECT to review the legality of acts of Parliament had been removed by the decisions in Cases 230/81 and 294/83.

The Court followed this submission by the Advocate-General and allowed such 'atypical legal acts' as the declaration by the President of Parliament that the budget has been adopted to be challenged. It was the President's declaration of final adoption that the Court saw as endowing the budget with binding force vis-a-vis the other institutions and the Member States. In exercising that function, the President was acting as an organ of the European Parliament. The Court consequently rejected the objections to the admissibility of the application pursuant to Article 173 EECT.

4. 'Le Pen/Group of the European Right v Parliament', Case 78/85, Order of 4 June 1986

In this case the Court had to deal with the question whether the principles of judicial review derived from the 'Les Verts' judgment were also applicable to acts affecting only the internal organization of Parliament's work.

The MEP Jean-Marie Le Pen and others had on 1 April 1985 brought an action for a declaration that a decision by the President of Parliament was void. By this decision taken during a meeting of Parliament's Bureau the President found that a motion signed by 113 MEPs to set up a committee of inquiry into the rise of fascism and racism in the Community was admissible. Parliament as defendant raised an objection of inadmissibility in respect of the action, which lacked a legal basis.

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35 Cases 15, 16, 17, 18, 19 and 23/86; the actions were however withdrawn after judgment was delivered in Case 34/86.
36 Other than those provided for in Article 189 EECT.
37 Case 34/86 [1986] ECR 2155 (2201 ff., paragraphs 6 and 8).
It was admissible neither under Article 38 ECSCT nor under Article 173 EECT since the review of legality in those provisions could pertain only to acts of the Council and the Commission.

The applicant replied to these objections of inadmissibility by referring to Articles 164 EECT, 136 EAECT and 31 ECSCT. Should the admissibility of the action be rejected by the Court, acts of Parliament would - in the applicant's view - be almost completely immune from review by the Court. This would give Parliament unlimited opportunity to concern itself with questions entirely outside the scope of the Community treaties.

The Court did emphasize that natural and legal persons have no opportunity to challenge acts of Parliament under Article 38 ECSCT but underlined the possibility of annulment proceedings being instituted under Article 173 EECT against acts of Parliament that produce legal effects vis-à-vis third parties.

Having regard to the principles derived from the judgment in Case 294/83, the Court rejected the admissibility of the action in this case, since the contested act of Parliament was not such as to produce legal effects vis-à-vis third parties as committees of inquiry had only investigative powers. The acts relating to their setting up concerned only the internal organization of Parliament's work. There was no question of interference with the status of the political group since the claim of discrimination referred solely to the subject-matter of the committee of inquiry and not to the infringement of the applicant's right of participation in Parliament.

However, the admissibility of annulment proceedings was not rejected by the Court in Case 221/86, although this was a decision in proceedings relating to interim measures where the examination of admissibility is in principle carried out during the main proceedings. In proceedings relating to provisional legal protection it is sufficient that the application is not manifestly inadmissible. The Court confined itself here to concluding that the applicants appeared prima facie to be third parties within the meaning of the judgment in Case 294/83. Since therefore the Court had not yet taken a decision on the admissibility of the action in the main proceedings, no contradiction existed with the rejection of Parliament's passive participation in proceedings in Case 78/85.

5. 'Blot and Front National v Parliament', Case C-68/90

Confirmation of the Court's previous decision in Case 294/83 came with Case C-68/90. The applicants challenged the legality of the procedure for appointing the chairman of an interparliamentary delegation. These delegations are responsible for Parliament's external contacts and interparliamentary cooperation. The applicant Blot contended that he and not G. Topmann, who had been elected on 16 January 1990, had been appointed chairman.

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In the opinion of the Court, measures relating to the appointment of their members by the very nature of the delegations concerned solely the internal organization of Parliament's work, did not affect the actual legal position of the applicants and did not interfere with their statutory rights.

In the Court's view, no claim could be made by the applicant Blot in this case to be appointed chairman since majority decisions had to be accepted in democratic bodies by parliamentary minorities. Furthermore, internal parliamentary delegations could not take measures capable of producing legal effects. The contested act of appointment was, in the final analysis, simply a working procedure of Parliament.

The application was dismissed as inadmissible with reference to the Court's order in Case 78/85 since measures relating only to the internal organization of Parliament could not be challenged in an action for annulment.


The Court had to deal in its decision with the rules on the transitional allowance at the end of the term of office of MEPs which had been adopted in May 1988 by Parliament's Bureau.

Articles 1 and 2 of these rules stipulate that this transitional allowance is not payable on leaving office during the electoral term but applies only in cases where the term of office is terminated by the expiry of the electoral term. The applicant had been an MEP since 1979 until her election as Mayor of the City of Heidelberg, following which she resigned her seat in Parliament on 17 December 1990.

Parliament then refused to pay the transitional allowance and, as defendant, took the view that payment could be claimed only by MEPs leaving Parliament at the end of the electoral term. Furthermore, in Parliament's opinion the application was inadmissible since the decision to grant a transitional allowance concerned only the internal organization of Parliament's work and produced no legal effects vis-à-vis third parties.

The central issue in this dispute was whether subdivisions of Parliament could defend themselves with annulment proceedings against the infringement or removal of their rights of parliamentary participation by the institution as a whole. It was open to question whether this was primarily an internal parliamentary dispute or whether the applicant was a 'third party' within the meaning of the first paragraph of Article 173 ECT (third alternative). On the latter construction it would not have been clarified precisely to what extent 'genuine' internal parliamentary disputes are subject to legal review by the Court. In clarifying this question it is crucial to ascertain whether the subject of the action is a measure having external effects or whether it is not after all a parliamentary organizational measure. The fact that the applicant already no longer enjoyed the status of MEP at the time in question militated against the argument of internal parliamentary effects. The reasoning of Advocate-General van Gerven in his opinion went along these lines. In his view the applicant was affected simply in terms of her personal legal position.

42 Ibidem, 2105.
44 See Strauss, p. 45.
The decisions of the Quaestors were addressed exclusively to departing MEPs and such activity was not directly connected with the organization of Parliament or its work.

The Court held Mrs Weber's application to be admissible basing its decision mainly on the principles in the 'Les Verts' judgment. In the light of the basic principle enunciated in this judgment, the EC is community-based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. The Treaty established a complete system of legal remedies and procedures designed to permit the Court to review the legality of measures adopted by the institutions. This means that an action will lie to the Court against any measures taken by the institutions which are capable of having legal effects. However, the Court made an exception from this principle for acts of Parliament concerning only its internal organization. In such cases legal review before the Court was ruled out. Such a state of affairs always existed where measures either had no legal effects at all or had legal effects only within Parliament as regards the internal organization of its work and were subject to review procedures laid down in its rules of procedure.

It was contended that this was a purely internal measure of Parliament since the applicant did not have the status of a 'third party' but, as an MEP, was an organic part of Parliament and as such affected by the refusal to grant a transitional allowance.

In this case the Court concluded that the rules governing the transitional allowance and the corresponding refusal to grant such an allowance produced legal effects that went beyond the limits of Parliament's internal organizational activity, since they affected the financial situation of an MEP on relinquishing office.

The application was consequently declared admissible by the Court.

III. Analysis

Although the evolution of this jurisprudence has led to a situation in which Parliament can now be involved as a defendant in proceedings before the Court, this is to be seen as an upgrading of Parliament in the institutional machinery of the Community. Through this case law Parliament has now achieved partial equality with the Council and the Commission. However, this equality is limited since the Council and the Commission can still appear as defendants in proceedings pursuant to the first paragraph of Article 173 ECT (second alternative) in respect of all acts open to challenge 'other than recommendations and opinions'.

It is impossible to institute proceedings against Parliament where only the internal organization of its work is concerned or where organic parts of Parliament are affected only in terms of their statutory rights.

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46 See Case 294183 above.
47 Also, for example, in Case 314/85 Foto–Frost [1987] ECR 4199 (4231), paragraph 16
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However, the bringing of proceedings by organic parts against internal parliamentary acts of the institution has not in principle been ruled out by the jurisprudence of the Court in the judgment in the 'Beate Weber versus Parliament' case\(^{50}\) where there is encroachment on the legal position of its organic parts.

An encroachment on the statutory rights of an organic part exists where a subdivision of Parliament is incapable of exercising its fundamental participatory powers or can do so only to a limited extent and consequently can no longer fulfil its purpose within the overall framework.

G. Active involvement in legal proceedings (active legitimation)

I. Initial position in the EEC Treaty

In accordance with Article 175 EEC T (Art. 148 EAEC) a treaty basis for active legitimation has existed expressly only for Parliament in respect of failure to act on the part of the Council or the Commission\(^5\). An action to compel performance should be understood as an action for a declaratory judgment that the Council or the Commission have violated the Treaty by failing to take a decision. This has, in fact, been an extremely rare occurrence in Community practice\(^{52}\). The delays with regard to direct elections in 1969 and in introducing the common transport policy in 1975 can be seen as the basis for actions to compel performance by Parliament.

II. Proceedings for failure to act


One fundamentally important decision by the Court in relation to Parliament's rights vis-a-vis the Council is the judgment in Case 13/83. Parliament took action against the Council for failure to act pursuant to Article 175, first paragraph (EECT) on the grounds that the Council had infringed the EECT by failing to introduce a common policy for transport and in particular to lay down the framework of such a policy in a binding manner and further by failing to reach a decision on 16 specified proposals submitted by the Commission in relation to transport.

The applicant and the Commission, which intervened in support of Parliament at the latter's request, was of the opinion that in accordance with the clear wording of Article 175, first paragraph (EECT), Parliament was actively entitled to initiate an action for failure to act. The defendant, by contrast, took the view that only an explicit allocation of powers could have justified active legitimation on the part of Parliament. The Council's viewpoint was based on the claim that the Court of Justice, as an 'other institution' within the meaning of Article 175, first paragraph, in conjunction with Article 4, EECT was not itself entitled to take action for failure to act.

\(^{50}\) See Case C – 314/91.
\(^{52}\) Oppermann, Europarecht, § 5, Rdnr. 239.
In his opinion of 7 February 1985, Advocate-General Carl Otto Lenz stressed Parliament’s power to bring an action for failure to act pursuant to Article 175, first paragraph, EECT. This power to take action was, in his opinion, in the interests of the proper functioning of the Community:

'If despite the wording of the Treaty the Parliament had no right of action, it would mean excluding the institution which on account of its independence of the Council would be most likely to be in a position to bring it before the Court for failure to act'.

Such an interpretation would frustrate the objectives of the Treaty. Parliament’s power to take an action for failure to act was rather an expression of its supervisory powers. According to the Advocate-General, Parliament’s right to take an action for failure to act did not require proof of a special interest requiring protection. As a privileged body entitled to take action, an action by Parliament was not subject to such a requirement. In the case in question, the Advocate-General felt that the conditions for the admissibility of an action pursuant to Article 175, first paragraph, EECT were fulfilled.

With regard to the Council’s denial of the admissibility of the action, the Court ruled as follows:

- Article 175, first paragraph, EECT explicitly gave the ‘other institutions of the Community’ - i.e. Parliament as well - a right of action for failure to act against the Council and Commission. Restricting the exercise of that right would adversely affect Parliament’s status as an institution under the Treaty, in particular Article 4(1).

- The absence of a package of measures capable of creating a common transport policy within the meaning of Articles 74 and 75 EECT did not, as such, and without any further details being specified, necessarily constitute a specific failure to act which might be the subject of an action pursuant to Article 175.

- Application of the principles of freedom to provide services, pursuant to Articles 59 and 60 EECT, must be achieved in the field of transport, pursuant to Article 61(1) through the implementation of a common transport policy, in particular by defining common rules for international transport and the conditions under which non-resident carriers may operate transport services within a Member State, as provided for in Article 75(1)(a) and (b) EECT. Since the result to be achieved is obvious on the basis of these provisions and there is a certain room to manoeuvre only in respect of the details, the obligations provided for in Article 75(1)(a) and (b) are so specific that failure to comply with them can constitute grounds for a judgment on failure to act pursuant to Article 175 EECT. The Council is obliged to extend freedom to provide services pursuant to Article 75(1)(a) and (2) EECT before the end of the transitional period to transport, with respect to international transport from or to the territory of a Member State or transit transport through the territory of one or more Member States, and to define, pursuant to Article 75(1)(b)(2) EECT the conditions for the admission of non-resident carriers to transport within a Member State. To that extent, therefore, the Council can be deemed to have failed to act.

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56 i.e. 31 December 1969
2. 'Budget', Parliament v Council, Case 377/87 (removed from register)

Parliament derived some practical benefit from this decision in the context of planning the budget for 1988 in that with its action for failure to act it induced the Council to comply with its Treaty obligations, i.e. to submit a draft budget no later than 5 October of the year. However, the case is deemed to have been removed from the register because the Council subsequently did what it should have done, albeit with some delay.

3. 'Free movement of workers', Parliament v Council, Case C-44993 (removed from register)

In this case Parliament took action against the Commission for failure to act (18 November 1993) because it had failed to submit the requisite proposals, pursuant to Article 7a (TEU), for completion of freedom of movement of workers in the internal market. On 24 August 1995 the Commission submitted to the Council a total of three proposals for directives which were forwarded to Parliament by the Council on 6 October 1995. The President of Parliament then decided in January 1996 to submit the three proposals to the Court with a request for the case to be removed from the register since the object of the action no longer applied. The Court agreed to this request on 11 July 1996.

4. Analysis

The particular importance of the judgment in Case 13/83 lies in the fact that it gives Parliament a means of compelling the Council - which because of lack of unanimity and because of the interests of individual Member States has often not been in a position to take decisions which are necessary, provided for in the Treaty and long overdue - through an action for failure to act, albeit provided clear details are given of the requisite measures required.

One indication of the change in the Court's outlook on Parliament's active legitimation came in Case 230/81 (Seat of Parliament); in this case the Court did not examine the question of whether Parliament might be a party to proceedings pursuant to Article 173 EEC.

Parliament welcomed this judgment as strengthening its institutional position amongst the bodies of the Community. For example, in its resolution of 12 September 1985, Parliament expressed

'its satisfaction with this judgment which it considers to be a major political event in view of its great institutional importance in many respects; ... (and) calls on its (committees) to study this judgment closely with a view to strengthening Parliament's role in the decision-making process within the Community, being convinced that the judgment has brought about a clear change in the balance of power between the institutions;'

58 Case 230/81, op. cit., paragraph 20 of the grounds of judgment.
The Court's judgments on Parliament's actions for failure to act have also been welcomed by the literature. In addition to the clear wording of Article 175, first paragraph, EECT, the literature is of the opinion that Parliament's power to take action lies in the fact that in view of the developing nature of Article 173 EECT the active right to take action must be assumed with respect to Article 175, first paragraph EECT, and Article 146(1) EAEC, the wording of which is more favourable for Parliament in this respect. Finally, the power to take action can also be supported by the consideration of expediency in that the Community suffers more from a lack of too much initiative rather than too little and to this extent Parliament's power to take action makes sense.

III. Annulment proceedings

Active legitimation of the Parliament to initiate actions for annulment was not originally part of Community law. Article 173, first paragraph, EECT specified only the Council, the Commission and the Member States as bodies entitled to take action. Article 173, second paragraph, extended this group to include natural legal persons provided they are immediately and individually affected. Nevertheless, it seemed only logical to take the final stage in acknowledging active legitimation for Parliament with regard to actions for annulment pursuant to Article 173.

A large part of the literature has welcomed this: on the grounds that it was not easy to see why Parliament should be entitled to take action for failure to act pursuant to Article 175 in order to enforce action on the part of the Council or Commission, while being prevented from contesting legal acts already adopted by such bodies. Secondly, it was regarded as contradictory to recognize, on the one hand, the passive legitimation of Parliament, provided third parties are individually and directly affected by its actions, while consistently denying its active legitimation even if its rights are infringed by the action of other bodies. The prevailing view, therefore, is that recognizing passive legitimation and the right to take action for failure to act should be paralleled by active legitimation, in order to create the appropriate interaction between Parliament's position as plaintiff and as defendant. This is a conclusion which Parliament supported in its resolution of 9 October 1986.

There have been various ways of seeking justification for active legitimation in the Treaties. In accordance with the 'most progressive' solution, Parliament should be granted active legitimation pursuant to Article 173, first paragraph, namely privileged legitimation similar to that of the other Community and bodies, and independent of enforcement in respect of a violation of its rights or interests.
This view is justified on the grounds of Community bodies being deemed to have equal status pursuant to Article 4 EECT. Accordingly, Parliament would be protecting not only its own interests but also those of the Community.

A more cautious approach rules out analogy with Article 173, first paragraph, because the difference in wording between Articles 173 and 175 can scarcely be dismissed as a mistake in drafting. However, this would leave open the possibility of making Parliament equivalent to (natural and legal) persons under Article 173, second paragraph, who are entitled to take action only in instances where they are directly and individually affected. Hence, this view grants Parliament only limited powers to take action.

The Court has not accepted either of these approaches. Instead, it dashed any hopes of allowing active legitimation to take action for failure to act through its judgment of 27 September 1988 on comitology.

1. Evolution of jurisprudence with regard to consulting Parliament until 'Chernobyl'

This is concerned in the first instance with compliance with Parliament's rights to be involved pursuant to the Treaty. Consultation is governed in the Treaty establishing the European Community (ECT) throughout the following formula (cf. for example, Article 43(2), second paragraph, ECT):

'The Council shall (decide) on a proposal from the Commission and after consulting the European Parliament . . .'

The consultation procedure starts with a proposal (monopoly of initiative) by the Commission. The proposal is forwarded to Parliament and may also be forwarded to the Economic and Social Committee by the Council, which is not bound by Parliament's opinion. Once the opinion has been submitted, the Council takes a final decision with the majority provided for in the legal base.

What is not clear is whether consultation, to be valid, requires the delivery of an opinion and whether failure to deliver an opinion would lead to the total legal procedure pursuant to Article 174 and 173 EECT being rendered null and void. Moreover, could the Council commence its final deliberations before such an opinion has been delivered, and does a substantial amendment to the original Commission proposal mean that further consultation is required?

The Court has over the years had an opportunity of resolving these legal issues in a number of cases.

(a) 'Isoglucose', Case 138/79, judgment of 20 October 1980

The background to a whole series of decisions on these issues was Parliament's intervention in the 'Isoglucose' case in favour of two isoglucose producers against the Council of Ministers, the
substantive point of law involving annulment of a Council regulation assessing production quotas for specific manufacturers.

On 19 March 1979 the Council requested Parliament for its opinion pursuant to Article 43 EECT which provided for Parliament to be 'consulted'. The President of Parliament referred this matter, pursuant to Rules 22 and 38 of the Rules of Procedure of the European Parliament to the Committee on Agriculture and the Committee on Budgets. On 10 April 1979, the Committee on Budgets forwarded its opinion to the Committee on Agriculture; the latter adopted a resolution on 9 May 1979 but this was rejected in plenary sitting on 11 May 1979 and the matter was referred back to the Committee on Agriculture. However, because of the election campaign for the direct elections in June 1979, Parliament did not intend to meet again until 17 July 1979, although it had expressly stated that the Council or the Commission could request an extraordinary meeting of Parliament pursuant to Rule 1(4) of the Rules of Procedure.

On 25 June 1979, the Council adopted Regulation 1293/79 amending Regulation 1111/77 on the introduction of common provisions for isoglucose. Although Parliament had not formally submitted an opinion, the introductory citations to the regulation stated 'having consulted the European Parliament'.

The plaintiffs argued that there had been an infringement of essential formalities, because consultation of Parliament by the Council pursuant to Article 43 EECT had not taken place. The right to be consulted formed a necessary precondition for proper enactment of a legal act, and any deviation from this meant that it was null and void as essential formalities had not been respected.

According to the Council, although consultation was in principle an essential formality within the meaning of Article 173 EECT, a consultative body did not have the right to paralyse the decision-making process. Although Article 43(2) provided for consultation, there was no requirement for an opinion actually to be delivered.

In its judgment of 29 October 1989, the Court largely adopted the plaintiffs' position and said:

'The consultation provided for in the third subparagraph of Article 43(2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality, disregard of which means that the measure concerned is void.'

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Proper consultation has only taken place if Parliament has actually expressed its opinion, and not when the Council requests it for an opinion. In the case in question, the Council had not exhausted all possibilities of securing an opinion from Parliament. Firstly, it had not requested the urgency procedure provided for in Parliament’s Rules of Procedure; and, secondly, it had not requested an extraordinary sitting of Parliament pursuant to Article 139 EECT.

What the judgment did not settle was what would have to happen if the Council were to request the urgency procedure. It appeared at least dubious whether it would then be at the discretion of Parliament to determine the further course of the consultative procedure.74

It was not until several years later that the Court had an opportunity to resolve these issues.

(b) 'Buij v Commission’, Case 817/79, Judgment of 4 February 198275

This case was concerned with Regulation 3085/7876, which sought to amend the Staff Regulations. The Commission proposal77, submitted to the Council on 1 April 1977, provided for the introduction of the European Unit of Account (EUA) to replace the Belgian franc in Article 63 of the Staff Regulations both as an indication of emoluments and as a basis for effecting transfers. This change was intended as a response to the collapse of the international system of fixed exchange rates in 1971 which had been used up until then to calculate the official exchange rate. The intention was also to dispense with the use of the weightings to adjust exchange parities which had originally been provided for in Article 64 of the Staff Regulations, in order to take account of the rise in the cost of living. Parliament considered this proposal and, in response to a request from the Council for an opinion, delivered a favourable opinion.78

In the final version of the regulation in 1978, the Council abandoned the idea of introducing the EUA for officials’ salaries. In accordance with Article 63(2) of the amended version of the Staff Regulations, salaries paid in a currency other than Belgian francs are calculated on the basis of the exchange rates which are applied for implementation of the general budget of the European Communities. By contrast, salaries paid in Belgian francs would continue to be used as the reference for salaries paid in other currencies.

The plaintiffs complained of the infringement of essential formalities. They maintained that Parliament had been consulted on the basis of a proposal which differed substantially from the text of the regulation adopted by the Council. Consultation had not therefore duly taken place. Instead, there should have been a further consultation of Parliament before the regulation was adopted.

On the basis of the previous judgment of 15 July 1970 in Case 41/69, ‘Chemiefarma v. Commission’, the key issue here, too, was whether the change affected the draft regulation as a whole in its substance, thereby rendering the original consultation process obsolete and irrelevant.

74 These questions have been raised by Bieber, Einflüsse der Rechtsprechung des Gerichtshofes auf die Stellung des EP in: Schwarze, Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz, 1st ed. 1983, 197, and by Beutler, op. cit., p. 58 f.
75 [1982] ECR 245 ff.
The Court denied this in its judgment of 4 February 1982. It said that the regulation as enacted largely
corresponded to the proposal which had been submitted to Parliament. The main difference lay in
replacement of EUA by the updated exchange rates. In this respect, however, it should be pointed
out that the fixed exchange rates accurately reflected the value of the EUA on 1 April 1978 as expressed
in national currency, so that this change to the original proposal was in effect a change in
the method rather than a change in substance.

To the extent that the regulation as enacted contained a transitional scheme in favour of specific
pensioners, which had not been provided for in the original proposal, this scheme corresponded to
an express wish of Parliament. Accordingly, there was no need for the Council to consult the
Parliament again.

(c) 'Comitology', Case 302/87, Judgment of 27 September 1988

On 2 October 1987 Parliament brought an action for annulment of Council decision 87/373/EEC of
13 July 1987”. By that decision, which is based on Article 145 EECT as amended by Article 10 of
the Single European Act, the Council laid down the procedures which it may require to be observed
for the exercise of the powers conferred by it on the Commission for the implementation of the rules
laid down by the Council, and adopted the provisions governing the composition, the functioning
and the role of the committees of the representatives of the Member States called upon to act. Parliament
complained of infringement of its rights to be consulted by the Council.

The Council raised an objection of inadmissibility pursuant to Article 91(1) of the Rule of Procedure
of the Court and requested the Court to give it a decision on that objection without considering the
substance of the case. The Council was of the opinion that Parliament's case was inadmissible,
principally by virtue of the wording of the first paragraph of Article 173 EECT, which specified the
parties entitled to bring an action for annulment; those parties did not include Parliament. Nor,
according to the Council, was there any need, in view of the system created by the Treaty for
monitoring the legality of acts of the Council, to grant Parliament active legitimation. Article 155(1)
EECT assigned the Commission the role of guardian of the Treaties. Should it fail to perform this
role, Parliament could initiate an action against the Commission for failing to act pursuant to Article
175 EECT. Furthermore, in the event of failure to act, Parliament could express its lack of confidence
in the Commission.

Parliament, by contrast, based its case on a systematic interpretation of Article 173 EECT. The
principle of institutional balance required that Parliament be placed on an equal footing with the other
bodies in the Community system of legal protection. The Court, Parliament maintained, had in turn
acknowledged Parliament's right to intervene, its ability to be a defendant in an action for failure to
act and, finally, its right to bring an action for annulment. In this respect, it would not be a recognition
of the powers of Parliament, but a retrograde step, if Parliament could only be the defendant without

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79 Parliament had called for the actual values of payments made to officials as remuneration, allowances
and pensions not to be impaired in any way.
80 Case 302/87, [1988] ECR, 5615. For a detailed discussion of the judgment see: M. Thill, Le defaut de
qualite du Parlement europeen pour agir en annulation au titre de l'article 173 du traite CEE, CahDeur
1989, 334 ff.
also being the plaintiff. Finally, Parliament maintained that it could only effectively exercise the control function conferred on it if it had the same opportunities for taking action as the other bodies. A vote of no confidence and an action for annulment would have no effect whatsoever on the validity of acts of the Council. If Parliament's rights were to be confined to the role of a third party, its ability to put across its views would depend on the willingness of another party to take action, and hence would depend ultimately on chance.

In his opinion Advocate-General Darmon took Parliament's side and asked the Court to recognize the admissibility of the action, with particular reference to the need for effective legal protection.

In its judgment, the Court explicitly rejected this argument. In the first place, it said that Parliament was not one of the bodies entitled to bring an action pursuant to Article 173, second paragraph EECT since it was not a legal person and, moreover, Parliament had not been affected individually by the substance of the action in question. On the contrary, the case involved failure to comply with the procedural rules governing its involvement independent of the substance of the measure.

However, even on an interpretation of Article 173, first paragraph, EECT, Parliament cannot be acknowledged to have the right to take action for annulment against actions of the Council or the Commission. The option of an action for failure to act and intervention by a third party in accordance with Article 37 of the Rules of Procedure of the Court, should give Parliament sufficient opportunity to object to an infringement of its rights before the Court.

According to the Court, Article 155 EECT confers more specifically on the Commission the responsibility for ensuring that Parliament's prerogatives are respected and for taking such actions for annulment as might prove necessary. Furthermore, in accordance with Article 173, second paragraph, EECT, any natural or legal person could take action for the infringement of essential formalities or of the Treaty in order to achieve annulment of the action in question or for an interlocutory judgment where the action is inapplicable.

Finally, action could be taken against the illegality of an act in respect of infringement of the prerogatives of Parliament before a Member State court and the action in question could be submitted to the Court for a preliminary judgment to assess its validity.

The Court concluded from the foregoing considerations that the allocation of responsibilities and powers in the Treaty did not permit recognizing the capacity of the European Parliament to bring an action for annulment.

This rather surprising judgment brought to an end a whole series of judgments in which the Court had gradually developed a procedural basis from the enhanced institutional position of Parliament in the legislative process. In the literature the 'Comitology' judgment has been overwhelmingly and not surprisingly criticized.

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In particular, authors have examined the other possibilities of obtaining legal protection with the result that this approach is unlikely to lead to effective protection of Parliament.

The Court was soon to have an opportunity of giving an opinion on this issue again.

With the action for annulment of the 'Chernobyl regulation' brought on 4 March 1988, the Court was once again obliged to rule on Parliament's powers to take action. Would the Court be prepared to go beyond the limit it had recently set and acknowledge Parliament's active legitimation to bring an action for annulment?

Only after two years were the judges able to agree, in an interim ruling, on admissibility.

(d) 'Chernobyl', Case 70/88; Interim judgment of 22 May 1990

The regulation was concerned with laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident. It was adopted on the basis of Article 31 EAECT which provided for Parliament to be consulted. Parliament regarded this as essentially a measure concerned with the approximation of laws, and in accordance with the legal base pursuant to Article 100a EECT, called for more effective involvement for Parliament through the cooperation procedure. The Commission and the United Kingdom supported the Council as defendant.

The Council regarded the application as inadmissible and once again applied for a preliminary ruling on this objection. In support of its claim it presented similar arguments to those used in its objection on the grounds of inadmissibility in Case 302/87 ('Comitology'), on which a judgment had not yet been taken. In its oral submission of 5 October 1989 the Council also stated that in Case 302/87 the Court had issued a clear ruling on the power of Parliament to lodge an application for annulment, and said that the present case must therefore be deemed inadmissible. The Commission and the United Kingdom presented no separate applications on admissibility.

Parliament contended that new factors distinguished the present case from Case 302/87, however. In that case the Court had ruled that it was the responsibility of the Commission under Article 155 EECT to ensure that Parliament's prerogatives were respected and to bring any actions for annulment which might be necessary for that purpose. However, in the present case the Commission could not fulfil that responsibility since it chose a legal basis for its proposal which was different from the one which Parliament considered appropriate. Consequently, Parliament was unable to rely in all instances on the Commission defending its prerogative by bringing an action for annulment. Furthermore, in this case, Parliament was unable to bring an action for failure to act and the defence of its prerogatives by actions brought by individuals would be completely fortuitous and therefore ineffective. Accordingly, there was a legal vacuum which the Court should fill by recognizing that Parliament had the capacity to bring an action for annulment.

82 (...continued)
84 [1990] ECR 1–2041.
Broadly speaking, the Court agreed with Parliament.

In its judgment it confirmed that the various legal remedies were insufficient to secure effective legal protection in the case in question. An action for failure to act would not be applicable since it could not be used to challenge a measure which had already been adopted. The possibility of Member States or individuals bringing an action for the annulment of the act were mere contingencies, and Parliament could not be sure that they would materialize. Finally, the Commission could not be obliged to bring an action for annulment which the Commission itself considered unfounded. Parliament must therefore have a legal remedy of its own to enable it to ensure respect for its prerogatives. The Court referred in this connection to its task under Article 164 EECT of ensuring that in the interpretation and application of the Treaties the law is observed. Consequently, it had a duty to maintain the institutional balance and to see to it that Parliament's prerogatives, like those of the other institutions, could not be breached without it having available a legal remedy, among those laid down in the Treaties, which might be exercised in a certain and effective manner.

Consequently, an action for annulment brought by Parliament against an act of the Council or the Commission was admissible provided that the action sought only to safeguard its prerogatives, and that it was founded only on submissions alleging their infringement. Provided that condition was met, Parliament's action for annulment was subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.

In the case in question the requirement of infringement of rights had been met. The complaint about the wrong legal basis could breach Parliament's prerogatives, to the extent that, under the appropriate legal basis, Parliament was granted 'more' participation.

Parliament's actions for annulment following this judgment can be divided, broadly speaking, into two categories. The first category consists of those where the point at issue is the consultation procedure; either there is no consultation at all or consultation did not take place properly. The other category involves the choice of appropriate legal base for the adoption of a legal act.

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85 Schoo refers to these categories in EuZW 1996, p. 582.
86 Cf. the judgments in Cases 65/93 and 417/93 examined under 'first consultation'.
87 Cf. Cases 65/90, 388/92, 280/93, 417/93 and 21/94 discussed under 'second consultation'.
2. Jurisprudence concerning consultation of Parliament following 'Chernobyl'

(a) Failure to consult Parliament initially


Once again, the action hinged on whether the Council had failed to respect the consultation procedure for adoption of Regulation No 3917/92, thereby failing to comply with an essential formality pursuant to Article 173 EECT.

The regulation which was the subject of Parliament's action was based on a proposal submitted by the Commission to the Council on 15 October 1992. This proposal, based on Articles 43 and 113 EECT, sought to extend the existing customs preference system - subject to a number of amendments concerning the list of beneficiaries - to 31 December 1993.

By letter of 22 October 1992 the Council requested Parliament for an opinion and applied for the urgency procedure to be used subject to Rule 97 of Parliament's Rules of Procedure. The reason given for this application was the need to enact the regulation before 1 January 1993, the date on which it was intended to enter into force. After a discussion in the relevant committees, Parliament initially set 20 November as the date for the urgency procedure. However, before the deliberations took place, the chairman of the Committee on Development requested the matter be referred back to committee. Consideration of the report by the Development Committee was placed on the agenda for the plenary sitting on 18 December 1992. Before commencement of discussion of this item, 14 Members requested suspension of the sitting, pursuant to Rule 129(1). Following approval of this request, consideration of the remaining items on the agenda, including the motion for a resolution by the Development Committee, was deferred to 18 January 1993.

It transpired that it was no longer possible to convene an extraordinary sitting of Parliament before the end of 1992. For this reason, the Council adopted the regulation in dispute on 21 December. By letter of the same day, Parliament was informed of the adoption of the regulation.

In its action Parliament asserted that the adoption of the regulation should be declared null and void because of the infringement of an essential formality: when the regulation was adopted by the Council, the consultation procedure pursuant to Article 43 EECT which, in connection with Article 113, was the legal base had not been complied with.

In support of its claim, Parliament first cited the 'Isoglucose' judgment of the Court. It maintained that the present case was similar, in that it had not actually been consulted and hence the institutional balance had not been maintained. No deadline was given within which Parliament should deliver its opinion under the consultation procedure.

For its part, the Council did not query the consultation of Parliament as an essential formality.

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However, it did maintain that in extraordinary cases it should be granted the power of adopting, on a proposal from the Commission, an urgent item of regulation even if it had not received Parliament's opinion.

In its judgment of 30 March 1995 the Court dismissed the application. In its reasons it refers first of all to the principles underlying the 'Isoglucose judgment' and confirmed them. The reasons for adopting a different decision in the present case can be summed up in the 'same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions'.

The Court regarded these obligations as having been violated in that - despite the assurance given to the Council that it would discuss the matter as a matter or urgency - Parliament decided to interrupt the session of 18 December 1992 without debate on the proposal for a regulation, for reasons which had nothing to do with the regulation in question. By contrast, by requesting the urgency procedure and an extraordinary sitting the Council had exhausted all possibilities of securing Parliament's opinion in good time.

(bb) 'Extension of TACIS', Parliament v Council, Case C-417/93

This case gave the Court an opportunity of taking up a position on a key issue concerning the relationship between the Council and Parliament. Has the requirement of actual consultation of Parliament been met if the Council considers a proposal for a regulation from the Commission before Parliament has delivered an opinion, and enacts this regulation shortly after receiving Parliament's opinion? The background to this was the increasing practice of Parliament and the Council considering, almost in parallel, legislative proposals in order to be able to implement the internal market by the due date of 1 January 1993.

The background to the application for annulment concerning regulation No 2053/93 was as follows. On 25 November 1992 the Commission issued a proposal for a regulation permitting the continuation of technical assistance to the newly independent states on the basis of three-year framework programmes (the aim was for the regulation to extend the TACIS support programme for 1991 and 1992). The legal bases for this proposal were Articles 235 EECT and 203 of the EURATOM Treaty (hereinafter EAECT), both of which provided for consultation of Parliament. The proposal was forwarded by the Commission to the Council on 15 January 1993 and forwarded to Parliament for information on the same day. The Council undertook examination of the proposal on 5 April 1993, when it noted 'a broad consensus of views'. It was agreed to consider the proposal again once Parliament had delivered its opinion.

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91 Loyalty between institutions is derived from Article 5 E(EE)CT. This obligation was first stressed in the Court's judgment of 27 September 1988 in Case 204/86, Greece v Council, [1988] ECR 5323, paragraph 16.


94 See the replies by the Council to the Court's written questions.
On 5 March 1993 the Council forwarded the Commission's proposal to Parliament for an opinion and formally requested Parliament to implement urgent procedure. After a period of repeated examination of the proposal by the responsible committee of Parliament and after long discussions in plenary sitting attended by representatives of the Council and the Commission and repeated postponement of the vote in Parliament, the latter rejected the proposal by resolution of 14 July 1993. On 19 July 1993 the Council adopted the contested regulation.

The following remarks concern only the first plea by Parliament. Parliament submitted that the obligation to consult laid down in Articles 235 E(EE)CT and 203 EAECT was not complied with. Although Parliament's opinion had been requested, consultation was a mere sham or fiction since the Commission's proposal immediately became the subject-matter of discussions in the Council, not just before the opinion was delivered but even before the proposal had officially been referred to Parliament, by which time discussions within the Council were so far advanced that the subject-matter of the consultation was a proposal which by then was out-of-date and obsolete. Although the Council had not yet formally adopted the proposal, in effect its decision had already been taken. Such a procedure was not only a violation of essential formalities, but also an abuse of procedure and violation of the obligation of loyal cooperation between institutions.

In its judgment of 10 May 1995 the Court first confirmed the 'Isoglucose' judgment in Case 138/79, saying that proper consultation of Parliament in the instances provided for in the Treaty was a major formal requirement, failure to comply with which would result in annulment of the measure in question. However, it went on to point out that there were no provisions under Community law in the consultation procedure obliging the Council to refrain from consideration of the Commission proposal or from seeking a general approach, or even a common position, before Parliament's opinion had been delivered. On the contrary, such an approach reflected the legitimate concern of the Council to make good use of the period during which it awaits Parliament's opinion in order to prepare its own position and thus to avoid unnecessary delay. It is only if the Council definitively adopts its position before receiving Parliament's opinion that there is a failure to comply with the obligation to consult. In the case in question it is clear from the documents that the Council intended to reconsider the proposal once it had received Parliament's opinion, pending which it had simply noted 'a broad consensus of views'.

The Court's conclusion, therefore, was that the Council had not adopted its final position on the Commission proposal before Parliament's opinion was forwarded to it. Parliament's application was dismissed.

(b) Failure to consult Parliament a second time

The following judgments are concerned with the issue of whether Parliament, having been consulted once, should be consulted again if the proposal finally adopted differs from the proposal on which it has already been consulted. The Court first looked into this question in the judgment of 15 July 1970 in Case 41/69 'Chemiefarma v Commission'. It decided that if the Council had consulted Parliament on a proposal for a regulation it did not need to consult it again if the proposal as amended was not altered in its substance.

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The essential issue, then, in any individual case is whether the changes to the Commission's original proposal are so far-reaching that they render the original consultation obsolete and irrelevant. If this is the case Parliament must be consulted again to give effective expression to its opinions.  

(aa) 'Goods cabotage', Parliament v Council, Case C-65/90

This application under Article 173 EECT sought annulment of Council Regulation No 4059/89 of 21 December 1989 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (cabotage).

The regulation, based on Article 75 EECT, established a cabotage quota consisting of 15 000 cabotage authorizations, each valid for two months (Article 2(1)). The quota must be allocated among the various Member States according to a scale determined and increased annually from 1 July 1991 in line with the average trends in internal road haulage in the Member States (Article 2(3) and (4)). In the event of a serious disturbance of the internal transport market in a given geographical area due to cabotage, the Commission was to adopt safeguard measures after consulting the Member States; such measures might involve the temporary exclusion of the area concerned from the scope of the regulation (Article 2(5)).

The regulation entered into force on 1 July 1990 and applied until 31 December 1992 (Article 9(1) and (2)). However, the Council had undertaken to adopt before 1 July 1992 a regulation laying down the definitive cabotage system which was to enter into force on 1 January 1993 (Article 9(3)).

The contested regulation was based on a proposal submitted by the Commission to the Council on 5 December 1985, in respect of which Parliament had delivered an opinion in its resolution of 12 September 1986.

The proposal, which was based on Article 75 EECT, provided essentially that from 1 January 1989 any commercial road haulier who was established in a Member State and was authorized in that country to carry out international road haulage operations, was to be authorized to carry out national road haulage operations in a different Member State; he might temporarily pursue his activities in the Member State concerned without having to set up a registered office or other establishment in that State (Article 1). In addition, the proposal provided that any carrier might, with effect from 1 January 1987, carry out national transport operations in a different Member State, without quantitative or qualitative restrictions, following on from the haulage operation between two Member States (Article 5).

During the Council meeting when the contested regulation was adopted on 21 December 1989, the Commission amended its original proposal and gave it a wording identical to the present regulation.  

95 However, see Case 1253/79, 'Battaglia v Commission', [1982] ECR, 297, where further consultation was not necessary because the amendment to the original proposal related solely to the method and not to the substance, and because the transitional scheme for certain pensioners largely corresponded to a wish expressed by Parliament.  


By a qualified majority, the Council adopted the regulation in accordance with the proposal amended in this way, without consulting Parliament again on the amended proposal.

Parliament based its action on the infringement of its right to take part in the Community legislative process. It maintained that the Council had failed to consult it again before adopting the contested regulation. In Parliament's view this second consultation became necessary pursuant to Article 75 EECT when the Council departed substantially from the Commission proposal.

The Council, by contrast, maintained that there had simply been differences in the procedure for introducing cabotage and, accordingly, the change consisted solely in the method of achieving the desired objective.

Once again the Court had to decide on whether the text as a whole as originally adopted differed in nature from the text on which Parliament had already been consulted or - should this be the case - whether the changes corresponded to a wish expressed by Parliament itself.

The Court regarded these changes as such as to affect the substance of the draft as a whole, thereby necessitating the further consultation of Parliament.

In its judgment the Court said:

'A comparison between the Commission's original proposal and the contested regulation shows that temporary authorization within the framework of a Community quota has been substituted for the principle of freedom of cabotage in Member States for carriers established in another Member State. Those amendments affect the very essence of the instrument adopted and must therefore be regarded as substantive. They do not correspond to any wish of the Parliament. On the contrary, in its opinion of 12 September 1986 the Parliament favoured greater liberalization, proposing that a paragraph should be added to Article 1, ensuring that Member States in which authorization to carry out national transport operations is subject to quantitative restrictions should increase the number of authorizations appropriately in order to allow carriers from other Member States to participate in domestic transport operations when additional authorizations are issued.

(…) In those circumstances, the fact that the Parliament was not consulted a second time in the legislative procedure provided for in Article 75 of the Treaty constitutes an infringement of essential procedural requirements entailing the annulment of the contested measure.

This judgment has recently been confirmed by the following judgments:

(bb) 'Personal cabotage', Parliament v Council, Case C-388/92

This judgment was the result of a case very similar to the one described above. In this case Council Regulation (EC) No 2454/92 of 23 July 1992, against which Parliament lodged an application for annulment, was concerned with authorizing non-resident carriers to operate road passenger services
within a Member State. The Commission's proposal of 4 March 1987\(^{104}\), which was the basis of the Regulation, provided for any carrier operating road transport passenger services for hire or reward who is established in a Member State and authorized, in that State, to pursue the occupation of road transport passenger operator in international transport operations to be permitted with effect from 1 January 1989 to operate national road transport passenger services for hire or reward in another State, without being required to have a registered office or other establishment in that State.

After being consulted by the Council, Parliament delivered its opinion in its resolution of 10 March 1988\(^{105}\) in which it broadly agreed with the Commission proposal.

However, the regulation adopted by the Council provided for cabotage transport operations to be authorized for all non-regular services (Article 3(1)), while cabotage in the form of special regular services for the carriage of workers between home and work and school pupils and students to and from their educational institutions was permitted in frontier regions.

The Court regarded this as a substantial change affecting the very nature of the original proposal. In support of this it maintained that regular service had been virtually excluded from the actual scope of the Regulation. This did not reflect the underlying philosophy of the original proposal encouraging full liberalization of cabotage. Shifting liberalization to non-regular services would no longer reflect this thinking.

Since the amendments made a substantial change to the nature of the proposal, Parliament had to be consulted again.

\(\text{(cc) 'Organization of the market in bananas', Federal Republic of Germany v Council, Case C-280/93}\(^{106}\)\)

Regulation No 404/93\(^{107}\) covers the common organization of the market in bananas; in particular it regulates the conditions for importing third-country and non-traditional ACP bananas into the Member States. The Federal Republic of Germany maintained that the original Commission proposal differed so radically from the regulation originally adopted that Parliament should have been consulted again. The disputed changes relate, firstly, to the ad valorem duty (20% of the value of the goods), as originally provided for in the Commission proposal, being changed to a duty on volume (zero duty or a levy of ECU 100 per tonne) and, secondly, the rules on the breakdown of the quota. The original proposal introduced a partnership system covering, pursuant to Article 17(3) of the proposal, 30% of the total volume of the basic quota. The 30% quota was to be available to operators undertaking to market a specific volume of Community bananas and/or traditional ACP bananas. The proposal which was eventually adopted changed this partnership system to a scheme in which shares in the 30% quota depended not on an undertaking to import specific volumes of Community/ACP bananas but on the marketing of such bananas in the preceding three years.

\[^{104}\text{OJ C 77, p. 13}\]
\[^{105}\text{OJ C 94, p. 125 ff.}\]
\[^{106}\text{[1994] ECR, 4973, judgment of 5 October 1994}\]
Although the Court regarded the replacement of the *ad valorem* duty by the specific duty as a legal change, it was a change which in the final analysis served the same purpose, namely keeping imports under control. Furthermore, it had not been demonstrated that the introduction of the specific duty would necessarily result in an increase in restrictions on imports of third-country bananas into the Community, since the specific duty for the importers had not meant a higher financial burden than the *ad valorem* duty of 20%.

The Court regarded the creation of subquotas for the various categories of operators in preference to the partnership arrangements originally proposed as being merely a technical means of implementation which did not affect the basic structure of the regulation.

Accordingly, the Court did not believe that it was necessary for Parliament to be consulted again.


The following remarks relate only to Parliament's second plea in law in support of its *case*[^109]. Parliament maintained that the text of the regulation finally adopted by the Council differed on four points from the text of the Commission's proposal on which it had been consulted. Since these amendments were substantial, Parliament should have been consulted again. Since it was not, the contested regulation should therefore be nullified.

Parliament's first point of criticism concerned the states benefiting from TACIS. Article 2 of the regulation included an additional provision that the states concerned were to benefit from assistance under TACIS insofar as they did not benefit from technical and financial assistance given by way of assistance to the developing countries in Latin America and Asia pursuant to Regulation *No 443/92*[^110] of 25 February 1992.

The Court stated: 'According to the documents before the Court, the provision at issue, which specifically concerns the situation in Mongolia, is intended to avoid multiple Community aid. Far from calling in question the arrangements put in place by the TACIS programme, it is a specific addition which cannot be considered to be a substantial amendment to the Commission's proposal necessitating reconsultation of the Parliament.'[^111]

The second point of criticism concerned the actual scope of the regulation through the inclusion of an Annex II. Parliament argued that the annex meticulously detailed the areas in which TACIS assistance was to be given and thus went beyond the scope of the corresponding provision in the proposal, which should have listed examples of such areas.

The Court said that the list of areas in Annex II was merely indicative and not exhaustive, and that it did not therefore alter the scope of the original proposal.

[^109]: The first point was set out in the context of first consultation above (the facts of the case are also discussed above); this case is concerned with renewed consultation of Parliament.
[^110]: Council Regulation of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America, OJ L 52, p. 1
[^111]: Cf. paragraph 19 of the judgment
Thirdly, Parliament complained that a final sentence had been added to Article 7(4) of the final version, making the participation of undertakings from third countries in co-financed projects conditional on reciprocity. Parliament maintained that such a condition, of major political significance for third countries, constituted a substantial amendment to the proposal necessitating reconsultation. This, too, was not accepted by the Court, which said that the condition of reciprocity was a specific criterion in accordance with the usual practice in this area. It affected neither the general scheme of the TACIS programme nor the principle of the participation of undertakings from third countries in co-financed projects.

The last amendment to which Parliament drew attention concerned the type of committee designated to assist the Commission in implementing the TACIS programme. Whereas Article 7 of the Commission's proposal provided for a management committee, the Council finally opted in Article 8 for a regulatory committee. The Court acknowledged that the type of committee provided for would play a significant role in implementing the TACIS programme. The choice of committee involved different decision-making procedures and a different division of powers between the Commission and the Council, which would have a decisive influence on the operation of the arrangements in question. However, in the case in question the overall balance of the powers allocated to the Commission and the Council was not decisively affected by the choice between the two types of committee at issue, so that the amendment to the Commission's proposal was not substantial. Reconsultation was accordingly not necessary on this point either. Consequently, the second plea was also rejected.

(ee) 'Harmonization of vehicle taxes', Parliament v Council, Case C-21/94

In this case Parliament took out proceedings pursuant to the third paragraph of Article 17 ECT for the annulment of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures.

The Commission proposal, which was based on Articles 75 and 99 ECT, provided for the introduction of a transitional scheme to harmonize existing taxes, among the salient features of which were the application of minimum rates, reviewable every two years, for heavy goods vehicles, except for Portugal and Greece which were authorized temporarily to apply lower rates, the possibility of levying tolls and user charges on the motorway network and, lastly, the right to make partial refunds of vehicle taxes on the basis of tolls and user charges paid.

For the purposes of introducing a harmonized system of road charging based on the principle of territoriality the Commission was to submit a report and proposals aimed at achieving this objective so as to enable the Council to adopt this harmonized system by 31 December 1998.

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Parliament was consulted on 18 December 1992 and approved the proposal subject to two amendments.\(^{115}\)

The requirements laid down in the proposal were not incorporated in the directive, according to which the Commission was simply to submit to the Council by 31 December 1997 a report on the implementation of the directive accompanied, if necessary, by proposals for establishing cost-charging arrangements based on the principle of territoriality.

The disputed legal act was adopted on 25 October 1993 without prior reconsultation by the Council of Parliament. Parliament singled out for criticism the absence of requirements on the Commission and Council to submit proposals for framing a harmonized system and adopting the system in question by the end of 1998 respectively. It was argued that the Council was thereby transforming what the Commission had planned as a transitional solution into a more or less permanent system. Parliament saw here a substantial modification which made fresh consultation essential.

The Council maintained that the directive did not depart from the objective of the proposal, i.e. the progressive adjustment of national systems, the attenuation of distortions of competition and the definition of a future taxation system as a subsequent objective. Furthermore, the Council took the view that, even if the text finally adopted as a whole did depart substantially from the text on which Parliament had been consulted, it was not required to reconsult that institution provided that, as in this case, the Council was sufficiently well informed as to the opinion of Parliament on the essential points at issue.

The Court fully accepted Parliament's position, seeing in the directive's departure from the proposal in respect of the obligations on the Council and Commission respectively to submit proposals for a harmonized taxation system and adopt such a system by the end of 1998 substantial amendments affecting the core of the arrangements adopted.

The Court also had to rule in this case - for the first time - on the need for consultation where the Council has already become acquainted with the opinion outside a formal consultation procedure. It rejected this argument on the following grounds:

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* proper consultation of Parliament in the cases provided for by the Treaty constitutes one of the means enabling it to play an effective role in the legislative process of the Community...; to accept the Council's argument would result in seriously undermining that essential participation in the maintenance of the institutional balance intended by the Treaty and would amount to disregarding the influence that due consultation of Parliament can have on adoption of the measure in question.\(^{116}\)
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The outcome was that Parliament therefore had to be consulted again.

\(\text{\textbf{(ff)}}\) "Plant protection products", Parliament v Council, Case C-303/94

See here point G.III.4

\(^{115}\) \(^{116}\) OJ C21/1993, p. 522 ff.

See paragraph 26 of judgment.
(c) Analysis

Through its jurisprudence in the past two decades, the ECJ has elevated Parliament’s right to be consulted from the status of a mere formality to effective involvement in the legislative process through interaction between the Council, Commission and Parliament - within the framework of the rules laid down in the Treaties.

Not only does its failure to be taken into account as an essential procedural requirement always result in annulment of the act in question but the same fate awaits a legal act where a major change has been made after Parliament has delivered its opinion. The latter point in particular also prevents the right to be consulted from being circumvented by subsequent manipulation of the original proposal.

It is worth noting that a stringent approach is discernible in the series of requirements laid down by the Court for the proper conduct of the consultation procedure which serves as a guide and makes its jurisprudence predictable and not arbitrary in appearance. On the basis of the Isoglucose judgment, the Court assesses in each of its judgments the extent to which the right to be consulted has been complied with by whether expression was actually given to the opinion under a formal consultation procedure and it could thus influence the content of legal acts adopted by the Council. The jurisprudence concerning ‘substantial amendment’ also reveals a uniform approach: in judging whether the finally adopted legal act departs substantially from the original proposal, the Court examines, for example, the objectives of both. Where they diverge, a fundamental modification is involved and the Court confirms the substantial amendment and annuls the legal act in question. Other criteria are whether only a specific addition or an alteration to the substance is involved, whether amendments to the method or material amendments are involved. Even though these terms in themselves do not mean a great deal, the Court has lent them substance as grounds for proceedings through its ample caselaw in precisely this area and has defined them more clearly. The Court has thereby made a significant contribution to legal certainty and reduced the risk to Parliament inherent in legal proceedings.

The Court has clarified the borderlines that need to be drawn in order to distinguish clearly the consultation procedure from the assent procedure, the codecision and the cooperation procedures. This borderline has not been reached so long as no substantial amendment according to the above criteria exists and/or the amendment corresponds to a wish of Parliament. With this formulation the Court has followed a middle path that safeguards both Parliament’s ability to deliver its opinions

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117 The Council had produced the counterargument that the Court enjoyed discretion in deciding what implications an incorrect consultation had on the entire legal act.
118 As decided for the first time in Case 41/69 ‘Chemiefarma v Commission’, op.cit.
119 As decided for the first time in Case 41/69 ‘Chemiefarma v Commission’, op.cit.
120 In its judgments on cabotage (Cases 65/90 and 388/92 op.cit.) the Court in each case saw the objective of liberalization of the promotion of cabotage in the original proposal as not having been satisfied by the purely limited authorization in the adopted regulation.
121 For example, the rules concerning the beneficiaries under the TACIS programme (see Case 417/93 op.cit.) were in the Court’s eyes only a specific addition that did not affect the substance of the Commission proposal.
122 Used for the first time as a criterion in Case 41/69 ‘Chemiefarma v Commission’, op.cit.
123 See here the judgment in Case 817/79 ‘Buyi v Commission’, op.cit.
effectively, while at the same time taking into account the Council's interest in the prompt enactment of legislation.

The judgment in Case 65/93 ('Customs preference system') also belongs to this category. This judgment must definitively not be seen as a rejection of the Isoglucose judgment but - is fundamentally - its continuation. While the question whether Parliament actually had a right of veto by withholding its opinion was still left open in the Isoglucose judgment, this judgment clarifies the issue. Thus, Parliament's right to be consulted cannot extend so far as to block the adoption of a legal act by not delivering an opinion. Its limits are reached once the Council, by requesting urgent procedure and/or an extraordinary sitting has exhausted all possible means of securing Parliament's opinion. The Court has thus in fact granted the Council the power to set a time limit, although this does not weaken Parliament's position but simply demonstrates the limits of the right to be consulted.

3. **Wrong choice of legal basis**

(a) 'Chernobyl', Case 70/88

See under point G.III.1(d)

(b) 'Students' Directive', Case C-295/90

Parliament had sought the annulment of Council Directive 90/366/EEC on the right of residence of students on the territory of another Member State on the grounds that the Council had chosen a wrong legal basis with Article 235 EECT and arguing that Article 7(2) EECT was the only appropriate legal basis. Parliament was supported in this view before the Court by the Commission as intervenor.

The use of the correct legal basis has great practical significance for Parliament because different procedures are involved. In the present case, instead of simple consultation under Article 235 EECT the cooperation procedure stipulated in Article 7(2) EECT would have been applicable pursuant to Article 149(2) EECT. This procedure would mean Parliament enjoying greater influence over the contents of a proposed legislative measure.

**As** for the admissibility of the annulment action, the Court referred to its jurisprudence in Cases 302/87 (Comitology) and C-70/88 (Chernobyl) according to which Parliament was entitled to bring an action only where that action sought to safeguard its prerogatives and was founded on submissions alleging their infringement. These prerogatives also included participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty. These conditions were met here with the result that Parliament was entitled to bring an action directly and was not obliged to rely on the Commission which would again have to weigh up the public interest in maintaining the directive and the protection of Parliament's prerogatives.

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126 Case C-70/88 [1990] ECR I - 2041, paragraph 27
It was therefore confirmed for the first time in this case that, since the judgment in Case C-70/85, Parliament enjoyed the right to bring proceedings directly subject to the above conditions. The Court held the action to be admissible on the grounds put forward by Parliament and the Commission and annulled Directive 90/366/EEC.

(c) ‘Lomé Convention’, Case C-316/91127

At issue in this case was the fact that the Council had adopted a financial regulation on a legal basis that did not provide for consultation of Parliament. Nevertheless, Parliament was in fact consulted. Parliament subsequently instituted annulment proceedings on the grounds that the financial regulation should have been issued pursuant to Article 209 EECT which stipulated consultation of Parliament.

The Court allowed Parliament's action. It first confirmed its jurisprudence in Case 70/88 'Chernobyl' stating that an action for annulment brought by Parliament against an act of the Council was admissible provided that the action sought only to safeguard its prerogatives and was founded only on submissions alleging their infringement.128 This condition was satisfied where Parliament indicated in a conclusive manner the substance of the prerogative to be safeguarded and how that prerogative was allegedly infringed.129

With reference to the present case the Court stated:

"The right to be consulted in accordance with a provision of the Treaty is a prerogative of Parliament. Adopting an act on a legal basis which does not provide for such consultation is liable to infringe that prerogative, even if there has been optional consultation.130"

(d) 'Waste shipments', Case C-187/93131

In this case Parliament again challenged the choice of legal basis. The Council had based a regulation on the shipment of waste within, into and out of the Community on Article 130s EECT, whilst Parliament was of the opinion that this legal basis should be replaced by Articles 100a and 113 EECT.

The Court declared the action to be inadmissible inasmuch as it was founded on the exclusion of Article 113 EECT from the legal basis of the contested regulation. At the time that the regulation was adopted, Article 113 did not provide for Parliament to be involved in any way in the drawing up

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128 This is the only condition that needs to be satisfied in the context of the right to institute proceedings. In particular, it is immaterial whether the Commission or other institutions with the capacity to bring an action and/or Member States share Parliament's legal standpoint. Thus the Court's clarification in Case 295/90 (‘Students' Directive') op.cit., paragraphs 8 and 9. Here, the UK took the view that Parliament's action was inadmissible because the Commission shared Parliament's legal standpoint concerning the choice of legal basis.
129 In line with this condition the Court declared inadmissible an action by Parliament based on Article 190 EECT on the grounds of inadequate justification of the disputed provisions because Parliament had not conclusively indicated to what extent such an infringement might have encroached on its powers, if at all, see the Court's judgment of 13 July 1995 in Case 156/93, op.cit. paragraph 11.
130 See paragraph 16 of judgment.
of the acts envisaged in that Article, so that its exclusion from the legal basis of the regulation was not such as to prejudice the prerogatives of Parliament. However, insofar as it contested the fact that the regulation was based not on Article 100a but on Article 130s of the Treaty, the application sought to show that the prerogatives of Parliament had been prejudiced by reason of the legal basis chosen and it was therefore admissible. At the time of enactment of the regulation, Article 130s provided only that Parliament was to be consulted, whereas Article 100a required the implementation of the procedure for cooperation with that institution.

(e) 'EU-USA Agreement', Case C-360/93

On the basis of an agreement with the USA, the Community undertook not to apply under certain circumstances to tenderers from the USA the preference rule for tenderers from the Community under the exclusive sectors Directive 90/531/EEC. This agreement was transposed into Community law by a Council resolution and decision based on Article 113 EECT. Parliament made an application for annulment of the decision and resolution, arguing that these legal acts should have been based on other treaty provisions under which even in the then wording of the EEC Treaty - there was provision for the participation of Parliament. The Court allowed the action because the disputed decision and resolution should have been based not only on Article 113 but also on Articles 57(2), 66 and 100a EECT. Even before the entry into force of the Treaty on European Union these articles, unlike Article 113, stipulated use of the cooperation procedure with Parliament.

On the grounds of legal certainty the Court, on application from the Council and without objection from Parliament, maintained in force the legal effects of the annulled legal acts pursuant to the second paragraph of Article 174 EECT, particularly as the agreement had anyway expired on 30 May 1995.

4. Parliament's rights of participation where requirements laid down in a basic directive are amended by an implementing directive

The following case opens a new category of legal disputes in which Parliament is involved. Hitherto, Parliament had always acted on the basis of the infringement of essential procedural requirements by the Council when consulting and/or reconsulting Parliament or with regard to the choice of legal basis.

However, this case dealt with the compatibility of an implementing provision with a basic directive:

'Plant protection products', Case C-303/94


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The latter was based on Article 43 ECT which stipulates consultation of Parliament and was intended to lay down the rules applicable by the Member States in relation to the authorization, marketing, use and control of plant protection products. Member States are required to ensure that a plant protection product is not authorized unless certain conditions are fulfilled (Article 4(1)), one of these conditions being that, in implementation of the uniform principles laid down in Annex VI, it must be established that the product has no harmful effect on human or animal health, either directly or indirectly, or on groundwater and has no unacceptable influence on the environment, particularly in relation to the contamination of water, including drinking water and groundwater. The uniform principles referred to in Annex VI are to be adopted by the Council acting by a qualified majority on a proposal from the Commission (Article 18(1)).

Parliament claimed that its rights had been infringed on three grounds, only the first two of which will be dealt with here:

- the Council had modified in the implementing directive the obligations laid down in the basic directive.
- the maximum admissible concentration laid down in Directive 80/778 had been overridden.

Parliament saw an infringement of its right to be consulted in the fact that the implementing directive which was adopted without the involvement of Parliament amended directives, the adoption of which required Parliament's involvement (Articles 43, 100 and 235 ECT).

In its judgment the Court repeated by way of introduction its standing jurisprudence according to which the Council cannot be required to draw up all the details of regulations or directives concerning the common agricultural policy according to the procedure laid down in Article 43 ECT. It is sufficient for the purposes of that provision that the essential elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by the provision. The provisions implementing the basic regulations or directives could be adopted according to a different procedure, but an implementing directive adopted without consultation of Parliament must respect the provisions which were incorporated in the basic directive after such consultation.

In this case, by not taking account of the effects which plant protection products may have on all groundwater, the essential elements of the matter expressly laid down by the basic directive had not been observed. As to that, it needed merely to be pointed out that the basic directive seeks in particular to ensure a high standard of protection so as to preclude any unacceptable influence of plant protection products on the environment in general and, in particular, any harmful effect on human or animal health or on groundwater.

Moreover, Annex VI allowed the issue of a conditional authorization for plant protection products whose foreseeable concentration in groundwater intended for the production of drinking water exceeded the maximum permissible concentration laid down in Directive 80/778/EEC. Even if

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See the jurisprudence of the Federal German Constitutional Court for the theory of essential elements.

those provisions were presented as transitional provisions, they manifestly affected the scope of the principles defined in the basic directive according to which a plant protection product must not be authorized unless it is established that it has no harmful effect on human or animal health or on groundwater and that it has no unacceptable influence on the environment, in particular as regards the contamination of water.

Overall, the scope of the obligations on the Member States would thus be modified by the implementing directive to such an extent that it should have required the application of the legislative procedure laid down in the Treaty with the involvement of Parliament.

The Court annulled the disputed directive.

5. **No maintenance of legal effects of annulled directives/regulations**

As regards the practical effects of court judgments accepting Parliament's application for annulment, the following should be noted by way of conclusion:

In the first two categories of annulment proceedings brought by Parliament (consultation and legal basis) it is true that the Court did initially annul the relevant legal acts because of procedural flaws but maintained in force their legal effects until the adoption of a new legal act (see Article 174, second paragraph, ECT). This was necessary on the grounds of legal certainty, particularly in view of the arrangements made by the business sectors concerned, and was not questioned either by Parliament as the applicant. Actions against the Council thus remained practically without effect because the Council as the losing party and also the Commission took a great deal of time over complying with their obligation under Article 176 ECT and initiating a new legislative procedure respecting Parliament's rights. Parliament became increasingly frustrated at winning cases against the Council without practical effect. When Parliament requested in the proceedings relating to Case C-21/94 that a definite time limit be set for the Council to adopt a new directive, the Court did not see itself as having the jurisdiction 'in the context of its review of the legality of an act under Article 173 of the Treaty' to accede to this request.

Not until Case C-271/94 (‘Edicom’) did the Court decide, at the request of Parliament as applicant, that the legal effects of the decision were to be maintained only until delivery of the judgment. This blocking effect of the judgment meant that the Commission and Council immediately initiated a new legislative procedure.

(a) **‘Edicom’, Case C-271/94**

Not until this case did the Court show some understanding of Parliament's frustration and ruled at the request of Parliament as applicant that only the legal effects of those decisions already adopted pursuant to the muddled Council Decision 94/445/EC of 11 July 1994 on interadministration telematic networks for statistics relating to the trading of goods between Member States remained in force until such time as a decision adopted on the appropriate legal basis took effect. This blocking effect

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139 Tax harmonization [1995] **ECR I** - 1827
resulted in the Commission and Council immediately setting about the task of initiating a new legislative procedure.

(b) 'Plant protection products', Case C-303/94

In this case too (see also III.2.b ff) there was no question of maintaining the legal effects of the annulled directive since the implementing measure infringed higher-ranking legal provisions (Directive 80/778/EEC and Basic Directive 91/414/EEC). The Court accordingly annulled the implementing directive unconditionally.

6. Analysis

The significance of the Chernobyl judgment for Parliament is reflected in particular in the fact that the Court has not shirked from an at least partial rectification to its jurisprudence. This was not self-evident and, in order to decide on this step, the Court had to undergo a further judicial evolution, the acceptability of which is not uncontroversial. In so doing, the Court has not chosen the easiest route. With a simple reference to the comitology judgment it would have avoided all the difficulties of justification. The contrary decision shows that the Court attaches great importance to the balance between the institutions and takes seriously its powers derived from Article 164 ECT as guardian of the law.

With foresight, it has also prevented a flood of litigation from Parliament through the special condition of admissibility involving infringement of Parliament's own prerogatives. That it has been successful in so doing is proved by the limited number of subsequent actions by Parliament on which the Court has so far had to rule. However, neither should the preventive effect of the judgment be underestimated: the Council and Commission now pay careful attention to respecting Parliament's powers so as not to trigger legal disputes which ultimately strengthen Parliament's role in the interaction of the institutions.

However, if there are infringements Parliament can henceforward on its own authority uphold its rights and powers deriving from the Treaty. This judgment thus forms part of the unbroken series of cases aimed at strengthening the democratic principle and realizing effective legal protection.

H. Position of Parliament since the Maastricht Treaty

The ongoing judicial evolution of Parliament's passive participation in legal proceedings has been enshrined in the Maastricht Treaty. The jurisprudence was confirmed by the 'masters of the Treaties' with the revised version of Article 173 ECT in the Maastricht Treaty.

By virtue of the first paragraph of Article 173 ECT Parliament has been included in the category of parties specifically mentioned in the ECT as being entitled to participate in proceedings. However, the right to bring an action is restricted in terms of substance since it can be used only to safeguard its own powers and rights conferred by the Treaty and covers only those grounds alleging

infringement of these powers and rights. In addition, the new version of Article 173 ECT also incorporated Parliament's passive participation in proceedings.

Firstly, Parliament can be taken to court pursuant to the first paragraph of Article 173 ECT (first alternative) where 'acts adopted jointly by the European Parliament and the Council' are involved and, secondly, it may be a passive party to proceedings pursuant to the first paragraph of Article 173 ECT (third alternative) in respect of acts it has itself adopted.

The third alternative in the first paragraph of Article 173 ECT reflects the standing jurisprudence of the ECJ on the passive participation of Parliament in proceedings which was developed with the case of 'Les Verts'. Parliament can thus be taken to court where the action challenges parliamentary acts with legal effects vis-a-vis third parties. This includes those measures that produce legal effects vis-a-vis other Community institutions, the Member States and natural or legal persons who are outside Parliament and hence to be regarded as 'third parties'. This also opens up the possibility for national and European parties to institute annulment proceedings.

A noteworthy feature of the new version of the first paragraph of Article 175 ECT is that Parliament has explicitly been assigned passive participation in proceedings in respect of failure to act.

1. **Outlook for the Intergovernmental Conference**

After the IGC of February 1992 ('Maastricht I'), the IGC has been dealing since 29 March 1996 with the revision of the Treaty on European Union ('Maastricht II').

The obligation to convene this IGC is contained in Article N(2) of the Treaty on European Union. This provides as follows:

'A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B.'

In order to prepare this ICG the European Council in Corfu set up a 'Reflection Group'. The institutions were also asked to contribute to this group's deliberations by drawing up reports on the operation of the TEU. The treatment of the positions submitted concentrates mainly on Parliament's role in a reformed set of treaties.

1. **Parliament's position**

Parliament acceded to this request of the European Council with its resolution of 17 May 1995. MEPs Jean-Louis Bourlanges and David Martin were appointed rapporteurs and produced a report on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference.

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43 See Strauss, p. 53.
44 Hereinafter referred to as TEU.
Parliament's report advocated strengthening Parliament's role and powers in the Union. More particularly, the number of MEPs should not exceed 700, Parliament must participate in the decision regarding its own seat and should give its assent to all nominations to the European Court of Justice, the Court of First Instance, the Court of Auditors and the ECB. Parliament should enjoy equal status with the Council in all fields of EU legislative and budgetary competence and its role should be reinforced in the areas of the CFSP, JHA and EMU. The report also emphasizes that future treaty amendments should be approved jointly by the Council and Parliament. In addition, democratic control should be expanded through a partnership between Parliament and the national parliaments.

Parliament's standing before the ECJ should be corrected by giving Parliament, like the other institutions, the right to request the opinion of the Court on the compatibility of international agreements with the Treaty and the right to bring cases (not only in order to preserve its own prerogatives). In addition, Parliament advocated a new means of redress enabling any institution to bring an action in the Court where its rights have been infringed when another institution or a Member State has breached the Treaties. Furthermore, Parliament should be informed of requests for preliminary rulings and should be entitled to submit observations on them. The Commission should be required to respond to Parliament initiatives made pursuant to Article 138b, second paragraph, ECT.

Parliament reconfirmed this position in its resolution of 14 December 1995. In its Turin resolution of 13 March 1996 Parliament expressed its view that the IGC could not open until the Council had decided on the arrangements for the participation of Parliament.

In its resolution of 19 June 1996 on the IGC Parliament regretted the stagnation in the development of a new institutional balance. The IGC was marked by a tendency towards preserving the status quo and opposing change.

2. **Position of the ECJ**

In its report of May 1995 the Court expressed no objections concerning Parliament's demand for the same legal standing as the Commission and Council, i.e. the comprehensive right to institute proceedings. However, it expressed doubts about the appropriateness of removing political disputes to the judicial arena.

3. **Position of the Reflection Group**

The Reflection Group began work on 2-3 June 1995 at a meeting of Foreign Affairs Ministers in Messina. It comprises the personal representatives of the 15 Foreign Ministers, the President of the Commission and two representatives of the European Parliament.

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146 ibidem, p. 63.

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46 PE 167.046
Its task is to facilitate an exchange of views on all topics to be raised at the 1996 ICG for the revision of the Maastricht Treaty, to develop options for possible solutions and identify points on which a consensus or a broad majority emerges. After an interim report of 24 August 1995 the Reflection Group submitted its final report to the Member States on 5 December 1995.

In its final report of 5 December 1995\(^{29}\) the Reflection Group advocated a maximum number of 700 MEPs. As for the uniform electoral procedure, some members proposed fixing a final date for the application of Article 138(3) ECT. On the issue of Parliament’s legislative initiative under Article 138b, the Group felt that the right of request was sufficient, although some Members believed that the Commission should be required to give a proper reply. As for Community legislative procedures, the Group tended in this report to favour reducing them to three, i.e. codecision, assent and consultation. The Group doubted whether it was necessary to enhance cooperation between Parliament and the national parliaments by creating a new institution or a permanent body. The creation of a Second Chamber comprising members of national parliaments was accordingly rejected unanimously by the Group.

In the continuing deliberations on the IGC, the report from the Presidency to the European Council of 17 and 18 June 1996 (Florence) is important\(^{152}\). Parliament’s right to bring action should be extended beyond that already provided for in Article 173 ECT.

Given the current state of play with the IGC, Parliament has achieved considerable influence over the future development of the Union in connection with the Treaty revision with its resolution on the basis of the report of 17 May 1995 by the MEPs Mr Bourlanges and Mr Martin. Parliament’s reform proposals have been widely taken up by the Reflection Group and confirmed in its report. There is thus a great deal of common ground in the reform proposals. Nevertheless, the ideas of the majority of the Reflection Group differ in various respects from Parliament’s positions. The divergences arise, for example, where the status of Parliament is concerned but have to be accepted at the present time by Parliament on account of the unanimity requirement in the Council and can only be eliminated by the steady expansion of Parliament’s significance in European integration.

Ultimately, judicial developments in the context of Treaty reform depend on the political will of the Member States.

J. Final remarks

The above survey of case law shows that, after a long period of isolation in the institutional machinery, Parliament has increasingly been integrated into the Community.

Its rights to be consulted that are enshrined in the Treaty have been developed into effective involvement in the legislative procedure and Parliament’s role before the ECJ has also been considerably strengthened in procedural matters.

\(^{151}\) See White Paper on the 1996 IGC, Volume 1, p. 149 (186, paragraph 81 ff)

Despite this upgrading of Parliament through the codification of judicial developments in Article 173 ECT, the complete equality of Parliament with the other Community institutions has not been achieved in the present state of the integration process.

The imbalance becomes particularly clear when considering the right of the institutions to bring actions under the first and third paragraphs of Article 173 ECT. Granting Parliament the unrestricted right to bring proceedings would be a step towards greater equality, enabling Parliament not only to challenge the infringement of its own rights but also to bring actions in the general interest of the Community. The idea of Parliament enjoying the right to bring actions directly under Article 173 ECT without it being necessary to substantiate a need for any kind of legal protection was positively received by the Reflection Group. This is the only way in which it could finally acquire the status of a body scrutinizing the executive, a role which is a major task for the national parliaments given the principle of the separation of powers.

It is to be feared, however, that the promising trend towards a Strengthening of Parliament's position has for the time being been halted with the revision of the Community treaties by the Maastricht Treaty.

While it is true that the most recent examples from the case law of the ECJ\(^\text{153}\) have exerted considerable influence on the momentum of Community law, such a process cannot be expected in relation to a further strengthening of Parliament. It has to be assumed therefore that the trend of case law favourable to Parliament will stagnate.

Instead, the Member States are urged at the IGC to broaden the political claim of Parliament to be a fully fledged institution of the Community transcending the status quo. The unrestricted involvement of Parliament in the legislative process of the Community seems to make sense here.

This is the only means of avoiding further setbacks for the political and judicial development of integration.

Overall analysis and appraisal

by Professor Jurgen Schwarze

I.

The present study is prompted by the decidedly worthwhile objective of seeking to clarify in a detailed analysis of case law what contribution the European Court of Justice (ECJ) has made to upholding the rights and enhancing the role of the European Parliament. The study's point of departure is the thesis that improvements in the standing of the European Parliament, which was initially endowed with few powers in the Treaties establishing the European communities and which did not originally even bear that name, can be brought about not only through treaty amendments but also through the evolution of case law.\textsuperscript{154}

This thesis takes into account the peculiarities of the European legal system. When the Community treaties were framed, it was certainly appreciated that a fully fledged 'perfect' European legal system could not be created overnight but that a lengthy process of development would be required.\textsuperscript{155} Even in well developed national constitutional systems it is true that the constitution as a basic judicial framework\textsuperscript{156} is decisively influenced in its material substance by the constitutional court that is called upon to interpret it: 'The Constitution is what the judges say it is.'\textsuperscript{157}

This applies with even greater force to a legal system like that of Europe which, as 'evolving law', was in many cases guided only by objectives and principles laid down in the Treaties\textsuperscript{158} and in its far-reaching notions of integration was historically without precedents that had succeeded in practice.

The European Court of Justice employed at a very early stage the notion of a constitution for the Treaties establishing the European communities\textsuperscript{159}. Furthermore, it has explicitly been followed here

\textsuperscript{154} See page 1 of study

\textsuperscript{155} For details see here, for example, J. Schwarze, Grundzüge und Entwicklungsperpektiven des europäischen Gemeinschaftsrechts, in: J. Schwarze (Hrsg.), Vom Binnenmarkt zur Europäischen Union, Baden–Baden 1993, p. 9 ff.

\textsuperscript{156} For the various methods for defining the term 'constitution' see J. Schwarze et al., Verfassungsentwicklung der Europäischen Gemeinschaft – Begriff und Grundlagen – , in: J. Schwarze, R. Bieber (Hrsg.), Eine Verfassung für Europa, Baden–Baden 1984, p. 15 ff.

\textsuperscript{157} Allegedly said of US constitutional law by the American judge Charles Evans Hughes (1926); Pusey, Charles Evans Hughes, Vol. 1, New York, 1951, p. 204; see also W. Huller, Supreme Court und Politik in den USA, Bern 1972, p. 13.

\textsuperscript{158} Hans–Peter Ipsen, Die Verfassungserstellung des Europäischen Gerichtshofes für die Integration, in: J. Schwarze (Hrsg.), Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz, Baden–Baden 1983, p. 29 ff. (50 f) has in this connection spoken of European law as an 'evolving constitution'.

\textsuperscript{159} Advocate General Lagrange was probably the first to describe in one of his opinions the ECSC Treaty 'although … concluded in the form of an international treaty … it is nevertheless, from a material point of view, the charter of the Community' (Case 8/55 [1954 – 1956] ECR 277). The Court itself has used the notion of the EC treaties as the constitution of the Community in the cases involving 'Les Verts', Case 294/83 [1986] ECR 1339 (136 f) and Opinion 1/91, Agreement on European Economic Area (continued…)}
by Germany's Federal Constitutional Court which already in the early days of its case law relating to European integration approved and adopted the case law of the ECJ describing the Treaties as being 'as it were the Constitution of the Community'. The ECJ itself grew rapidly not only into its role as the body providing legal protection but also as the constitutional court of the Community. The primary tasks of a constitutional court are the interpretation of the powers vested in the various constitutional bodies and the delivery of binding rulings on their interaction under the relevant constitution. The jurisprudence of the ECJ has undertaken similar tasks in defining the standing of the European Parliament with one essential difference which is rightly mentioned at the beginning of the present study.

Since the various Community institutions do not discharge functions identical to those of the constitutional bodies under a national constitution and, in particular, Parliament still does not enjoy the role of sole responsible legislator, it is not possible to transfer the classical principle of the separation of powers to the Community constitutional order. Instead, the ECJ has consequently tackled the task specific to the Community of maintaining the 'institutional balance' between the Community institutions. As rightly emphasized in the study, this flexible principle of Community law which is not rigidly predetermined but influenced by actual case law has been one of the decisive factors in the judicial definition of the powers and rights of participation of Parliament, particularly in the Community legislative process.

It is not the aim of the following appraisal of the study's findings to run through all the individual findings once again. This is impossible not only on account of the in depth research on which the present study is based: it shows a true picture of the development of the Court's case law concerning the powers of Parliament that is correct down to the last detail. Furthermore, it guides the reader rapidly and reliably through the summary assessments attached to the individual chapters, referred to as 'analyses' in the study. These concluding remarks seek instead to draw attention once again to developments affecting points of principle. For this purpose, a number of individual decisions have been selected and highlighted. At the same time, this summary will concern itself with the concluding main arguments.

159 (...continued)
162 See here the exemplary study on the German constitution by K. Hesse, Stufen der Entwicklung der Verfassungsgerichtsbarkeit, shortly to be published in Jahrbuch des öffentlichen Rechts, Vol. 46 (Hrsg. P. Haberle).
164 See p. 1 of study.
Firstly, however, attention needs to be drawn to the variety of problem situations in which issues concerning Parliament's legal standing have been presented to the Court. The study under final appraisal here provides a comprehensive survey of the various categories of cases in which the Court has defined the scope of Parliament's powers. The systematically structured investigation identifies as the main features of case law the definition of the scope of Parliament's internal organizational powers, its rights to be involved in legal disputes initiated by other parties (delivery of observations in procedures involving preliminary rulings (Article 177 ECT) and in respect of opinions pursuant to Article 228(6) ECT (intervention)), the dispute over active and passive participation in proceedings before the Court and the shaping of Parliament's right to participate in the legislative procedure. In singling out below individual decisions of the Court for particular attention, the aim has been to highlight general trends and fundamental guidelines of the case law on Parliament's powers. Admittedly, a degree of arbitrariness cannot be avoided with any selection and emphasizing of individual cases. However, this selection concentrates on those decisions of the Court that have also attracted particular attention in specialist literature and the legal policy debate.

Apart from the yardstick of upholding 'institutional balance' between the Community institutions which is emphasized both at the outset here and in the study itself, the Court's decision in the cases 'Roquette Freres-Isoglucose' (138/79) and 'Maizena' (139/79) deserves particular attention.

In these cases the Court has as it were created a guideline for its subsequent case law on Parliament's powers. In its view, the effective participation of Parliament in the Community legislative procedure reflects 'the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.' Democratic principles should therefore also guide the sovereign formation of opinion in the Community even where it follows its own organizational principles that depart from the internal constitutional order in the Member States and, as recorded by the Court with some regret, the democratic principle has been directly realised only to a limited extent in the Community.

When reviewing the Court's jurisprudence to date it can definitely be established, as was also done in the study under review here, that the Court has tended to adopt an approach that is deliberately favourable to Parliament clearly in order to offset as far as possible the democratic deficits to be noted at Community level in connection with the Treaties and certainly to avoid widening them still further. The decision in the isoglucose cases accordingly set standards for subsequent case law. For the sake of completeness it should be added that, since 1987, Parliament's official name has been 'European Parliament' and is no longer simply called 'Assembly' as correctly indicated at the time in the isoglucose judgment.

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165 For further details see J. Schoo, Das Europäische Parlament und sein Verfassungsgericht, EuGRZ 1990, p. 525 ff.
167 Case 138179, op. cit. 3360, paragraph 33.
168 ibidem.
169 The term 'European Parliament' was inserted in the basic treaties by the SEA of 17/28 February 1986, in force since 1.7.1987 (Articles 3(1) and 32 SEA) and confirmed by the Treaty on European Union of 7.2.1992 (Article 4 ECT).
A final assessment of the Court's isoglucose judgment shows it to be particularly instructive in two respects from the point of view of principle. Firstly, the notion of maintaining the 'institutional balance' which is referred to here in the jurisprudence but is not specifically mentioned in the Treaties themselves serves to emphasize the need for effective involvement of Parliament in the Community's legislative process. Secondly, the Court has established that the democratic principle has been realized only in incomplete form at Community level and this has provided an additional opportunity in subsequent case law to create a counterbalance and interpret Parliament's existing powers as generously as possible. The fundamental approach developed by the Court in the isoglucose judgment has subsequently had favourable implications for Parliament in the many cases in which the proper implementation of the consultation of Parliament under the legislative procedure and the choice of the right legal basis have been at issue; these are listed separately in Chapter G. III, 2 to 6, of the study.

Among the cases of fundamental significance, mention should secondly be made here of the Court's decision on Parliament's action against the Council for failure to adopt a common transport policy\textsuperscript{170}. It is of particular interest not least because it makes a sharp distinction, as far as Parliament's rights are concerned, between legislative powers and capacity to initiate proceedings. Considerable space is rightly devoted to it in the study\textsuperscript{171}. In this first action for failure to act which Parliament brought against the Council in the Court, the Council defended itself on the grounds that Parliament could not be granted an autonomous right to bring an action for failure to act pursuant to Article 175 ECT for the very reason that it would thereby secure legislative power to which it was not entitled in this area\textsuperscript{172}. The Court did not allow this objection from the Council and granted Parliament the right to bring an action that was open to it in the wording of the Treaty as 'other institution' (Article 175 ECT).

The Court thus compensated Parliament for the legislative power to which it was not actually entitled by allowing it in any case, if necessary by bringing legal proceedings, to see to it that the Council complied with the legislative obligations incumbent on it under the Treaty. Specific mention is made in the study of the decisive argument in favour\textsuperscript{173} as formulated by Advocate-General Lenz in his opinion: 'If despite the wording of the Treaty the Parliament had no right of action, it would mean excluding the institution which on account of its independence of the Council would be most likely to be in a position to bring it before the Court for failure to act.\textsuperscript{174}

It can be inferred as a general consequence of this decision that the Court has resisted the temptation of concluding that no legislative power also means no power to bring an action. Instead, the Court decided in this case to grant Parliament, even though lacking legislative rights under the Treaties, the right to challenge the fact that the body with primary responsibility for legislation (the Council) had not fulfilled its obligations under the Treaty.

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\textsuperscript{171} See p. 18 ff of the study.

\textsuperscript{172} For this submission of the Council see p. 1565 ff. of the judgment in Case 13/83 op. cit.

\textsuperscript{173} See p. 18 of the study.

\textsuperscript{174} Case 13/83, op. cit. p. 1520.
As the third and last example of fundamental significance, reference needs to be made here to the well-known judgment of 25 May 1990 in the Chernobyl case. Here, the Court granted Parliament over and above the then wording of the Treaties a right to bring proceedings in order to safeguard its own powers in connection with an action in annulment (Article 173 ECT). As also pointed out in the study, it is to the Court's credit that it did not hold back from rectifying at least in part its own restrictive case law in the comitology judgment. Specifically, this judgment represents an example of successful judicial evolution not least because the principles developed in the Chernobyl case were later explicitly incorporated in the Treaty (Article 173, third paragraph, ECT) by the Member States. The judgment is instructive not only as far as the Court's own view of itself is concerned but shows also that it takes its task of ensuring that the law is observed in the interpretation and application of the EC Treaty (Article 164) extremely seriously in that it acknowledges its commitment to the objective of the widest possible legal protection. Furthermore, this judgment is clearly aimed at strengthening the legal standing of Parliament as far as possible. As its basis the Court once again employs the principle of maintaining the institutional balance which it had itself developed. This principle operates in this case in two directions. Firstly, it creates the very basis for recognizing Parliament's right to bring an action, which is not specifically laid down in the Treaties, and, secondly, at the same time it restricts this right by not granting it in comprehensive fashion to Parliament as to the privileged parties to proceedings (Member States, Council and Commission, Article 173, first paragraph, ECT) but only subject to the proviso that it is used to protect Parliament's own rights. The recognition of Parliament's unrestricted right to bring proceedings would undoubtedly have exceeded the scope of permissible judicial evolution. By simultaneously restricting the right to bring proceedings to the safeguarding of Parliament's own rights the Court has found a way that contributes to the acceptance of the solution frame by the judge which is not to be found in the wording of the Treaties alone.

The study then lists in detail the various circumstances in which Parliament has made use of the opportunity to initiate proceedings opened up by the Chernobyl judgment. As rightly pointed out in the study, the annulment proceedings brought by Parliament can be divided up primarily into two categories. On the one hand, actions were brought to secure the objective of ensuring a properly conducted consultation procedure while, on the other hand, actions were brought in which Parliament sought to secure the choice of the correct legal basis and hence as far as possible far-reaching involvement for itself in Community law-making. The study shows with its detailed run-down of individual cases that Parliament has exploited the newly created opportunities for legal action responsibly and generally with success.

176 See above p. 45.
179 For an example of case law illustrating this objective see e.g. Case 294/83 Les Verts v Parliament [1986] ECR 1339 ff.
180 See p. 29 ff. of the study.
III.

The study deserves broad approval both for the systematic treatment and analysis of the wide variety of case law and for its conclusions set out in the final remarks. The initial thesis of Parliament's growing incorporation into the institutional machinery of the Community and its legal system is impressively confirmed by the large amount of evidence presented. As far as the study's two fields of enquiry are concerned, the jurisprudence of the European Court of Justice has ensured that Parliament's rights to participate in Community law-making have been effectively implemented and the legal protection provided for its benefit has also been appreciably enhanced beyond what was originally provided for in the Treaties. It can definitely be said of the Court's jurisprudence that within the scope offered by the Treaties, it has opted quite overwhelmingly in favour of Parliament and its rights to participate both in legislative and in judicial procedures. On occasion, as in the Chernobyl Case\(^{182}\), the decision in favour of Parliament has even represented a bold judicial advance, the justification of which has been confirmed by a subsequent treaty amendment on the same lines (Article 173, third paragraph, ECT.).

What is still lacking and has not been provided by the Amsterdam Treaty either is complete equality for Parliament with the privileged parties to proceedings, i.e. the Member States, the Council and Commission. This means that Parliament is empowered only to bring an action to safeguard its own rights but, unlike the others, is not entitled to bring an action in the general interest of the Community without proof of an actual need for legal protection. The study criticizes this as a shortcoming mainly on the grounds that only through being granted the unrestricted right to bring proceedings could Parliament finally acquire the status of a body controlling the executive, a role which falls as a major task to the national parliaments on account of the principle of the separation of powers\(^{183}\). I have fewer doubts about the justification for the demand for equal legal standing for Parliament with the other Community institutions and the Member States than about the reasons advanced for this demand. In the first place, an effective body for monitoring the executive - contrary to what is assumed in the study - does not necessarily require recourse to judicial remedies. The available means of monitoring state power\(^{184}\) certainly include other instruments which can be just as effective as judicial review, e.g. political control.

In the second place, not all national parliaments enjoy similar opportunities for ensuring legal protection\(^{185}\) as sought after in the study. After all, the Court's expressed view on the corresponding demand of Parliament to which the study refers is particularly thought-provoking. Doubts do indeed exist about the appropriateness of shifting political conflicts to the judicial arena\(^{186}\). Nevertheless, in endorsing in the final analysis the study's demand that Parliament should be granted the same

\(^{182}\) see Case 70/88 op. cit.
\(^{183}\) see 49 of the study
\(^{184}\) see J. Schwarze, Zum Nutzen einer Systembildung fur die Kontrolle der Staatsgewalt, in Deutsches Verwaltungsblatt (DVBI) 1974, p. 893 ff.
\(^{185}\) For example, no one would doubt that, in the UK, Parliament is an effective body for monitoring the executive without having any specific judicial means of review available for its benefit or such means being considered necessary.
opportunities for legal protection as the Community’s other institutions and the Member States, I do so because Parliament has in the past made responsible use of the rights accorded to it and there is therefore no reason to place it in a worse position, particularly in relation to the other Community institutions, the Commission and the Council.

In connection with the Amsterdam Treaty reform, Parliament has had much greater success with the other fundamental demand of the study than with securing more comprehensive rights to bring proceedings. Parliament’s right to be involved in Community legislation has been markedly expanded and the relevant procedures have been simplified in the interests of easier implementation.”. Parliament therefore has little ground for pessimism, since the history of past treaty reforms has shown that Parliament’s rights have effectively been expanded on a continuing basis, if not all in one go.” Here, the rights to participate in Community law-making are certainly of greater relevance than the expansion of the opportunities for legal protection beyond their existing status. I do not believe either that there is necessarily any reason to complain of the future inevitability of a stagnant tendency in the Court’s case law favourable to Parliament as stated in the study’s final remarks.” Court decisions are taken in the light of the specific circumstances of the individual case which are difficult to foresee. There may well also be occasions in the future when the jurisprudence of the Court operates in a specific case in favour of Parliament; in any case, past judicial practice gives no cause to foresee a stagnant tendency in the area of case law. This means however - and here I agree with the main demand put forward at the end of the study - that the Member States are called upon ‘to broaden the political claim of Parliament to be a fully fledged institution of the Community going beyond the status quo.” This appeal is valid not only for the Amsterdam Treaty reform but also for the future beyond that.

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187 See Der Vertrag von Amsterdam, Ergebnisse, Erläuterungen, Vertragsentwurf, EU Nachrichten Nr. 3 of 9 July 1997, Chapter 14.
189 See p. 49 of the study.
190 Ibidem.