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**THE EUROPEAN PARLIAMENT
AND ARTICLE 173 OF THE EEC TREATY**

by

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Introduction

The two main direct actions of the system of judicial protection of the European Communities are the action for annulment laid down in Article 173 of the Treaty of Rome ("the Treaty") and the action for failure to act provided for in Article 175 of the Treaty¹.

Comparing Article 173 and Article 175 of the Treaty it seems to follow that the European Parliament cannot be challenged under these Articles before the Court of Justice and furthermore that the Parliament cannot challenge acts of the Council and the Commission under Article 173 although it can proceed under Article 175 of the Treaty if the Council or the Commission fail to act in infringement of the Treaty. But since the extension of the powers of the European Parliament and especially after the Court decisions in the cases concerning the seat of the

¹ The text of these two Articles can be found in Annex (A).

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Parliament under Article 38 of the ECSC Treaty², an academic discussion³ arose concerning judicial review of acts of the

2 European Court of Justice, February 10, 1983, case 230/81, Luxembourg v. European Parliament, (1983) ECR 255 et seq.
 European Court of Justice, April 10, 1984, case 108/83, Luxembourg v. European Parliament, (1984) ECR 1945 et seq.
 3 Bebr, Gerhard, Development of Judicial Control of the European Communities, The Hague / Boston / London (Martinus Nijhoff Publishers) 1981, p.33 see also footnote 68; Bieber, Roland, "Einflüsse der Rechtssprechung des Gerichtshofes auf die Stellung des Europäischen Parlaments" in: Schwarze, Juergen (ed.), Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz, Referate und Diskussionsberichte der Tagung des Arbeitskreises Europäische Integration e.V. in Hamburg vom 2. bis 4. Juni 1983, Baden-Baden, Nomos Verlagsgesellschaft, 1983, (Schriftenreihe des Arbeitskreises Europäische Integration 20) and almost the same text can be found in: Bieber, Roland e.a. Le "Chapitre V: Les Actes du Parlement et la Cour de Justice" in: Le Parlement Européen, Paris, Economica, 1984, pp.235-246; Beutler, "Mehr Macht durch Recht" in Europarecht, (1984), p.143-154; Cova, Colette, "Nouvelles Difficultés Budgetaires" in: Revue du Marché Commun (1986)293, pp.1-2; Glaesner, Hans, J., "Mögliche Konfliktzonen zwischen den Gemeinschaftsorganen" in: Europarecht (1981)1, pp. 9-22; Glaesner, H.J., "Haushaltsbefugnisse des Parlaments und Rechtsschutz". in Einigkeit und Recht und Freiheit. Festschrift fuer Karl Carstens, ed. Bodo Boerner + Hermann Jahrreiss + Klaus Stern, Carl Heymanns Verlag KG, Cologne, 1984, Band I, p.115-124; Hartley, Trevor, "Where should the European Parliament meet?". in European Law Review, 9(1984), p.44-46; Jacque, Jean-Paul, "Jurisprudence. Cour de Justice des C.E.. Arrêt du 22 mai 1985". in Revue Trimestrielle de Droit Européen, 21(1985)4, p.756-766; Louis, Jean-Victor, "Jurisprudence. Cour de Justice. 10 février 1983". in Cahiers de

(Footnote continues on next page)

Parliament also under Article 173 of the Treaty.

Furthermore, because the Court had ruled in the Chevalley case that;

"The concept of a measure capable of giving rise to an action is identical in Articles 173 and 175, as both prescribe one and the same method of recourse"⁴

the possibility of the Parliament to use Article 173 to initiate proceedings was discussed. Several fairly recent cases have provided answers to some of these questions.

(Footnote continued from previous page)

Droit Europeen, 19(1983), p.528-543; Masclet, Jean-Claude, Le Parlement Europeen devant ses juges. in Revue du Marche Commun, (1983)268, p.518-532; Neville Brown, L., "Judicial Control of Acts of the European Parliament". in Legal Issues of European Integration, (1983)1, Deventer, Kluwer Law and Taxation Publishers, p.75-86; N.N., "Editorial Comments" The European Parliament before the Court of Justice?. in Common Market Law Review, 1979, p.175-177; N.N., "Editorial Comment. The decision to take the European Parliament to Court". in European Law Review, 7(1982)1, p.1-2; Pescatore, Pierre, "Reconnaissance et controle judiciaire des actes du Parlement europeen". in Revue Trimestrielle de Droit Europeen, (1978)4, p.581-594; Schermers, Henry G., Judicial Protection in the European Communities, Deventer, Kluwer Law and Taxation Publishers, 1983, third edition, p.196.

⁴ European Court of Justice, November 18, 1970, case 15/70, Chevalley, consideration 6, (1970) ECR 975 at 979.

The Parliament initiated in the Transport case an action for failure to act against the Council that was ruled admissible under Article 175 of the Treaty by the Court of Justice⁵. Therefore at least this Article could be used by the Parliament to initiate proceedings. After the Transport case the Parliament lost two cases in which it was challenged itself under Article 173 of the Treaty. In the first of these two cases, "Les Verts" v. European Parliament⁶ the Court basically followed the argument which former Judge Pierre Pescatore had developed in an Article, published already in 1978, to interpret Article 173 of the Treaty in such a way as to allow for an action against the Parliament⁷. The Court held that:

"an action for annulment may be brought against acts of the European Parliament which are intended to have legal effects vis-a-vis third parties, provided that the other conditions laid down by that Article are

5 European Court of Justice, May 22, 1985, case 13/83 European Parliament v. Council, (not yet published).

6 European Court of Justice, April 23, 1986, case 194/83 Parti Ecologiste "Les Verts" v. European Parliament, (not yet published).

7 Pescatore, pierre, "Reconnaissance et controle judiciaire des actes du Parlement europeen". in Revue Trimestrielle de Droit Europeen, (1978), p. 581-594.

X
satisfied."⁸

In the second case, the budget case Council v. European Parliament⁹, the Court just referred to the judgment in "Les Verts" v. European Parliament.

On October 9, 1986 the European Parliament adopted, with only one abstention¹⁰, a resolution on the position of the European Parliament in the context of actions brought before the Court of Justice under Article 173 of the Treaty¹¹. This resolution drawn up on behalf of the Parliaments' Legal Affairs and Citizen' Rights Committee by Mrs. Vayssade (French Socialist), contains 4 points that give the opinion of the Parliament on Article 173 of the Treaty and the recent cases that were based on this Article.

(The Parliament:)

"1. Welcomes the Court's statement that the European Economic Community is a Community governed by the rule of law so that neither its Member States nor its institutions can avoid a review of whether or not their acts

8 idem note 5, consideration 25.

9 European Court of Justice, July 3, 1986, case 34/86 Council v. European Parliament, (not yet published).

10 Bulletin Quotidien, Agence EUROPE, saturday 11 October 1986, No 4407, 34th year, page 12.

11 resolution adopted October 9, 1986 (not yet published) on the basis of the Vayssade-report PE DOC A 2-71/86/Rev. of 18-7-1986.

are in conformity with its basic constitutional document, the Treaty;

2. Notes that, by means of an interpretation of Article 173 of the EEC Treaty, the Court of Justice declared admissible an action for annulment brought against acts of the European Parliament intended to have legal force with regard to third parties;

3. Observes that the finding by the Court that the EEC Treaty "established a complete system of legal remedies" implies that the European Parliament also has the right to bring actions under Article 173 and so has created the necessary balance in relations between the institutions;

4. Stresses the fact that acts which it has adopted in connection with its own internal organization, which have legal effects only within Parliament and which can be reviewed under procedures laid down in its Rules of Procedure must be exempted from a review of their legality by the Court of Justice;"¹²

Therefore, on the one hand the Parliament now accepts, even welcomes, the interpretation of the Court of Article 173 of the Treaty but on the other hand maintains under points 3 and 4 that the Parliament should also have the right to bring actions under Article 173 of the Treaty and that a certain category of acts of

¹² Idem, page 6.

the Parliament should be exempted from review by the Court of Justice.

Three questions arise in relation to the resolution passed by the European Parliament.

-What is the value of Parliament's claim to a right to initiate proceedings under Article 173 of the Treaty?

-How should one interpret the Parliament's assertion that certain acts should be exempted from judicial control?

-Why did the Parliament feel compelled to declare its opinion in the form of a resolution?

This paper will address these three questions taking into account recent pronouncements of the Court of Justice which may help in finding answers.

The Parliament as Plaintiff under art. 173 of the Treaty.

Point 3 of the resolution argues that the Parliament should have the right to initiate proceedings also under Article 173 of the Treaty. This matter is not yet resolved by the Court. Principally there are three possible answers to the question whether the Parliament has the right to institute proceedings under Article 173 of the Treaty. The first possible answer, the one which the Parliament adheres to, is that the Parliament should by analogy with the other institutions, Council and Commission, be allowed to sue under the conditions of the first paragraph of Article 173 of the Treaty. The second possible answer is to allow the Parliament to institute proceedings in analogy with legal persons under the second paragraph of Article 173 of the Treaty. The third possible answer is not to allow the Parliament to act as a plaintiff under Article 173 of the Treaty because the Parliament does not fulfil the requirements of either the first or the second paragraph of Article 173 of the Treaty.

The difference in consequences between the first and the second answer lies in the conditions under which a plaintiff can institute proceedings. The Member states and the Council and the Commission do not have to be directly and individually concerned

by the act of which the legality is contested. Legal persons, on the other hand, have to demonstrate that the contested decision is either addressed to them, or when it concerns a regulation or a decision addressed to another person, that it is of direct and individual concern to them. Therefore one can say that the Member states and the Council and the Commission have a privileged position as a plaintiff which allows them to challenge all binding decisions where legal persons can challenge only those which are not general rules and which are of special concern to them.

The Parliament argues in favour of the first answer. In the Explanatory Statement of the resolution the Parliament tries to prove its point with a reference to a number of arguments including the principle of institutional balance, the feature of a counterclaim that often exists in systems of municipal procedural law, the obligations of the Parliament under Article 137 of the Treaty, the possibility for the Parliament to intervene in cases before the Court and the right of the Parliament to bring an action for failure to act under Article 175 of the Treaty.

This last point is also used by the Parliament in connection with the judgment of the Court in the Chevalley case in which the

Court opined in connection with Articles 175 and 173 of the Treaty that "both provisions merely prescribe one and the same method of recourse".

Apart from these arguments which can be found in the academic literature¹³ on the subject, the Parliament also refers in a loose way to the opinion of Advocate General Mancini in the "Les Verts" v. European Parliament case.

During the plenary session of the Parliament Mr. Ripa di Meana speaking for the Commission said that the Parliament should have the right to present annulment procedures under Article 173 of the Treaty¹⁴.

These points do not amount to conclusive evidence that the Court will have to interpret Article 173 of the Treaty in the same line as the Parliament.

The Parliament did not take into account some academic writing which highlights the difference in phraseology between Article 173 and Article 175 of the Treaty and which contradicts some of its arguments. Furthermore, the Parliament failed to

¹³ See note 2.

¹⁴ Bulletin Quotidien, Agence EUROPE, Saturday 11 October 1986, No 4407, 34th year, page 12.

analyze carefully recent judgments of the Court relating to Article 173 of the Treaty, and to a certain degree the opinions of the Advocate General.

Professor Schermers justified the existence of the difference in wording between Article 173 and 175 of the Treaty as follows:

"The political power of the Parliament is limited, especially in relation to the Council. If the Council acts on the initiative of the Commission, the Parliament has some control over the latter institution; if the Council amends a proposal of the Commission, then it must be unanimous, so that each individual Council member can be held responsible to his own national parliament. But if the Council does not act at all (in practice this occurs when agreement cannot be reached), no one is politically responsible before any parliament. Therefore it may be instrumental that the European Parliament is allowed to request the Court of Justice to establish the obligation to act."¹⁵

Further, the Parliament did not try to analyse the recent opinions of the advocate general and the recent judgments of the Court. The Vayssade-report refers to the opinion of the Advocate General Mancini in the "Les Verts" case to support its

¹⁵ Schermers, Henry G., Judicial Protection in the European Communities, Deventer, Kluwer Law and Taxation Publishers, 1983, third edition, p.219.

interpretation of Article 173 of the Treaty without giving any precise indications and without mentioning the criticism the Advocate General made of the position of the Parliament in this case¹⁶. Part of this criticism will be dealt with in the fourth section of this Article, but one point is interesting to note here. Although the Advocate General supports a liberal interpretation of Article 173 of the Treaty to allow the Parliament to sue under that Article, he does not agree that this necessarily arises from the possibility of the Parliament being sued under Article 173 of the Treaty;

"Disons d'emblée qu'il nous paraît excessif de voir entre les deux légitimations un lien aussi étroit (toujours dans le cadre de l'Article 173, par exemple, il n'existe pas en ce qui concerne les Etats; et nous songeons à la position des régions par rapport au contrôle de la constitutionnalité de leurs actes dans l'ordre juridique italien).¹⁷"

Also the Vayssade-report fails to refer to the opinion of

¹⁶ Vayssade-report PE DOC A 2-71/86/Rev. of 18-7-1986, p. 24 and 25.

¹⁷ Opinion of the Advocate General Mancini of December 4, 1986, in case 294/83 "Les Verts" v. European Parliament, consideration 7, page 21 in the French text.

Advocate General Lenz in the transport case¹⁸, who interpreted Article 175 of the Treaty and Article 173 of the Treaty solely by referring to their wording and therefore concluding that the Parliament had only a right to sue under Article 175 of the Treaty.

The Court interpreted Article 173 of the Treaty as follows:

"...the European Economic Community is a Community based on the rule of law,....
...the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.

...The European Parliament is not expressly mentioned among the institutions whose measures may be contested (under Article 173 EEC) because, in its original version, the EEC Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effects vis-a-vis third parties. Article 38 of the of the ECSC Treaty Treaty shows that where the Parliament was given ab initio the power to adopt binding measures, as was the case under the last sentence of the fourth section of Article 95 of that Treaty, measures adopted by it were not in principle immune from actions for annulment.

¹⁸ opinion of the Advocate General Lenz in case 13/83 European Parliament v. Council of February 2, 1985, paragraph II, page 45 of the German text.

Whereas under the of the ECSC Treaty Treaty actions for annulment against measures adopted by the institutions are the subject of two separate provisions, they are governed under the EEC Treaty by Article 173 alone, which is therefore a provision of general application. An interpretation of Article 173 of the Treaty which excluded measures adopted by the European 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. ... It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects vis-a-vis third parties.¹⁹

In arguing that the Parliament has a right to sue under Article 173 of the Treaty there are several problems arising from the above quoted extract of the judgment. One element which the Court uses to establish that the Parliament can be sued under Article 173 of the Treaty is lacking for an argument that the Parliament can be a plaintiff also. The Court could argue by analogy with Article 38 of the ECSC Treaty that binding acts of the Parliament are susceptible to judicial review. No such analogy exists for the converse; to establish that the Parliament

¹⁹ European Court of Justice, April 23, 1986, case 194/83 "Les Verts" v. European Parliament, (not yet published), considerations 23-25.

can use Article 173 of the Treaty, like the Council and the Commission against the other institutions.

Another problem lies in the pivotal role that Article 164 of the Treaty plays in the argumentation of the Court. The Court felt it necessary to extend Article 173 of the Treaty to complete the system of judicial protection. Therefore in establishing a role for the Parliament to initiate proceedings under Article 173 of the Treaty one will have to reason from the perspective of Article 164 of the Treaty and from the idea of judicial protection. It is by no means clear that it is necessary under such an argument to extend the interpretation of Article 173 of the Treaty so as to allow the Parliament the privileged position to act as plaintiff that the Council and the Commission have.

Therefore one cannot yet draw the conclusion that the Parliament should be allowed to institute proceedings under the conditions of the first paragraph of Article 173 of the Treaty. Nevertheless, one can find in the judgment of the Court in the budget case, Council v. European Parliament, some assistance to reason that there should be a possibility for the Parliament to initiate proceedings under Article 173 of the Treaty.

The Court held in this judgment that;

"It must be observed that under Article 203
(10) of the EEC Treaty each institution is to

exercise the powers conferred upon it in respect of the budget with due regard for the provisions of the Treaty. If it were not possible to refer the acts of the budgetary authority for review by the Court, the institutions of which that authority is composed could encroach upon the powers of the Member States or of the other institutions or exceed the limits which have been set to their own powers"²⁰

The general way in which the Court argues about institutions seems to suggest that also the Parliament could act as a plaintiff under Article 173 of the Treaty as an institution and therefore under the conditions of the first paragraph.

Usually this possibility is discussed in the light of the first paragraph of Article 173 of the Treaty, that is whether the Parliament should have a similar position before the Court as the other institutions. However in cases where the Council or the Commission have encroached upon the powers of the Parliament, the Parliament could perhaps use Article 173 of the Treaty to institute proceedings without needing an extensive interpretation of the first paragraph if it could sue like a private individual under the conditions of the second paragraph of Article 173 of

²⁰ European Court of Justice, July 3, 1986, case 34/86 Council v. European Parliament, (not yet published), consideration 12.

the Treaty. This brings us to the second possible answer to the question whether the Parliament can institute proceedings under Article 173 of the Treaty. The suggestion to allow the Parliament to institute proceedings under the second paragraph of Article 173 of the Treaty is made in Grabitz' commentary on the Treaty after a rejection of a privileged position for the Parliament analogous to the position of the other institutions;

"... der EuGH ... könne im Rahmen des Art. 173 "Lücken schließen", so kann dies doch nicht ohne zwingende Gründe der Rechtssicherheit oder der Gerechtigkeit erfolgen. Da das EurParl, soweit er durch eine Handlung des Rates oder der Kommission in seinem Rechten beeinträchtigt ist, nach Abs. 2 klageberechtigt wäre, sind derartige Gründe nicht ersichtlich." 21

The possibility of allowing the Parliament to sue under the same conditions as a private party was also mentioned in the opinion of Advocate General Lenz in the Transport case in relation to Article 175 of the Treaty. The Advocate General Lenz, and later the Court, accepted that the Parliament was a

21 Grabitz, Prof. Dr. Eberhard e.a., Kommentar zum EWG-Vertrag, C.H. Beck'sche Verlagsbuchhandlung, München, 1986.

privileged party under Article 175 of the Treaty so the parallel with a private party was not pursued.²²

Therefore the question becomes whether the European Parliament can be, even if only by analogy, a "legal person". The Court of Justice held obiter dictum in the *Algera* case that:

"... the fact that only the Community has legal personality, and its institutions do not."²³

Similarly Advocate General Lagrange in his opinion in the *Lassalle* case.²⁴

Therefore also this possibility of allowing the Parliament to sue under Article 173 of the Treaty is problematic.

For political reasons, however, this possibility is very attractive because it would imply only a limited locus standi for the European Parliament. It would mean that the Parliament could protect its position before the Court when necessary but that it

22 Opinion of the Advocate General Lenz of February 2, 1985, in case 13/83 *European Parliament v. Council*, paragraph I 2.2, page 14 and 15 in the german text.

23 Decision of the Court of Justice in the *Algera* case (7/56 and 3/57-7/57), 12 July 1957, [1957] ECR 58.

24 Opinion of the Advocate General Lagrange of November 5, 1963, in case 15/63 *Lassalle v. European Parliament*, [1964] ECR 53.

could not use access to the Court as an additional political weapon against the Council and the Commission. Something which would potentially change the balance of power between the institutions of the European Communities.

A closer consideration of this question is therefore justified.

Returning to the Algeria case one has to note that the concept of "legal person" of Article 173 of the Treaty differs from that in Articles 210 and 211 of the Treaty that grant the EEC legal personality under international law and under the municipal law of the Member states. It is only this latter concept (of Articles 210 and 211 of the Treaty) to which the Court refers in the Algeria case. In respect to Articles 210 and 211 of the Treaty it is clear that only the Community as such has legal personality and not the institutions²⁵. But discarding in this respect the

25 Article 211 contains the formula "To this end, the Community shall be represented by the Commission". Article 6 of the ECSC Treaty on the other hand contains the formula "The Community shall be represented by its institutions each within the limits of its powers". Because of the Luxembourg v. European Parliament

(Footnote continues on next page)

Algera case does not yet mean that the basic idea behind it is refuted. A strong argument against giving the European Parliament legal personality can be that it is only an organ of a larger entity that has legal personality. We will have to reconsider this aspect somewhat further on.

Since the concept of "legal person" of Article 173 of the Treaty is an independent concept of Community law that does not need to be the same as the concept in the law of the Member States²⁶, one does not need to consider in detail the different national legal systems.

Therefore it suffices to find arguments for accepting the European Parliament as a legal person in the context of Article 173 of the Treaty only.

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cases we must assume that this Article 6 is still valid also for all those areas where it is not possible to distinguish whether the European Parliament operates under the ECSC Treaty or the EEC Treaty. This therefore gives the European Parliament even some power of decision say over the legal personality of the Community as such!

²⁶ Decision of the European Court of Justice 135/81, 1982.

In considering the question whether the Staff Committee of the European Parliament has this legal personality Advocate General Lagrange opined that:

"It is enough - but it is imperative - that the right to be a party to legal proceedings before the Court ... be recognized as necessary in order that the Committee exercise the powers conferred on it by the Staff Regulations. It is all a question of the nature and the extent of those powers ..."²⁷

Article 173 of the Treaty is explained on similar lines by Professors Smit and Herzog;

"As is increasingly recognized, legal personality is a relative concept. Whether an entity can act as a separate legal person depends in the first instance on the purpose for which the determination is to be made. See e.g., Reparations for Injuries Suffered in the Service of the United Nations, International Court of Justice, Advisory Opinion, 1949 I.C.J. 174. The crucial question is whether the body, in order to carry out its proper functions, should be able to bring suit as a separate person."²⁸

²⁷ Opinion of the Advocate General Lagrange of November 5, 1963, in case 15/63 Lassalle v. European Parliament, [1964] ECR 56. Lagrange, and later the Court, held that the Committee did not fulfill this condition.

²⁸ Smit, Hans and Peter Herzog, The Law of the European Economic Community. A Commentary on the EEC Treaty, Matthew Bender, New York, 1982, Volume 5 page 388.

From these two quotes it follows that we have to consider whether the powers and functions of the European Parliament make it necessary to allow the Parliament to institute proceedings. And that an affirmative answer implies that the European Parliament should be considered to be a legal person.

To my opinion the European Parliament meets these requirements. Especially since the budgetary treaties of 1970 and 1975, that amended the Treaty, the Parliament has important independent powers in the budgetary procedure. These powers made it also necessary for the Court to allow procedures against the Parliament. But if the Council or the Commission infringes on these powers it would also be necessary to allow the Parliament to institute proceedings in order to maintain institutional balance in the European Communities. This last point is perhaps recognized by the Court in the Budget case, Council v. European Parliament²⁹.

Therefore it seems possible to construe a "legal personality" for the European Parliament under Article 173 of the Treaty in

²⁹ European Court of Justice, July 3, 1986, case 34/86 Council v. European Parliament, (not yet published), consideration 12, cited in this paper on p. 14.

order to allow the Parliament to institute proceedings under the same conditions as legal persons.

One objection to this was raised earlier in this paper and that is that the European Parliament is only an organ of a larger entity which has itself legal personality so that the Parliament cannot have an independent legal personality. This objection does not take account of the purpose for which the Parliament should have a separate legal personality, that is to allow the Parliament to protect its powers before the Court in order to ensure that the Parliament fulfills its proper role in the European Communities, which is, as explained above, the most important element in deciding on legal personality. In this interpretation of the concept of legal personality also the Member states and the Council and the Commission are legal persons. But because they are enumerated in the first paragraph, which is an exception to the second paragraph only as far as the conditions for an application are concerned, the question of their being a legal person does not arise.

The fact that the Parliament is an organ, an institution of the European Communities, can play a role in determining whether one wants to allow the Parliament the right to institute proceedings under the first or under the second paragraph of

Article 173 of the Treaty. If one sees the analogy with the other institutions as the most important factor in deciding this question it seems more logically to grant the Parliament the same privileged position as the other institutions. If one on the other hand, wants to stick as closely as possible to the text of the Treaty and the element of judicial protection is seen as the overriding argument, then it seems more logical to opt for the position of legal persons.

Choosing the second possibility would mean that the difference in wording between Article 173 of the Treaty and Article 175 of the Treaty keeps a meaning and that also the Court's interpretation of Article 164 of the Treaty as implying "a complete system of legal remedies" can remain intact. Also it would maintain the institutional balance between the institutions in the sense that neither the Parliament gains a large access to the Court nor is it subject to the risk of being threatened with legal proceedings by the other institutions without the possibility to protect its own position in a similar way.

In the beginning of this section a third possible answer was suggested to the question whether the Parliament should have the right to institute proceedings under Article 173 of the Treaty. That third possibility was not to allow the Parliament to

institute proceedings under Article 173 EEC. Since this paper argues that it is possible to defend both other possibilities this third answer has become redundant. Politically it would be not redundant but almost disastrous not to allow the Parliament to institute proceedings under Article 173 of the Treaty because it would mean that the Parliament could not anymore make full use of its powers when only the other institutions could bring conflicts with the Parliament before the Court.

Finally, this section should have demonstrated that the position the Parliament took in its resolution of October, 9 1986, is not above doubt and criticism. My preferred solution would be to allow the Parliament locus standi under the second paragraph of Article 173 of the Treaty because this solution would respect best the institutional balance and would also avoid that the Court could be too easily seized with politically inspired cases.

Limits of Judicial Review

It is hard to understand point 4 of the resolution of the Parliament of October 9, 1986. It seems to suggest an exception to

Article 173 of the Treaty but it is questionable whether indeed it is an exception. In the Explanatory Statement of the Vayssade-report attention is drawn to several judgments of the Court in which the Court stated that the Parliament has the right of autonomous organization, and also attention is drawn to an Article by Masclet³⁰. But if one studies the relevant cases of the Court it is clear that the Court merely places some acts in the category of autonomous self-organization of an institution after it has found that the act concerned has no legal effect vis-a-vis a third party and therefore fails to fulfill the condition of "acts ... other than recommendations or opinions" that is included in Article 173 of the Treaty. Therefore point cannot be an exception to Article 173 of the Treaty but is merely a description of part of an exception within Article 173 itself. Whether something concerns the right of self-organization of the Parliament or not, this is not relevant to the question of admissibility.

30 Masclet, Jean-claude, "Le Parlement devant ses juges". in Revue du Marche Commun, (1983)268, p.518-522.

The Court had to deal with the right of self-organization of the Parliament first in case 230/81 Luxembourg v. European Parliament. The Court held that;

"the Parliament is authorized, pursuant to the power to determine its own internal organization given to it by Article 25 of the of the ECSC Treaty Treaty, Article 142 of the EEC Treaty and Article 112 of the EAEC Treaty, to adopt appropriate measures to ensure the due functioning and conduct of its proceedings."³¹

But the Court made this observation not in relation to its own competence to judge the case but in relation to the substance of the case in order to distinguish between the competence of the Parliament and the competence of the Member states.

In the second case relating to the seat of the Parliament, the Parliament argued that its resolution which was challenged by Luxembourg was "an administrative measure relating to the internal organization of Parliament, and does not of itself produce legal effects"³² and that therefore the application of Luxembourg was

31 European Court of Justice, February 10, 1983, case 230/81, Luxembourg v. European Parliament, (1983) ECR 255 et seq., consideration 38.

32 European Court of Justice, April 10, 1984, case 108/83, Luxembourg v. European Parliament, (1984) ECR 1945 et seq., consideration 19.

inadmissible. The Court on the contrary held;

"Consideration of the content of the resolution at issue shows that it is of a specific and precise decision-making character, producing legal effects. Consequently, the second submission must be rejected"³³.

Therefore the Court did not decide that actions against acts of the Parliament relating to the Parliament's internal organization are inadmissible but held admissible actions against acts which produce legal effects.

In this case the Court held that the Parliament had exceeded the limits of its powers in adopting the resolution in dispute and therefore declared the resolution void.

Another example where the concept of "internal organization" played a role, can be found in a recent Order of the President of the Court³⁴. In his order the President declared inadmissible an application for annulment filed by the Group of the European Right, one of the party-groups within the European Parliament, against the decision of the Parliament to establish under Article

³³ Idem considerations 23 and 24.

³⁴ Order of the President of the Court of Justice in case 78/85, Group of the European Right v. European Parliament of June 4 1986 (not yet published).

95 of the Rules of Procedure of the European Parliament³⁵ a committee of inquiry into the rise of fascism and racism in Europe. The formation of this committee in the Parliament can be seen as a political step of the majority of the parliamentarians against the presence in the Parliament of an extreme right-wing group. According to this group, the Group of the European Right, the decision of the Parliament violated Article 95 of the rules of procedure of the European Parliament in that it could not be said that this committee was charged to "investigate specific matters". Also the Group of the European Right argued that the object of the research falls outside the scope of the EC Treaties, which would be a violation of Rule 95-1 of the Rules of Procedure of the European Parliament. Finally the Group of the European Right maintained that the objective of the committee is a discrimination of a minority-group in the European Parliament.

Against this application the Parliament brought by way of a preliminary objection an exception of inadmissibility (Article 91-1 Rules of Procedure of the Court) stating that Article 38 of the ECSC Treaty did not apply and that Articles 146 EURATOM and 173 of

³⁵ Rule 95-1:

"Parliament shall, at the request of one quarter of its current Members and without previously referring the request to committee, set up a committee of inquiry to investigate specific matters."

the Treaty do not allow for a review of other acts of the Parliament.

This exception of the Parliament logically failed because of the prior decision of the Court on Article 173 of the Treaty in the "Les Verts" case³⁶. But the Court assisted the Parliament by applying Article 92-2 Rules of Procedure of the Court to decide *ex officio* on the admissibility of the application of the Group on the European Right. After citing the "Les Verts" decision the Court tried to find legal effects vis-a-vis third parties in the challenged decision of the Parliament;

Sans même qu'il y ait lieu de vérifier si le recours a bien été formé dans le délai fixé à l'Article 173, troisième alinéa, il convient de souligner qu'il est irrecevable du fait que l'acte du Parlement européen attaqué n'est pas de nature à produire des effets juridiques à l'égard de tiers. En effet, les commissions d'enquête dont la constitution peut être demandée en vertu de l'Article 95 du règlement intérieur ne sont dotées que d'un pouvoir d'étude et, en conséquence, les actes relatifs à leur constitution ne concernent que l'organisation interne des travaux du Parlement européen³⁷

The words "en consequence" may underline the route the Court took in concluding the matter was inadmissible. The Court did not

³⁶ See also paragraph four of this article that specifically deals with the positions the Parliament took.

³⁷ Order of the President of the Court of Justice in case 78/85 Group of the European Right v. European Parliament of June 4 1986 (not yet published), consideration 11.

check whether the challenged act only concerned the internal organization of the Parliament but did conclude this from the fact, which it did check, that the act did not have any legal effects vis-a-vis third parties. Therefore it should be noted that the admissibility rules do not create any special restraints on judicial review of acts of the Parliament.

Still this does not mean that there are no limits to judicial review. The Court has also to respect Article 4-1 of the Treaty and has to act within the limits of the powers conferred upon it and therefore should not infringe upon the competence of the other institutions.

Delineating the limits of the competence of the Court is very difficult especially since it decides itself the extent of these limits. The same holds true for some other constitutional courts, therefore a comparative approach may suggest the beginning of an answer. American experiences in the Supreme Court look especially relevant.

Basically two methods can be used by Courts to evade "political questions" that can be better decided by other institutions. It can often be done by a restrictive interpretation of the conditions for admissibility. The United States Supreme Court can do this fairly easily in the procedure

of certiorari where the Court first has to decide itself by simple majority whether or not to take the case³⁸.

Such a decision on certiorari does not have to be reasoned, which makes this tool even easier to handle. For instance the Supreme Court in this way refused to rule on questions relating to the legitimacy of the Vietnam War³⁹. This method is very dependent on the measure of stringency a Court can apply to questions of admissibility. In the light of the European Court's case law this is not a reliable possibility.

The second way to evade political questions is, after admissibility has already been granted, to label them political questions that are not justiciable or to state that the discretion of another institution has to be respected. This device can be found as well in the American legal system; the political question. A "political question" is "non-justiciable"

38 The Supreme Court's Rules on this procedure specify:
 "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore"
 In fact this procedure is the most common means of access to the US Supreme Court.

39 *Mora v. McNamara*, 389 U.S. 934, this case contains a dissenting opinion concerning the decision on certiorari.

and has to be solved by another institution. Many eloquent references to this concept can be found in the case-law of the Supreme Court. For instance:

"To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action"⁴⁰

This quotation stems from 1946. Already in 1962 the Supreme Court reversed its idea that reapportionment was a political question" and therefore "not justiciable"⁴¹. Since the fifties the U.S. Supreme Court has been very activist so that references to this concept were not so much found in the majority opinion as well as in dissenting opinions⁴².

40 *Colegrove v. Green*, 328 U.S. 549 (1946).

41 Of course the very famous case of *Baker v. Carr*, 369 U.S. 186 (1962). Justice Frankfurter who had drafted the majority opinion in *Colegrove v. Green* wrote a strong dissenting opinion.

42 Very elegant examples by first a "conservative" and second a "liberal" are Justice Frankfurter in *Trop v. Dulles*, 356 U.S. 86 (1958) and earlier Justice Holmes in *Lochner v. New York*, 198 U.S. 45 (1905).

The concept "political question" is found most explicitly in the legal system of the United States. But the somewhat wider concept of "judicial restraint", that aims also at safeguarding a separation of powers, is found in many legal systems.

For instance the constitutional review system of West-Germany recognizes explicitly the need for restraint. The "Bundesverfassungsgericht" stated its opinion on this maybe most clearly in a case concerning the "Ostverträge";

"Der Grundsatz des judicial self-restraint zieht darauf ab, den von der Verfassung für die andere Verfassungsorgane garantierten Raum freier politischer Gestaltung offenzuhalten" 43

The need for restraint shows maybe also in the "verfassungskonforme Auslegung" which the Bundesverfassungsgericht applies. If there is reason to think that there might be a problem of constitutionality of a particular law then the Bundesverfassungsgericht will try to interpret this law in such a way that it does not infringe upon the constitution, in order to avoid declaring that the law violates the constitution.

Therefore the attitude of the Bundesverfassungsgericht seems to be more prudent and moderate vis-à-vis the other institutions than the attitude of the American Supreme Court.

In its recent judgment in the budget case the Court of Justice of the European Communities also shows on several questions considerable judicial self-restraint. But the Court

43 BVerfGE 40 no. 16, Ostvertraege, 1975.

does not systematize its use of judicial restraint by introducing a formal concept of a "political question".

According to the Council the Parliament had acted illegally when its President declared the 1986 budget adopted although the Council and the Parliament did not agree on several matters relating to the budget. The most important of these questions concerned the so-called maximum rate of Article 203-9. This maximum rate sets a limit to the extent to which the Parliament can raise non-compulsory expenditure - on which it has the last word - in the budget. This rate is fixed by the Commission in a computation based on three macro-economic indicators. If this rate is deemed to be too low, Council and Parliament can fix another rate by agreement. During the budgetary procedure for the 1986 budget the Parliament had raised unilaterally non-compulsory expenditure beyond the maximum rate without first seeking the agreement of the Council. After the President of the Parliament proceeded by declaring the budget adopted the Council and several Member States filed applications for annulment with the Court. One of them, the United Kingdom, also sought and obtained an interim Order suspending the budget beyond the level that the Council had agreed on. In its application the Council not only asked the Court to annul the budget of 1986 in so far as the Parliament had exceeded the maximum rate but also asked the Court to hold that the Parliament had acted illegally by treating some budgetary lines as non-compulsory which the Council considered to be compulsory expenditure.

In its judgment the Court, following in essence the opinion of Advocate General Mancini, went less far than the Council had wished. The Court first established three findings of fact that were crucial to the case.

"a. The Commission, the Council and the Parliament all concurred in the view that the maximum rate of increase as fixed by the Commission was not adequate to enable the Community to function properly during the financial year 1986;

b. The Council and the Parliament were unable to agree on a new maximum rate of increase although the positions which those two institutions finally adopted were quite close to each other;

c. The appropriations adopted by the Parliament at the second reading and ratified by the budget as adopted on 18 December 1985 by the President of the Parliament exceed the maximum rate of increase as fixed by the Commission and the various modified rates which had been proposed by the Council⁴⁴.

The Council disputed fact (b) arguing that the Parliament had implicitly agreed on the figures on the maximum rate established by the Council. The Court rejected this argument stating that the agreement on a new maximum rate has to be made explicit.

The Parliament disputed fact (b) on the flimsy explanation that the words "expenditure of the same type" in the first subsection of Article 203-9 of the Treaty referred not to non-compulsory expenditure in general but to equivalent expenditure

⁴⁴ European Court of Justice, July 3, 1986, case 34/86, Council v. European Parliament, (not yet published), consideration 32.

in the preceding financial year. According to the Parliament this meant that costs that would be incurred because of the recent enlargement of the EEC with Spain and Portugal fell out of the scope of the maximum rate. The Court disagreed arguing, much more logically, that the words "expenditure of the same type" can only refer to the expenditure mentioned later in the sentence, namely non-compulsory expenditure.

Therefore the Court could conclude from the facts that it had established that the President of the Parliament had acted illegally by declaring the 1986 budget adopted at a time when the budgetary procedure was not yet completed for want of an agreement between the two institutions concerned on the figures to be adopted for the new maximum rate of increase. Therefore the Court annulled only this act of the President of the Parliament. According to the Court this made the second claim of the Council, relating to the difference between compulsory and non-compulsory expenditure, redundant so that the Court did not have to rule on it.

In this case the Court displayed in several passages a considerable amount of judicial restraint. For example;

"determination of the exigencies posed, for the budget of the Communities, by special situations such as the accession of new Member States or the absorption of the "cost of the past" is not a matter for the Court but for the Council and the Parliament, acting in concert."⁴⁵

45 Idem consideration 38.

and

"It must be observed in the first place that , although it is incumbent on the Court to ensure that the institutions which make up the budgetary authority keep within the limits of their powers, it may not intervene in the process of negotiation between the Council and the Parliament which must result, with due regards for those limits, in the establishment of the general budget of the Communities."⁴⁶

further

"The Court does not have to consider to what extent the Council's or the Parliament's attitude during the entire negotiations on the budget prevented them from arriving at an agreement."⁴⁷

Also the Court found a way to avoid ruling on the second claim of the Council relating to the classification of expenditure in compulsory and non-compulsory expenditure. And in an obiter dictum the Court makes clear not to be very eager to rule on the difference between compulsory and non-compulsory expenditure in the future.

"It should also be noted that the problems regarding the delimitation of non-compulsory expenditure in relation to compulsory expenditure are the subject of an inter-institutional conciliation procedure set up by the "Joint Declaration" of the European Parliament, the Council and the Commission of 30 June 1982 (Official Journal No. C 194) and that they are capable of being resolved in that context."⁴⁸

46 Idem consideration 42.

47 Idem consideration 45.

48 Idem consideration 50.

This procedure is in essence a written agreement between the three institutions about some problems relating to the budgetary procedure. It reads almost like a treaty but the legal value of this document that is not based on any particular treaty provision has been disputed. Therefore it is striking to see the Court refer to it. The more so because of the words "and that they are capable of being resolved in that context" since the "Joint Declaration" does not contain a solution for the situation in which the individual institutions are not prepared to change their opinion of free will⁴⁹.

Therefore one wonders whether the Court can indeed continue to evade ruling on the delimitation of compulsory and non-compulsory expenditure. The examples do show, though, that the Court is aware of the need for a prudent use of its powers and for restraint when "political" matters are put before it. To state the need for judicial self-restraint is not too difficult. But attempts to define and categorize a concept like "political question" seem to fail always because of circularity:

49 On the "Joint Declaration" see Dankert, Piet, "The Joint Declaration by the Community Institutions of 30 June on the Community Budgetary Procedure". in Common Market Law Review, 20(1983), p. 701-712; Dewost, Jean-Louis and Marc Lepoivre, "La Declaration Commune du Parlement Europeen, du Conseil et de la Commission relative a differentes mesures visant a assurer un meilleur deroulement de la procedure budgetaire, signee le 30 juin 1982". in Revue du Marche Commun, 261(1982), p.514-525; Strasser, Daniel, "Le budget 1983: son environnement politique et financier, le trilogue, les deux procedures budgetaires, les perspectives pour une annee nouvelle". in Revue du Marche Commun, 268(1983), p. 307-362.

"The definition of a political question can be expanded or contracted in accordion-like fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process: matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins"⁵⁰.

Acknowledging this, one nevertheless can try another line of reasoning if one wants to argue for a normative description of the necessary restraint the Court should apply.

Our method of doing so is to argue conversely, not from the Court but from the institution concerned. The question then becomes which part of the powers of a certain institution need to be protected most. For a Parliament this will include; political control of the executive, a certain discretion in legislation and a certain discretion in the way a Parliament organizes its work. In the case of the European Parliament one is therefore left with political control and self-organization.

Also Masclet recognized these two categories, but like most authors on the question of constitutional review, he concentrates on the legitimacy of judicial review rather than on the question

⁵⁰ Strum, Philippa, The Supreme Court and "Political Questions": A Study in Judicial Evasion, The University of Alabama Press, Alabama, p.1.

of restraints to this review⁵¹.

This paper on the contrary, tries to argue which decisions of vital political significance in the field of political control should perhaps be exempt from too close a review by the Court. The concept of self-organization or autonomy for the Parliament is less interesting because it is identical with the question of legal effect as has been shown above⁵².

Within the Community-framework one can think of at least three actions of the Parliament that are of such a vital political significance. These are a motion of censure, a rejection of the budget and a refusal of discharge.

A motion of censure is the most political act the Parliament can pass. Although one can harbor some doubts about its effectiveness when it would be used⁵³ it is the apex of the political control that the European Parliament can exert. If anywhere the Court should not have jurisdiction it is here.

An interesting question is whether Article 38 of the ECSC Treaty does allow the Court to rule on a motion of censure or

51 Masclet, Jean-Claude, "Le Parlement devant ses juges". in *Revue du Marche Commun*, (1983)268, p.518-522. On the question of constitutional review see for instance; Cappelletti, Mauro, "Repudiating Montesquieu? The expansion and legitimacy of "constitutional review"". in *Catholic University Law Review*, 35(1985)1, p.1-32.

52 See page ?

53 See for instance: Bieber, Roland, "Das Parlamentarisches Misstrauensvotum in den Europäischen Gemeinschaften". in *Neue Juristische Wochenschrift*, (1973)10, p.405-408.

not. Masclet argues that the Court can⁵⁴. If this is correct, the view that Article 173 fails to mention the Parliament because the Parliament could not take any justiciable acts before the the two budgetary treaties, part of the reasoning of the Court in the "Les Verts" case, becomes logically inconsistent. If one reads the decision of the Court in "Les Verts" carefully it seems not unlikely that the Court realizes this. In explaining that the EEC Treaty does not contain a provision like Article 38 of the ECSC Treaty it does not refer to Article 24 of the ECSC Treaty but it only mentions Article 95 of the ECSC Treaty be it in a way that suggests that there might be other categories of acts that are susceptible of Court review under Article 38 of the ECSC Treaty (something we know to be the case because of the *Luxembourg v. European Parliament*- case⁵⁵). Maybe the Court implicitly is of the opinion that Article 38 of the ECSC Treaty does not give it competence for cases involving a motion of censure. A second indication for this could be that the Court distinguishes in "Les Verts" between "powers of consultation and political control" and "measures intended to have legal effects vis-a-vis third

54 Masclet, Jean-Claude, "Le Parlement devant ses juges". in *Revue du Marche Commun*, (1983)268, p.518-522.

55 *European Court of Justice*, February 10, 1983, case 230/81, *Luxembourg v. European Parliament*, (1983) ECR 255 et seq.
European Court of Justice, April 10, 1984, case 108/83, *Luxembourg v. European Parliament*, (1984) ECR 1945 et seq..

parties"⁵⁶.

The Advocate-General Mancini was more explicit in his opinion on "Les Verts":

"Le Parlement, il est vrai, pouvait contraindre les commissaires à abandonner leurs fonctions en adoptant la motion prévue aux Articles 144 du traité CEE et 114 du traité CEEA; mais le caractère politique de cet acte l'emportait tellement sur son caractère juridique qu'il apparaissait comme imprudent (ou inutile) d'instituer la légitimation passive de l'organe compétent à la mettre en oeuvre."⁵⁷

Even the Council seems to support the view that there should be no judicial review of a motion of censure, when it stated in its application in the budget case that:

"As for the exception, it deals with the very particular case of the adoption of a motion of censure.... Such a decision, although it does have legal consequences to the extent that it compels members of the Commission to resign, is above all of a highly political nature, and one can easily understand that, in the mind of the authors of the Treaties, the possibility of such a decision did not merit an express reference to acts of the Parliament. The fact that the reference in Article 38 of the ECSC Treaty to the acts of the Parliament covers the motion of censure pursuant to Article 24 does not affect that conclusion since, as one has already seen, that reference is justified by reason of the

⁵⁶ European Court of Justice, April 23, 1986, case 294/83 "Les Verts" v. European Parliament, consideration 24, quoted in this paper on pages 8 and 9.

⁵⁷ Opinion of the Advocate General Mancini, December 4, 1986, case 294/83, consideration 7, page 20 in the french text.

last section of Article 95 of the of the ECSC Treaty Treaty."⁵⁸

If ever a case would come before the Court challenging a motion of censure the Court will therefore, in my opinion, have to find a way out. A possibility would be to rule that although such an application in itself is admissible the Court nevertheless is not in a position to decide because this is a "political question" that should be decided by the Parliament. A solution along these lines would have a parallel in the case-law of the United States Supreme Court. An advantage of this solution could be that it would allow the Court to take action when the Parliament would violate one of the essential procedural requirements of a motion of censure⁵⁹. The Court's jurisdiction over procedural matters seems acceptable⁶⁰, but competence to judge the political reasons behind such a motion would go too

58 Application of February 10, 1986 by the Council v. European Parliament, entered in the Register of the Court on February 11, 1986 under no. 235166, case 34/86, quoted part to be found under I sub 7.

59 These are essentially voting requirements. And maybe one could see a condition in the words "the activities of the Commission" in the sense that the Parliament cannot censure the Commission just for its personal composition or for activities that have nothing to do with the Commission as an Institution. Also one could argue that it is impossible to censure only a member of the Commission in stead of the Commission as a whole.

60 Similar point: N.N., "Editorial Comments" The European Parliament before the Court of Justice? in Common Market Law Review, 1979, p.175-177.

"Equally, one could argue that the voting requirements laid down for the adoption of certain acts of Parliament - for example, in Article 144 of the EEC Treaty concerning a motion of censure ... - should also be subject of judicial control."

far. The essence of Article 144 of the Treaty is to secure that there is political trust between the Parliament and the Commission and that is not a matter for the Court to judge.

Similar arguments make it necessary that the Court would not have jurisdiction over the reasons why the Parliament can reject the draft budget. Legally this position is less strong here for two reasons. First because there is no logic compelling this reasoning in order to allow Article 173 of the Treaty to be used against the Parliament as is the case with a motion for censure. This necessity lacks because Article 203-8 of the Treaty is part of the budget treaties. Second because the Treaty does specify that the Parliament is only allowed to contemplate a rejection for "important reasons". A proviso that lacks in Article 144 of the Treaty.

Politically though this seems almost as important a power of the Parliament as the power to pass a motion of censure.

The budgetary treaties also conferred the right to discharge the Commission in respect of the implementation of the budget to the Parliament (Article 206(b) of the Treaty).

This power of discharge inspired the Parliament to set up a new budgetary control committee in stead of the sub-committee that functioned before the direct elections in 1979. A question that has been debated is whether or not Article 206(b) of the Treaty made it also possible for the Parliament to refuse a discharge and if this would be the case what then would be the legal and political effects of this.

An Article by Uta Rueping argues that if one uses the usual methods of interpretation of the Court of Justice, one will have to conclude that a refusal of discharge is allowed for (partly because this seems to be the case in the majority of Member States) but that such a refusal would not have legal effect⁶¹. Definitely it is clear that it cannot be an alternative motion for censure without it fulfilling all the requirements of a motion for censure laid down in Article 144 of the Treaty⁶². The presumption therefore is that a refusal of discharge has no legal effect, therefore it will not be possible to initiate an action for annulment against it.

Another way of approaching such a refusal could be to treat it as a failure to act. And then it might be justiciable since Article 175 of the Treaty does not specify, in the case of an application by a Member state or an institution, that an act should not be a recommendation or an opinion as Article 173 does. But the Court's jurisdiction under Article 175 of the Treaty can be axed by a definition of position of the Parliament. And a

61 Rueping, Uta, "die Parlamentarische Haushaltskontrolle in den Europäischen Gemeinschaften und deren Mitgliedstaaten unter besondere Beruecksichtigung der Entlastung sowie der Konsequenzen einer eventuellen Verweigerung". in Europarecht, 3(1982), p.213-230.

62 The one time the Parliament refused a discharge nor the Commission, nor the member of the Commission in charge of the budget, Tugendhat, did resign, although Tugendhat had stated earlier before the Parliament that he and/or the Commission as a whole should draw this political consequence out of a discharge. (November 1984, Agence Europe, Bulletin Quotidien, 1e novembre 1984.)

reasoned explicit refusal of the Parliament would be such a definition of position. But then the question arises whether or not such a definition of position can be challenged before the Court under Article 173 of the Treaty. The legal effect of a definition of position is clear since it blocks litigation that otherwise would have been possible. To a certain degree this may undermine the requirement of binding effect of Article 173 of the Treaty but stepping aside from that, the question is what the Court should do in content in such a case. Definitely it should still allow the Parliament to refuse a discharge⁶³ and it should allow the Parliament freedom how and when to refuse a discharge because this is also a useful political sanction the Parliament can apply.

Position of the Parliament vis-a-vis Article 173 of the Treaty

The Vayssade-report states that until the resolution this report proposed the Parliament had no official position on Article 173 of the Treaty. Nevertheless the report cites two comments by the Legal Affairs Committee. The Committee had argued in an opinion for the Committee on Budgets in favour of the

⁶³ Rueping, Uta, "die Parlamentarische Haushaltskontrolle in den Europaeischen Gemeinschaften und deren Mitgliedstaaten unter besondere Beruecksichtigung der Entlastung sowie der Konsequenzen einer eventuellen Verweigerung". in Europarecht, 3(1982), p.213-230.

application of Article 173 of the Treaty for judicial review of the acts of Parliament. And in a letter to the President of the Parliament the president of the committee wrote, on behalf of the committee;

"that it should be possible to contest under Article 173 of the EEC Treaty acts adopted by Parliament which are final and produce effects vis-a-vis third parties. The increase in Parliament's budgetary powers makes this particularly necessary.

In addition, at the political level, it would be an advantage for the Parliament if it were possible to bring such actions against it, both in the interests of the consistent development of Community law and having regard to the possibility that the Court of Justice might give a wide interpretation to Article 173, as a result of which Parliament might also be granted the right to bring an action on the basis of Article 173 of the EEC Treaty."⁶⁴

This position greatly resembles the resolution the Parliament adopted on October, 9 1986. And the first section looks similar to the conclusion the Court found on the question whether acts of the Parliament could be challenged under Article 173 of the Treaty. Therefore it looks as if in fact the Parliament is merely confirming a point of view they already had. This though cannot be inferred from the positions which it took in the cases that came before the Court.

In the Transport case *European Parliament v. Council* the Parliament argued in the first instance that it could use Article

64 Vayssade-report page 14, PE DOC A 2-71/86/Rev. of 18-7-1986.

175 of the Treaty to initiate proceedings but it also argued that in the alternative it could use Article 173 to initiate proceedings⁶⁵. Since the Court found a failure to act it did not need to answer the question of Article 173 of the Treaty. But in this case it seemed clear that the Parliament supported a wide interpretation of Article 173 of the Treaty.

In the "Les Verts" case the Parliament began, in the written procedure, to state that Article 164 of the Treaty called for a wide interpretation of Article 173 of the Treaty to allow also applications for annulment against acts of the Parliament. But also, in the written procedure the Parliament stated that even when the application of "Les Verts" was admissible, a necessary equilibrium had to be maintained between the prerogatives and the obligations of the Parliament. The Parliament thereby hinted at the lack of an active legitimation for it to sue under Article 173 of the Treaty. In the oral procedure the Parliament went somewhat further and claimed that if it could be attacked under Article 173 of the Treaty that then it also should have the right to sue under Article 173 of the Treaty, and that when the latter would not be allowed that then also the former had to be rejected. This attitude of the Parliament brought the Advocate General to state that:

"Il convient cependant d'observer d'emblée que le défendeur ne nous a pas beaucoup aidé dans

65 European Court of Justice, May 22, 1985, case 13/83 European Parliament v. Council, (not yet published), "Facts and Issues" III A 3, page 29-30 in the English text.

la recherche de la solution correcte même si
l'on fait abstraction du fait qu'il s'est
abstenu d'exciper formellement de
l'irrecevabilité." 66

The Advocate General and the Court did not see such a close link between the possibility to be sued and the right to sue and allowed actions against acts of the Parliament to be taken without granting the Parliament at the same time the right to sue⁶⁷.

In the budget case Council v. European Parliament the Parliament argued on the contrary against any extensive interpretation of Article 173 of the Treaty in as far as the Parliament could be a party in proceedings before the Court. According to the Parliament Article 173 of the Treaty could not be used against the Parliament since the Parliament was not mentioned in it. An extensive interpretation of Article 173 of the Treaty was also held impossible by the Parliament because the Inter Governmental Conference that drew up the European Single Act in the autumn of 1985 had rejected an amendment forwarded by the Commission that aimed at including the European Parliament in the list of possible plaintiffs and defendants in Article 173 of

66 Opinion of the Advocate General Mancini of December 4, 1985, in case 294/83 "Les Verts" v. European Parliament, consideration 6, page 15 in the french translation.

67 Opinion of the Advocate General Mancini, December 4, 1986, and European Court of Justice, April 23, 1986, case 294/83 "Les Verts" v. European Parliament.

the Treaty⁶⁸. If indeed the Member States, in the IGC the highest legislative, indeed the constituent body under the Treaty, did not want to fill the lacuna in judicial protection offered by way of Article 173 of the Treaty, then one has to conclude that this very lacuna was part of the law. Such a reading of the facts makes it very difficult to find a justification for the Court to interpret Article 173 of the Treaty in a teleological way to fill this lacuna.

And even when one does not agree that the Member States implicitly wanted this lacuna the IGC presents difficulties in relation to the Court's argumentation. In explaining, in the "Les Verts" case, why the EEC Treaty does not contain an Article like Article 38 of the ECSC Treaty the Court relies on the fact that the Parliament could not take any binding and justiciable decisions before the two budgetary treaties of 1970 and 1975. This already begs the question why the Member States did not provide for an amendment to Article 173 of the Treaty in these budget treaties, but it makes it even more difficult to understand why they did not do so in the IGC. When the IGC met,

68 sources for this amendment are;

- The opinion of the Advocate General Mancini and the judgment of the Court of Justice in the budgetcase Council v. European Parliament (case 34/86) and
- The 19th General Report of the European Commission, p. 29-34 and the articles in the Bulletin referred to in the General Report. For this particular proposal see Bulletin of the European Commission, (1985)9, p.13-14 and
- The least official but more precise in Bulletin Quotidien, Agence EUROPE, Monday/Tuesday 14/15 October, 1985, no 4183, 33rd year, page 4 and 5.

Judge Pescatore had already written his Article in *Revue Trimestrielle de Droit Europeen* some years before, several organizations, under which the Council, had already filed applications under Article 173 of the Treaty against the Parliament and one must assume that the Commission also explained its amendment which all in all makes it unlikely that the delegates at the IGC were completely ignorant on this matter. So if the constituent body does not act why then is the Court allowed to do so in their place?

Neither the Advocate General nor the Court answers this question. The argument of the Parliament is mentioned by them, but only a reference to the decision of the Court in the "Les Verts"- case is made to conclude that Article 173 of the Treaty can be used against the Parliament.⁶⁹ On the one hand this is a pity because the question raised by the Parliament is an important one and it would have been interesting to have a more elaborate answer from the Court, but on the other hand it was to be expected that the Court would not be very eager to re-open its decision in the "Les Verts" case. The Parliament came with a good point but on the wrong time. In fact it could have followed this line in the "Les Verts" case but it failed to do so at that

69 Opinion of the Advocate General Mancini of June 2, 1986, in case 34/86 Council v. European Parliament, consideration 12, page 37 in the english translation. European Court of Justice, July 3, 1986, case 34/86 Council v. European Parliament, (not yet published), considerations 4 and 5.

time. Apparently the Parliament changed its opinion during or after the "Les Verts" case.

Around the same time the Parliament brought by way of a preliminary objection an exception of inadmissibility (Article 91-1 Rules of Procedure of the Court) against an application for annulment filed by the Group of the European Right arguing only that Article 173 of the Treaty could not be used against the Parliament. As stated above⁷⁰ the Court rejected in the Order of its President the arguments of the Parliament but found *ex officio* itself reasons to rule the application inadmissible. One wonders whether the Parliament could not itself have argued that if the Court would hold that Article 173 of the Treaty could be used against Parliament that then in the alternative the Court should rule the application of the Group of the European Right to be inadmissible since it attacked an act that had no legal effect.

These cases show that the Parliament in fact changed a couple of times its opinion. The first position is the one taken in the transport case and in the letter from the President of the Legal Affairs Committee to the President of the Parliament. Then the Parliament changes its position somewhat during the "Les Verts" case. And this change is followed by the radical reverse in its position in the budget case and the case of the Group of the European Right. And finally the Legal Affairs Committee draws

⁷⁰ See paragraph three.

up its report that restores the position of the Parliament more or less to its first position.

The discrepancy between the position of the Legal Affairs Committee and the position of the Parliament before the Court amply demonstrates the need for the Vayssade-report. But the discrepancy between the positions the Parliament took before the Court and the position it holds in the letters and reports of its Legal Affairs Committee and now in the resolution of the Parliament is difficult to comprehend. Proceedings of the meetings of parliamentary committees are not public and the final adoption of the resolution was almost unanimous which also meant that the debate was not very clarifying.

Part of the explanation could be that it is not the Legal Affairs Committee but the President of the Parliament who is responsible for the conduct of cases before the Court⁷¹. But this cannot explain the sharp turn the Parliament made during or shortly after its defence in the "Les Verts" case. Possibly this shift could be attributed to the change of the Presidency from Dankert to Pflimlin because that change took place around the same time.

71 Rules of Procedure of the European Parliament: Rule 18-4; "Parliament shall be represented in ... legal ... matters by the President, who may delegate these powers." But according to Annex V to the Rules of Procedure the Legal Affairs is responsible, among many other things, for matters relating to:

- submission of actions by Parliament in the Court of Justice.
- action by Parliament on behalf of the plaintiff or defendant in actions before the Court of Justice."

But then the reversal by the Vayssade-report has still to be accounted for. Without more knowledge about what took place within the Parliament it is not possible to arrive at a final conclusion.

On content the two positions of the Parliament could be that the one "school of thought" tried and tries now once more to get the possibility to use Article 173 of the Treaty as a privileged plaintiff against the other institutions. In this way of thinking the Transport case is of course a victory but also the "loss" of the "Les Verts" case is a victory. A tactical victory because it paves the way for further liberal interpretations of Article 173 of the Treaty which could lead to the privileged position of the Parliament as a plaintiff under Article 173 of the Treaty equal to the position of the Council and the Commission. The second "school of thought", that apparently had its way in the defence in the budget case and the case of the Group of the European Right, fears the risk that the Court will agree to allowing applications for annulment against the Parliament without allowing the Parliament the right to institute proceedings. And therefore this "school of thought" argued that this review of the acts of the Parliament should not be allowed. Whatever the value of this second line of thinking, it came just too late to change the direction the case law the Court was developing. As this Article tries to show this did not particularly help the Parliament before the Court. In that sense one can only welcome that the Parliament changed its position to a more realistic one in the light of the case law of the Court.

Some final remarks

In the sections above it is argued that the European Parliament should not be allowed to sue under Article 173 of the Treaty in the same privileged way as the Commission and the Council but that it can sue under Article 173 of the Treaty in a way comparable to private parties. It is argued also that there are no specific limits to judicial review of acts of the European Parliament in as far as questions of admissibility are concerned. Limits to the judicial control of the European Court of Justice do exist but are of the nature of judicial self-restraint the extent of which is determined by the Court itself. Finally it can be noted that the Parliament followed a somewhat contradictory and erratic course in its defense before the Court.

One question remains to be answered and that is the question to the political consequences of the recent decisions of the Court and of the here proposed solutions to some of the questions that are still open. This Article is mainly concerned with the legal aspects but it would not be complete without at least an attempt to say something about the political consequences.

The admissibility of actions against the Parliament especially by other institutions as demonstrated in the budget case, will probably make the Parliament more cautious in respecting the law. The area where this potentially will have the biggest impact is the budgetary procedure. Over the years the Parliament tried to make the most of its budgetary powers by putting forward interpretations of the Law that favored its

position and by then acting on the basis of such an interpretation without caring too much about the interpretations of the Commission and the Council⁷². This type of confrontational politics looks now less attractive since it is clear that it is possible that accepting this the Court could decide the question.

The open question of the possibilities for the Parliament to initiate proceedings before the Court can have different effects according to the way the Court will answer it. If the Court would allow the Parliament to sue under the same conditions as the Council and the Commission then the Parliament would obtain an extra weapon that could be very powerful and that could change the power-relationship between the Community institutions considerably in favor of the Parliament. If on the other hand the Parliament will not be allowed to sue at all, then the Council could start to play the game of confrontation politics in the budgetary procedure as the Parliament did itself over the last years. This could cost the Parliament a considerable part of its influence over the budget. But if the Court would follow the suggestion of this Article that the Parliament should be allowed to sue under Article 173 of the Treaty but only under the same conditions as a private party then it seems possible that the above-mentioned Scylla and Charibdis of either a too powerful

⁷² Examples of this abound in the yearly articles of Mr. Strasser in the Revue du Marche Commun on the budgetary procedure.

Parliament or a too powerful Council can be evaded and that the institutional power-relationship will stay more or less the same. This because both institutions will get the possibility to secure the lawful behavior of the other before the Court of Justice.

Still it will make one important change if this line would be followed and that is that it will sometimes be possible to break a deadlock and to clarify the law by referring a conflict to the Court instead of agreeing to disagree on a point of law with the intention to bring it up again at the next convenient opportunity. And that could perhaps contribute to a somewhat more harmonious cooperation between the institutions. This would be particularly useful in the budgetary procedure.

These changes may involve the Court of Justice in resolving some of the most important political struggles between the institutions. As has been argued above in the third section it will be up to the Court itself to exert enough judicial restraint to allow the other, political institutions to do their work.

Annex (A)

Article 173 of the EEC Treaty:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

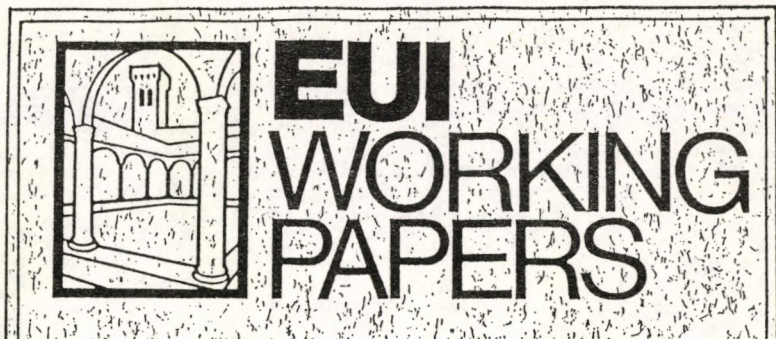
The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 175 of the EEC Treaty:

Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any other act than a recommendation or an opinion.



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