

Accession to the European Union – a Timeless Legal Opinion by Hermann Mosler

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On 4 October 1955, Frits de Nerée tot Babberich approached MPIL Director Hermann Mosler requesting an expert opinion. De Nerée, the Secretary-General of the Common Assembly of the Coal and Steel Community (ECSC), the European Parliament's predecessor, had been asked by the committee on Political Affairs and External Relations to assemble background information on questions surrounding the accession of third States to the ECSC.

The Coal and Steel Community is symbolic of Germany's reintegration into the European order after the Second World War. It can be argued that the requested opinion on the accession of third States to the ECSC is of similar importance for the European integration of the Max Planck Institute for Comparative Public Law and International Law.

Since its re-foundation in 1949, expert opinions from the Institute had been commissioned primarily by German ministries. In 1955, however, the Institute received two requests from the ECSC – one of which this contribution aims to discuss. These requests reflect the opening of the Institute beyond Germany – and the welcoming of a German research organisation into a European context.

This opening is closely linked to the person of Hermann Mosler. This is no coincidence. The German international lawyer – 43 years old in 1955 – had been the head of the legal department of West Germany's Foreign Office in its early years and in this capacity had been involved in the drafting of the

Schuman plan.¹ From 1954 on, Mosler headed the Max Planck Institute for 26 years and was instrumental in its new outward focus.² Until the end of the war, the Institute had referred to international law primarily in order to answer questions concerning Germany. With Mosler, the focus broadened: the Institute now looked more closely at international organisations and examined international relations and the beginning of European integration.

Hermann Mosler was perceived as an unencumbered partner on the international stage and Frits De Nerée's personal history can serve to illustrate this. Between 1942 and 1944, the Dutch politician had been held by the German occupiers as one of 1400 Dutch hostages in the St. Michielsgestel camp as a bargaining chip to prevent assassinations by the Dutch resistance.³ Despite this drastic experience, the Dutchman turned to the prominent German international lawyer in 1955 – not to enquire about the German perspective, but to obtain a European expert opinion on a timeless issue.



De Nerée 1950 in Amsterdam⁴

The enlargement of the then ECSC and now the European Union is still a hotly debated issue almost 70 years later. Countries still want to join the European Union. However, the attitude of the EU Member States towards enlargement has changed since. In the early days, it was important to emphasise the Community's openness in order to allay fears of "the formation of an economic bloc" (p. 6 of Mosler's

¹ Jochen Abr. Frowein, 'Hermann Mosler 70 Jahre', AöR 107 (1982), 630–32 (630).

² Ibid.

³ Frits Groeneveld, 'Het dubbelgezicht van Michielsgestel', NRC Handelsblad (15.08.1992), https://web.archive.org/web/20090509221217/http://www.nrc.nl/europa/in_europa/article1517350.ece/Het_dubbelgezicht_van_Michielsgestel (last consulted on 19.10.2023).

⁴ [https://commons.wikimedia.org/wiki/File:Frits_de_Ner%C3%A9e_tot_Babberich_\(1950\).jpg](https://commons.wikimedia.org/wiki/File:Frits_de_Ner%C3%A9e_tot_Babberich_(1950).jpg) (last consulted 19.10.2023).

expert opinion, tr. LB; all further page references are to Mosler's opinion). Mosler's opinion and his correspondence with de Nerée are good examples for this approach.

Today, it is the EU's enlargement capacity and new accession criteria that dominate the discussion. Article 49 TEU, which regulates accession, now also provides political criteria for accession. At the time when the Secretary General of the Common Assembly of the Coal and Steel Community requested the legal opinion on accession from the Head of the Max Planck Institute for Comparative Public Law and International Law, the questions were much more general: how should new Member States be integrated economically? How would accession be possible to a community as strongly integrated as the ECSC already was by 1955 standards? Similarly open was the question of whether the ECSC Treaty needed to be amended to allow the accession of third States, and if so, to what extent.

Hermann Mosler concentrated his efforts on clarifying these questions, as the correspondence concerning the commissioned report shows. To do so, he contacted Marga Klompé, the rapporteur on the Common Assembly committee which had asked de Nerée to compile materials on the accession question. Marga Klompé, the first female member of the ECSC Common Assembly, came from the region on the Dutch-German border, like her compatriot de Nerée.⁵



Marga Klompé (1956)⁶

The exchange between Mosler and Klompé helped clarify that the expert opinion should also address the question whether it was necessary to distinguish the accession of third states with a coal and steel production (such as Austria) from that of states without such production (such as Denmark). Hermann Mosler further divided his report into several sub-sections discussing accession conditions and logistics.

⁵ On Marga Klompé, cf. Angelika Fliegner in <https://www.uni-muenster.de/NiederlandeNet/nl-wissen/personen/margaklompe.shtml> (last consulted 19.10.2023).

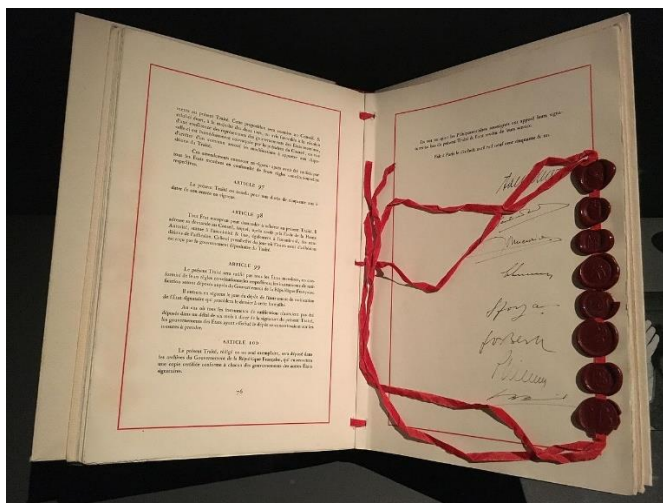
⁶ https://commons.wikimedia.org/wiki/File:Klomp%C3%A9,_dr._Marga_A._M._-SFA002001927.jpg (last consulted 19.10.2023).

First, he examined the legal requirements for accession and the competences of the institutions as set out in Art. 98 of the Treaty of Paris establishing the ECSC (p. 5 ff.). Then he addressed the question of the effect of accession on the institutions. He assessed whether Treaty changes would be necessary since the Treaty tailored the institutions' composition to the existing Member States. In this context Mosler discussed questions of balance and staffing of the High Authority (now the Commission), the Consultative Committee (now the European Economic and Social Committee), the Council, and the Common Assembly of the Community (p. 35 ff.). The last part of his report dealt with questions of transitional periods for accession, especially with regard to market entry (p. 71 ff.).

On the Way to a New Legal Order

In his expert opinion, Hermann Mosler relied on international law to support his arguments. He discussed an analogous application of procedures from other international treaties. Today, the transfer of mechanisms from international agreements to the EU seems odd. But the opinion dates from 1955, from before the next major step towards European integration which were the Rome Treaties in 1957. It was this next codification that prompted the European Court of Justice to declare in its *Van Gend en Loos* judgement that "the Community constitutes a new legal order of international law"⁷. Only then was the *sui generis* theory really launched, according to which the European Community(ies) represent an entirely new entity not to be appraised according to international law, but according to its own standards. Today, it is self-evident that the EU Treaties are to be interpreted using the methodology specific to EU law, as developed and monitored by the ECJ. Hermann Mosler's legal opinion, however, reminds us that this has not always been a matter of course and that such a development was not necessarily foreseeable at the time. It is with good reason that the *Van Gend en Loos* judgement is considered revolutionary. Nevertheless, Mosler's reflections indicate the high degree of integration of the ECSC at the time and the extent to which Member State sovereignty was affected. The German lawyer was often unable to draw parallels with other treaties under international law, he rather pointed out and justified distinctions from them in his opinion, as when he wrote that unlike for UN conventions, accession by simple notification is not possible (p. 6) and the mechanisms of the GATT are not transferable to the ECSC.

⁷ C-26/62, *Van Gend en Loos / Administratie der Belastingen*, ECLI:EU:C:1963:1, 12.



The Treaty of Paris establishing the ECSC, 18 April 1951⁸

Overall, Mosler's report offers a good insight into the beginnings of what is today the European Union. In addition to the EU's international law foundation, the legal opinion reveals the initial intention of the European project as a Franco-German peace project based on the pooling of production necessary for war. The fact that the ECSC Treaty clearly privileges France and Germany over the other Member States is also reflected in the report and informs Mosler's examination of the composition of the High Authority and the voting majorities in the Council (p. 36 ff.). At the time, the High Authority consisted of one member each from the Benelux and Italy and two each from France and Germany. The President of the High Authority was appointed by the other eight members (co-optation procedure). The discussion of this specific composition and its preservation after the accession of new members takes up quite some space in the report – considerations which at first glance seem irrelevant today. However, in reality the issue of the size of the Commission is still very much alive today and revolves around the very same question of Member State representation – despite the fact that the Commission is actually independent of the Member States.⁹

In general, it can be said that the issue of appointments to the institutions remains to this day. Hermann Mosler noted in 1955 that “no generally applicable principle has been laid down” for the appointment of High Authority members and the members of deputies to the Assembly – instead the numbers were determined based on the situation at the founding of the ECSC (p. 53; tr. LB) meaning they would need to be adjusted with each accession. This was then the case for the first accessions in 1973 (see Art. 10 of the Act concerning the Conditions of Accession¹⁰) and it is still the case today when new members join. The same applied when the United Kingdom left the EU: the seats in the European Parliament were scraped

⁸ https://commons.wikimedia.org/wiki/File:1951_CECA_ECSC.jpg?uselang=de (last consulted 19.10.2023).

⁹ On the development of the number of Commissioners, cf. Neill Nugent and Mark Rhinard (eds), *The European Commission* (London: Palgrave Macmillan 2015), 97 f.

¹⁰ Act concerning the Conditions of Accession and the Adjustments to the Treaties, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1972:073:FULL> (last consulted 19.10.2023).

or redistributed;¹¹ and the Commission was reduced to 27 Commissioners. The discussion of the formation of majorities and blocking minorities in the Council which occupied Mosler (p. 62 ff.) were also the object of night-long discussions as late as 2001 in Nice.¹²

Another issue where the 1955 report is still very topical is that of competence division between the EU and the Member States. For example, Mosler emphasises that the Council acts in representation of the Member States, and not the Community, during accession negotiations (p. 87).

In retrospect, many of Hermann Mosler's considerations remain relevant, even if this was by no means immediately obvious as the request came at a time of European upheaval.

Mosler's legal opinion in times of European upheaval

The ECSC Assembly Committee had been preoccupied with a limited question: does the Paris Treaty need to be changed to allow for accession of third States? But as the German international law scholar Mosler started addressing this question, a new dynamic in the European integration process emerged. The intergovernmental Spaak Committee, founded in Messina, Italy, was working out far-reaching reform ideas for a completely new treaty. On 14 May 1955, the Common Assembly in its Resolution 35 called on the Member States' foreign ministers in the Council to commission one or multiple intergovernmental conferences to draw up draft treaties necessary to allow for further European integration.¹³ After the publication of the Spaak Report in April 1956, work started almost immediately on two new European treaties: the Treaties of Rome.¹⁴ The Joint Assembly, which commissioned Mosler's report, had also called for the drafting of new treaties after the publication of the Spaak Report.¹⁵ Hermann Mosler's report to Frits de Nerée had been submitted only three months earlier, on 12 January 1956. With the Spaak report out, it suddenly seemed almost outdated.

In the end, the Rome Treaties did not replace the ECSC Treaty, but rather supplemented it. Art. 232 (1) of the EEC Treaty states: "The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, ...". They were finally brought together when the Rome Treaties were merged with the ECSC Treaty in the Merger Treaty, and the European Community (EC) was born. The first accessions in 1973 were therefore accessions to the EC. But as the ECSC Treaty

¹¹ Redistribution of seats in the European Parliament after Brexit, EP Press release (31.01.2020), <https://www.europarl.europa.eu/news/en/press-room/20200130IPR71407/redistribution-of-seats-in-the-european-parliament-after-brexit> (last consulted 19.10.2023).

¹² On the negotiations in Nice, cf. Pierre de Boissieu et al. (eds), *National Leaders and the Making of Europe – Key Episodes in the Life of the European Council* (London: John Harper Publishing 2015), Ch. 13.

¹³ Résolution 35 de l'Assemblée commune de la CECA (Strasbourg, 14 mai 1955), https://www.cvce.eu/obj/resolution_35_de_l_assemblee_commune_de_la_ceca_strasbourg_14_mai_1955-fr-02b1c4c5-7302-489b-849b-12dab73a0a5d.html (last consulted 19.10.2023).

¹⁴ For the chronology of developments towards the Rome Treaties, see https://www.cvce.eu/collections/unit-content/-/unit/df06517b-babc-451d-baf6-a2d4b19c1c88/ece2ffe3-374f-4d47-82e4-a88bda87a948#4fb59ef7-9500-4448-9dd7-7fb10eea5af2_fr&overlay (last consulted 19.10.2023).

¹⁵ Résolution 47 de l'Assemblée commune de la CECA (Strasbourg, 11 mai 1956), https://www.cvce.eu/obj/resolution_47_de_l_assemblee_commune_de_la_ceca_strasbourg_11_mai_1956-fr-32ab1ff4-3ccb-4aaa-88e2-931337d37c71.html (last consulted 19.10.2023).

continued to exist until 2002 within the Merger Treaty, Hermann Mosler's 1955 legal opinion on accessions under the ECSC Treaty remained relevant: accessions to the EC always included accession to the ECSC. Moreover, the accession clause in Art. 237 EEC Treaty largely corresponded to that in Art. 98 of the ECSC Treaty.

Since Mosler's opinion, however, the actual accession of new Member States has made it necessary to clarify the original provision. Art. 237 of the EEC Treaty therefore describes a more concrete accession procedure. Its first paragraph corresponds to the provision in the ECSC Treaty, but its second paragraph formulates requirements for accession and clarifies competences: "The conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules." It is striking that this paragraph also corresponds to the proposals made by Hermann Mosler. The competence of the Council is settled, Treaty adaptations are explicitly mentioned, and the ratification procedure is explained. These formulations continue to exist in Art. 49 TEU. Even though it is no longer possible to determine how much Mosler's legal opinion truly influenced the European Treaties, it is certain that the provisions the German legal scholar suggested in 1955 for accession have outlived many other provisions. They are being applied, specified, and supplemented – and continue to be discussed today.