

THE CONCEPT OF ENTERPRISE UNDER THE EUROPEAN COMMUNITIES: LEGAL EFFECTS OF PARTIAL INTEGRATION*

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INTRODUCTION

The operation of the European Coal and Steel Community (E.C.S.C.), the European Atomic Energy Community (Euratom), and the European Economic Community (E.E.C.)—established by France, the Federal Republic of Germany, Italy, Belgium, the Netherlands, and Luxembourg—undoubtedly affects enterprises located within the territories of these Communities. This raises the question to what extent enterprises and establishments, partly or totally owned by “foreign” corporations—*i.e.*, corporations outside the Communities—may come under Community jurisdiction. The concept of enterprise is to be examined from this aspect—a problem closely related to the question of competence of the Communities¹ and of the jurisdiction of the Community Court.² The primary problem centers around the question of competence of the quasi-legislative and administrative powers of the Communities. The present exposition attempts to analyze some features of this complex and somewhat unexplored question. It will, however, merely touch on the jurisdiction of the Community Court and the parties that may invoke its protection,³ since this question appears reasonably clear. Moreover, the judicial control as invoked by a party’s appeal for annulment or against inaction represents a broader question whose discussion would greatly exceed the scope of this paper.

Member States as well as private parties under Community jurisdiction may appeal before the Community Court allegedly illegal acts of a Community organ or its failure to act.⁴ The Treaties, of course, differentiate between appeals of Member States and of private parties, and grant to States a more extensive right of appeal. In specific instances, even third parties outside Community jurisdiction may appeal.⁵ The Communities exercise some powers directly over the enterprises, and it is, there-

* This article is part of a book, *The Judicial Control of the European Communities*, to be published shortly by Stevens & Sons, London.

The views expressed herein are those of the writer and do not necessarily reflect the opinions of the European Communities.

Due to difficulties in correspondence, certain minor editorial changes in the final draft of Dr. Bebr’s article were not passed upon by the writer.

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¹ E.C.S.C. Treaty art. 80; Euratom Treaty art. 196. Because of the general competence of the E.E.C., its Treaty contains no such similar provision.

² E.C.S.C. Treaty arts. 33, 35; Euratom Treaty arts. 146, 148; E.E.C. Treaty arts. 173, 175.

³ For a general discussion of this problem, see, *e.g.*, Bebr, *Protection of Private Parties Under the European Coal and Steel Community*, 42 *V.A. L. REV.* 879 (1956).

⁴ E.C.S.C. Treaty arts. 33, 35; E.E.C. Treaty arts. 173, 175; Euratom Treaty arts. 146, 148.

⁵ E.C.S.C. Treaty arts. 63(ab); 66(5), para. 2; 80.

fore, proper and in accord with the political structure if they are allowed to appeal in their own right, independently of their Member States.

The qualification of a Member State as an appellant hardly needs to be elaborated. The qualification of a private party to appeal appears equally simple. As none of the Community Treaties defines the meaning of enterprise, one may quickly conclude that in the context of standing to appeal, the term "enterprise" is to be viewed as a legal concept. As a result of a partial integration as provided for by the E.C.S.C. and Euratom Treaties, the legal and economic aspects of an enterprise need not necessarily coincide.⁶ Its economic aspect delimits the competence of the quasi-legislative and regulatory powers of the E.C.S.C. and Euratom in relation to national economies that remain under the Member States' jurisdiction. The legal concept of enterprise, on the other hand, points to the legal person that may act on behalf of this economic unit before the Community Court. At first, such a splitting of the concept of enterprise in its economic and legal aspects may seem arbitrary. The following discussion may show that this "split" concept is but the unavoidable consequence of a partial economic integration.

To view an enterprise in its economic and legal aspects is by no means unique to the Community law. Similar examples may also be found in municipal public laws, which pursue a great variety of public objectives in the fiscal, economic, social, and labor fields. These laws require and develop their own concept of enterprise, a concept that is not always identical with its legal form as formulated by civil or commercial law.⁷ This analogy with municipal public laws may be carried even further. Even though they develop their own concept of enterprise suitable to the goals they pursue, when it comes to the question of ability to sue or be sued, they necessarily resort to the traditional legal concept. A similar interplay and interrelation may be found in the E.C.S.C. and Euratom Treaties between the economic concept of enterprise and the legal person to represent and protect it.

I

THE ECONOMIC CONCEPT OF ENTERPRISE

A. The European Coal and Steel Community

According to article eighty of the Treaty, all enterprises that engage within the European territories of the Member States in the production of coal and steel, as technically defined by the Treaty and its annexes, or reclaim iron and steel scrap, are subject to the Community. This production activity establishes the competence of

⁶ CHARLES DE VISSCHER, *LE DROIT PUBLIC DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 51-52 (1956).

⁷ See Gieseke, *Der Rechtsbegriff des Unternehmens und seine Folgen*, in E. WOLFF (Ed.), *BEITRÄGE ZUM HANDELS-UND WIRTSCHAFTSRECHT* 606 (1950), who emphasizes that even without a statute, the concept of enterprise is changing, depending on the various purposes of its provisions; EUGEN LANGE, *KOMMENTAR ZUM KARTELLGESETZ* 55-56 (1957); HANS VON MÜLLER-HENNEBERG & GUSTAV SCHWARTZ, *GESETZ GEGEN WETTBEWERBSBESCHÄNKUNGEN* 151 (1958), who rightly stress the production and business activity of an enterprise for the application of the law against restraining competition; Ballerstedt, *Unternehmen und Wirtschaftsverfassung*, 6 *JURISTENZEITUNG* 486, 487-88 (1951). See also GEORGES RIPERT, *ASPECTS JURIDIQUES DU CAPITALISME MODERNE* 261, 274 (2d ed. 1951).

the Community and forms the underlying concept of enterprise within the meaning of the Treaty.⁸ As a result of this narrow competence, an enterprise may only partly come under the Community jurisdiction—only in so far as it produces coal or steel or reclaims scrap within the Community territory.⁹ The Treaty evidently bases the concept of enterprise on its specific economic activity: its legal form is irrelevant.¹⁰ Although coal and steel consumers are outside the Community competence, a steel enterprise within the meaning of article eighty of the Treaty is also subject to the Community with regard to its coal or scrap consumption.¹¹ An enterprise remains under the Community jurisdiction even if it does not produce in its own name. The so-called processing agreements according to which an enterprise carries out only a part of the production process is also an activity subject to the Community.¹²

Regulation of economic affairs must be concerned more with economic activities and their effects than with their legal forms. If the competence of the E.C.S.C. were exclusively based on a formal, legal concept of enterprise, skillful manipulation of this concept could frustrate and paralyze any effort to maintain and administer a common and competitive market. This “playing down” of the legal concept of enterprise has far-reaching consequences. Thus, a coal- or steel-producing enterprise, not legally independent but located within the Community, by whomever owned or controlled and wherefrom directed or administered, is under the jurisdiction of the Community.¹³ Neither the “nationality” of such an enterprise nor the domicile or seat of administration of a corporation to which it belongs is relevant.¹⁴

The economic concept of enterprise is by no means uniform through the Treaty.¹⁵ There are two main reasons for such a flexibility. First, its changing concept results from the recognition that a Community competence may hardly rest only on the narrow nature of this specific production activity. This is particularly true of borderline situations in which such a narrow Community competence would

⁸ RÉPUBLIQUE FRANÇAISE, MINISTÈRE DES AFFAIRES ÉTRANGÈRES, RAPPORT DE LA DÉLÉGATION FRANÇAISE SUR LE TRAITÉ INSTITUANT LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 78-79 (1951) [hereinafter cited as RAPPORT]; see also ENTWURF EINES GESETZES UEBER DIE GRUENDUNG DER EUROPÄISCHEN GEMEINSCHAFT FUER KOHLE UND STAHL VOM 18. APRIL 1951, BEGRUENDUNG DES VERTRAGSWERKES (Anlage 3) . . . DRUCKSACHE No. 2401, DEUTSCHER BUNDESTAG I. WAHLPERIODE 1949, at 23.

⁹ Macchiorlatti Dalmas e Figli v. Haute Autorité, Cour de Justice des Communautés Europeennes, 5 Recueil de la Jurisprudence de la Cour 415, 424 (1958-59) [hereinafter cited as REC.].

¹⁰ MICHEL DESPAX, L' ENTERPRISE ET LE DROIT 172 (1957); ROLF KIESEWETTER, DAS WIRTSCHAFTSRECHT DES SCHUMAN-PLANS UNTER BESONDERER BERUECKSICHTIGUNG DES PREISRECHTS 45-46 (1954).

¹¹ Groupement des Industries Siderurgiques Luxembourgeoises v. Haute Autorité, 2 REC. 53, 86 (1955-56), Société des Fonderies de Pont-à-Mousson v. Haute Autorité, 5 REC. 447, 472 (1958-59).

¹² Information of the High Authority, March 23, 1960, [1960] JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES 569 [hereinafter cited as JOURNAL OFFICIEL.]

¹³ See the Decision of the High Authority No. 2/52, as revised, art. 4(3) of which provides for the imposition of annual levies on establishments that belong to enterprises located in a third State. [1959] JOURNAL OFFICIEL 213. See further, Drucksache No. 2401, at 23; see 2 ROBERT KRAWIELICKI, DAS MONOPOLVERBOT IM SCHUMAN-PLAN (1952).

¹⁴ *Ibid.* KURT BALLERSTEDT, UEBERNATIONALE UND NATIONALE MARKTORDNUNG 13 (1955); Grassetti, *Les entreprises en tant que destinataires des regles du droit de la Communauté*, in 4 CENTRO ITALIANO DI STUDI GIURIDICI, ACTES OFFICIELS II, 34 (1958) [hereinafter cited as ACTES OFFICIELS].

¹⁵ Some support for this view may be found in the conclusions of the Avocat Général Lagrange in Phoenix Rheinrohr v. Haute Autorité, 5 REC. 165, 183, 194 (1958-59).

permit a by-passing of the Treaty provisions. The scope of application of articles sixty-five and sixty-six of the Treaty to the production of coal and steel as well as to their distribution makes this especially evident. Secondly, the different purposes of the various, specific Treaty provisions determine also the changing concept of enterprise. These two questions will be examined at some length in the following discussion.

1. Counterbalance to Pitfalls of Partial Integration

A sharp, clear-cut separation of the coal and steel industries from the "rest" of the national economy is economically artificial. A Community competence rigidly limited to these industries would fly directly against economic realities. The Treaty recognizes this shortcoming of a partial integration; it attempts to alleviate it by extending the Community competence in specific instances to first-hand dealers or organizations distributing coal or steel. Thus, article sixty-five, which prohibits "all agreements . . . all decisions of associations of enterprises, and all concerted practices, tending directly or indirectly, to prevent, restrict or impede the normal operation of competition within the common market," is binding on first-hand dealers and organizations as well. Similarly, article sixty-six applies to their participation in an illegal economic concentration with other coal or steel enterprises. The very nature of concentration requires, moreover, that the Community competence be explicitly extended to vertical integration. In this instance, any legal or natural person, even though outside coal or steel production and their distribution, comes under the competence of the Community.¹⁶ Motivated by a similar consideration, the Treaty is also applicable to buyers systematically discriminating among coal or steel enterprises.¹⁷ To prevent such a violation, the Community may require the enterprises of the E.C.S.C. to boycott such a buyer.¹⁸

A gradual *rapprochement* of the first-hand dealers to the status of coal- and steel-producing enterprises is dictated by the close economic ties existing between production and distribution. The need for viewing this link primarily in terms of its economic effects is apparent. A strict legal view would scrupulously respect a sales agency as an independent legal entity, even though it is entirely directed and owned by and composed of the coal-producing enterprises. Following this "dreamy" legal approach, such a sales agency would be classified as a distributing organization within the meaning of article eighty and subject only to the provisions of articles sixty-five and sixty-six. This example vividly demonstrates the need for an economic concept of enterprise. If the Community is to operate at all, it must disregard the hollow, legal mask of a formally independent enterprise and examine the actual economic link existing between the coal-producing enterprises and the sales organization. The economic ties are in this instance so close and tight that the producers and the sales agency actually represent one economic unit. The sales agency is

¹⁶ E.S.S.C. Treaty art. 66(1).

¹⁷ *Id.* art. 63(1).

¹⁸ *Id.* art. 63(2b).

nothing else but the "distributive arm" of the enterprises, it is part of them. Consequently, the sales agency would be subject to all Treaty provisions, and not only to articles sixty-five and sixty-six.¹⁹ If this were not so, the coal or steel enterprises could easily escape the price and discrimination provisions of the Treaty by establishing their own legally independent sales agency. While the more or less formal and fictitious sales from the enterprises to the agency would be scrupulously correct, the subsequent sales by their sales agency, being practically outside the Community jurisdiction, could disregard the Treaty provisions. This would be an utterly untenable position because it would enable the enterprises to by-pass the Treaty provisions by establishing an independent legal person. Why should the High Authority or the Court respect such a farce intended to avoid the Treaty provisions? Every conceivable reason speaks against such a maneuver.

In this light may be understood an interesting dictum of the Court in *Geitling*.²⁰ In this case, the Court examined, among other charges, the restrictive effects on competition of a questioned clause according to which dealers, in order to qualify as first-hand dealers with a sales agency, had to draw a certain total amount of coal.²¹ As part of this prescribed amount, these dealers could include coal drawn from the other two Ruhr sales agencies—a provision that the High Authority struck down when approving the agreement for establishing these agencies. Examining this disputed clause, the Court placed the sales organization on the same level with the coal producers. "On the basis of the disputed clause," observed the Court, "the appellants included in the deliveries of the first-hand dealers also those that they obtained from the other two sales organizations although they [*i.e.*, the appellants] should be competing with them as with other *producers* of the Community whose deliveries the appellants do not want to include in the total annual amount . . ."²²

Even in a reverse situation, the Court does consider the organic link between production and distribution somewhat artificially disrupted by the partial integration. The Court is inclined to protect the first-hand dealers not only when articles sixty-five and sixty-six are directly applied to them, but also when the application of these articles aggrieves their interests.²³

The economic concept of enterprise permeates, in various degrees, the E.C.S.C. Treaty and loosens and even disregards its legal concept. The controversy between these two concepts and their relative meaning flared up in the recent scrap-iron cases. To subsidize higher priced imports of scrap iron to the Community and prevent price increases of "Community" scrap, the High Authority established a compensation scheme that imposed a surcharge on the consumption of scrap iron by the enter-

¹⁹ KIESEWETTER, *op. cit. supra* note 10, at 46-47; see also L'INSTITUT DES RELATIONS INTERNATIONALES, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 170 (1953).

²⁰ *Geitling v. Haute Autorité*, 3 REC. 11 (1957).

²¹ *Id.* at 30-31.

²² *Id.* at 44-45. (Writer's translation; emphasis added.)

²³ *Nold v. Haute Autorité*, 3 REC. 235, 240-41 (1957-58), and the conclusions of the Avocat Général Roemer. *Id.* at 245, 251-52. See also *Stork v. Haute Autorité*, 5 REC. 45, 61-62 (1958-59).

prises.²⁴ From this surcharge the Authority exempted only the consumption of scrap iron reclaimed by the enterprises during their own steel production (so-called "own" scrap iron).²⁵ Consequently, the Authority considered the consumption of the so-called "concern" scrap—*i.e.*, scrap of a group of legally independent enterprises that are closely tied together by financial, economic, and administrative links—to be subject to this surcharge. A concrete example may serve as an illustration: A French steel mill, legally independent, but owned by Régie Renault up to 99.77 per cent, receives a large amount of scrap from Renault.²⁶ Because of this ownership by Renault, the French steel mill tried to claim the scrap iron coming from the holding company as the enterprise's own scrap, free of any surcharge.²⁷ Following the *legal* concept of enterprise, the Authority refused to extend the concept of "own" scrap iron beyond its formal ownership. "Only that scrap may be considered as the enterprise's own," stated the Authority, "which is reclaimed in its own steel mill managed under the same firm; on the other hand, scrap that comes from mills of other firms must then be considered as purchased scrap iron even if there are close financial or organizational ties between the supplier and the consumer."²⁸

Several German and French enterprises appealed this refusal, arguing that the economic concept of enterprise was the underlying principle of the Treaty.²⁹ They referred to the economic unit that these legally independent enterprises form and to the close financial and economic ties that exist among them. Consequently, argued the appellants, even the scrap iron transferred from one of these enterprises to another should be considered as "own" scrap free of any surcharge. In its defense, the Authority insisted on the ownership of scrap as determining the exemption.³⁰ Being aware of the dangerous limitation inherent in applying a legal concept of enterprise, the Authority wisely added a caveat that such a criterion was used in this particular instance only. It wished so to forestall a risky, almost fatal, precedent-courting disaster as to the application of articles sixty-five and sixty-six. In this particular instance, the Court followed the legal concept as advanced by the Authority. But it did so only after having satisfied itself that the application of this criterion was compatible with the economic and financial objectives of the compensation scheme. To exempt from the surcharge also "concern" scrap, as the "own" scrap is exempted, would, in the Court's words, ". . . exceed the meaning and purpose of this exemption and, moreover, constitute an advantage discriminating

²⁴ Decisions of the High Authority Nos. 22/54, [1954] JOURNAL OFFICIEL 286; 14/55, [1955] *id.* at 685; and 2/57, [1957] *id.* at 61.

²⁵ Letter from the High Authority to the Joint Bureau of Scrap Consumers, Dec. 18, 1957, [1958] *id.* at 45.

²⁶ S.N.U.P.A.T. v. Haute Autorité, 5 REC. 277, 286 (1958-59).

²⁷ *Ibid.*

²⁸ S.A.F.E. v. Haute Autorité, 5 REC. 383, 404 (1958-59). (Writer's translation.)

²⁹ S.N.U.P.A.T. v. Haute Autorité, 5 REC. 277, 291 (1958-59); S.A.F.E. v. Haute Autorité, 5 REC. 383, 394-95 (1958-59).

³⁰ Phoenix-Rheinrohr v. Haute Autorité, 5 REC. 165, 174 (1958-59); S.N.U.P.A.T. v. Haute Autorité, 5 REC. 277, 292 (1958-59); S.A.F.E. v. Haute Autorité, 5 REC. 383, 396 (1958-59).

against third enterprises"³¹—*i.e.*, enterprises outside the concern. Had the Court found the legal concept of enterprise inadequate and hindering the achievement of these objectives, it would have most likely set aside this criterion and searched for an economic one better fitted to pursue these objectives. The Court seemed to recognize the predominance of the economic goals of the Treaty and their strong bearing on the concept of enterprise. "It would be evidently contrary to the Treaty requirement," held the Court, "if a measure of the High Authority would make the production cost of steel, entirely or partly produced out of scrap iron, dependent on the legal, organizational, or financial structure of an industrial concern."³²

2. *Changing Concept of Enterprise*

Brief references may be made to some more typical Treaty provisions that reflect the changing concept of enterprise. Significantly, the provisions concerning the annual levy to be borne by enterprises is to be assessed according to the average production level of the various products under the Community jurisdiction.³³ Similar references to production mark articles 58 (2) dealing with production quotas, and article 59 (2) concerning consumption priorities. But the economic concept is not always so clearly discernible. As a result of an unfavorable opinion rendered by the High Authority on an investment project pursuant to article 54 (5), the enterprise concerned may only use "its own funds to carry out such a project." The question of what is to be understood by an enterprise's "own funds" raises a number of almost insurmountable problems. In this context, the economic concept of enterprise discloses fully its relative, changing character. The situation of a legally and economically independent enterprise exclusively engaged in coal or steel production would hardly present difficulties. But economic and financial relations and situations are everything but simple and clear. Assume that an enterprise is active in several industrial fields and only partly produces coal or steel—as, for example, a shipyard owning a steel mill or a chemical enterprise owning a coal mine. Under these circumstances, which funds are really this enterprise's "own funds?" It seems difficult, if not impossible, to separate the funds of an enterprise in a proportion corresponding to its coal or steel production. On the other hand, to permit this enterprise to utilize for its project all the funds at its disposal derived from other activities would undermine, if not defeat, the purpose of this provision. Even if an enterprise exclusively producing coal or steel and legally independent were restricted to using only its funds, such a restriction could hardly be effective if the enterprise were an organic part of a large holding company located in or outside the Community that might pour its

³¹ S.N.U.P.A.T. v. Haute Autorité, 5 REC. 277, 306 (1958-59); S.A.F.E. v. Haute Autorité, 5 REC. 383, 407 (1958-59). (Writer's translation.)

³² S.N.U.P.A.T. v. Haute Autorité, 5 REC. 277, 307 (1958-59); S.A.F.E. v. Haute Autorité, 5 REC. 385, 407 (1958-59). In his conclusions, the Avocat Général Lagrange also justifies the legal concept of enterprise by the economic considerations of the objectives pursued by the compensation scheme. Phoenix-Rheinrohr v. Haute Autorité, 5 REC. 165, 183, 200-01 (1958-59). In the Avocat Général's view, a very extensive interpretation of the "concern" scrap might have weakened the joint effort, based on economic solidarity, to assure imports of scrap iron at the Community price level.

³³ E.C.S.C. Treaty art. 50(2).

funds into this enterprise's proposed investment project. These remarks spotlight the complex problem the Authority encounters when influencing the flow of investment according to article fifty-four. They also reveal the variable economic concept of an enterprise, a concept that is to assist the Authority in determining the proper extent of its "own funds" available to the enterprise concerned. This extent should correspond to the objectives of article fifty-four—*i.e.*, to the establishment of a well-integrated coal and steel industry within the Community with the maximum use of available investment.

The economic considerations—and thus the economic concept of enterprise—rule supreme, of course, over the provisions of articles sixty-five and sixty-six governing the competition within the common coal and steel market of the Community. To permit a clear, unhindered look at economic realities, the legal concept of enterprises must be penetrated.

These observations suggest that the E.C.S.C. Treaty knows no uniform concept of an enterprise, as it is sometimes assumed. For example, a contrast of the concept of enterprise within the meaning of article 54 (4) with that of article sixty-six quickly dispels such an assumption. This should not be disturbing, because even public municipal law knows no uniform concept of an enterprise. Its changing economic concept underlying the different Treaty provisions may be justified by the different purposes these provisions pursue. The changing emphasis of the Treaty objectives—as reflected, for example, in the provisions dealing with discrimination or competition—color and shape the economic concept of enterprise.

B. The European Atomic Energy Community

The Euratom Treaty also bases its competence on the activity of a natural or legal person engaging in a highly technical production, as defined by the Treaty.³⁴ As under the E.C.S.C. Treaty, an enterprise may only partly come under the competence of Euratom; its legal form is thus equally irrelevant.³⁵ Article eighty-one particularly points to an economic concept of enterprise. According to this article, the Commission has extensive powers of control to assure that ores, special fissionable material, and other source material are not diverted by the user from their professed use. The economic concept of enterprise on which the competence of the Community rests is also strongly underscored by the provisions of article eighty-six, according to which Euratom is the exclusive owner of plutonium and uranium, whether imported or produced within the Community. This facilitates the Commission's control over enterprises utilizing or processing this special fissionable material.

C. The European Economic Community

The E.E.C. competence extends over the entire national economy of the Member States. It encounters, therefore, much less need for developing a special concept

³⁴ Euratom Treaty art. 196.

³⁵ See Euratom Commission Reg. No. 1, art. 2, [1958] JOURNAL OFFICIEL 511; see also HANS SÜNNER & KLAUS PFANNER, DER GEWERBLICHE RECHTSSCHUTZ IM EURATOMVERTRAG 32 (1959).

of enterprise, than is necessary under the E.C.S.C. and Euratom Treaties. The only exception may be the general Treaty provisions of articles eighty-five and eighty-six regulating competition, to be later implemented by Community regulations or directives. The nature of the matters to be regulated will undoubtedly again strongly emphasize the economic concept of enterprise in disregard of its legal form.

II

THE LEGAL CONCEPT OF ENTERPRISE

When the Treaty provisions are to be executed and enforced or the right of appeal to be exercised, the economic concept of enterprise loses its usefulness and justification. The economic concept of enterprise is in this instance merely the basis for exercising the right of appeal by the legal entity entitled to represent it. Defining enterprises subject to its competence, the Euratom Treaty speaks of ". . . any enterprise or institution wholly or partly engaged in activities" as determined by the appropriate chapters of the Treaty.³⁶ But it is worth noting that when the Euratom Treaty deals with the right of appeal, it significantly states "any natural or *legal* person."³⁷ The replacement of the expression "enterprise" by the notion of a "legal person" clearly points to a differentiation between an enterprise as an economic notion and its legal form.³⁸

Although that much is clear, still the question remains as to the law under which the legal personality of an appealing enterprise should be examined. The Community Treaties know no legal concept of enterprise independent of the municipal law of the Member States. Examining the capacity to appeal, the Court constantly resorts to the municipal law concerned.³⁹ But even this practice may not always determine the proper law that may govern the forms, rights, and duties of a corporation or of an enterprise if it is incorporated in one Member State but maintains its actual seat of administration in another. Generally, according to the Continental law and practice, the place of incorporation alone is inadequate for establishing the proper law of corporation. As a rule, the place of incorporation as well as the actual seat of administration in the Member State is required.⁴⁰ Conflicts are likely to arise as soon as these two elements do not coincide. An even more complex problem is presented in those instances in which a foreign corporation,

³⁶ Euratom Treaty art. 196.

³⁷ *Id.* arts. 146(2), 148(3).

³⁸ It may be observed that the E.C.S.C. Treaty arts. 33 and 80 do not differentiate so clearly.

³⁹ The provisions of the Rules of Procedure art. 38 § 5, [1959] JOURNAL OFFICIEL 349, which require legal persons recognized by private law to attach to their appeals a copy of the statute giving them legal personality, clearly indicate that in this instance, reference is made to the proper municipal law of the Member State. This is particularly clearly stated in *Nold v. Haute Autorité*, 5 REC. 91, 110 (1958-59); *Fedechar v. Haute Autorité*, 2 REC. 201, 206 (1955-56). The *avocat généraux* share this view. *E.g.*, *Roemer in Nold v. Haute Autorité*, 5 REC. 91, 119, 123-25, 133 (1958-59); *Lagrange in Macchiorlatti Dalmas e Figli v. Haute Autorité*, 5 REC. 415, 431, 433 (1958-59).

⁴⁰ 2 ERNST RABEL, *THE CONFLICT OF LAWS* 38 (1947); Audinet, *The Right of Establishment in the European Economic Community*, 86 JOURNAL DU DROIT INTERNATIONAL 983, 1017 (France 1959); Thibierge, *Le Statut des sociétés étrangères*, in 75TH CONGRÈS DES NOTAIRES DE FRANCE, LE STATUT DE L'ÉTRANGER ET LE MARCHÉ COMMUN 239, 303-04 (1959).

for one reason or another, maintains an establishment or a legally dependent enterprise in one of the Member States. The situation would be similar if, for example, an American corporation, incorporated in Delaware, were to maintain its seat in Belgium and operate an establishment in Germany or France. Without going into any details, it may be safely assumed that such a corporation would not enjoy a legal personality according to the European law. Only a treaty of friendship, commerce, and trade concluded between the United States and a Member State, which usually contains a special reciprocity clause as to the mutual recognition of the legal personality of corporations, could uphold the right of such a corporation to sue before a municipal court of the other State, even though it is not "domesticated" there.⁴¹ If such a treaty were concluded between a Member State and a third State, the Community Court would undoubtedly recognize its legal consequences and uphold the right of such a corporation to appeal—assuming, of course, that this corporation maintained within the Community an enterprise on whose behalf it appealed.

⁴¹ See, e.g., the Treaty of Friendship, Commerce, and Navigation, with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 Bundesgesetzblatt (Ger. Fed. Rep.) 487; [1956] 7 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593, art. VI(1): "Nationals and companies . . . shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defence of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party, shall enjoy such access therein without any requirement of registration or domestication." See also art. XXV(5): "Companies constituted under the applicable laws and regulations within the territories of either Party shall . . . have their juridical status recognized within the territories of the other Party."