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FOREIGN AFFAIRS POWERS AND POLICY IN THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION

by

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The European Policy Unit

The European Policy Unit, at the European University Institute, was created to further three main goals. First, to continue the development of the European University Institute as a forum for critical discussion of key items on the Community agenda. Second, to enhance the documentation available to scholars of European affairs. Third, to sponsor individual research projects on topics of current interest to the European Communities. Both as in-depth background studies and as policy analyses in their own right, these projects should prove valuable to Community policy-making.

In October 1984, the EPU, in collaboration with the University of Strasbourg and TEPSA, organised a conference to examine in detail the Draft Treaty Establishing the European Union. This Working Paper, presented at the conference and revised in light of the discussion, will appear in book form later in 1985 along with other studies of the Draft Treaty.

Further information about the work of the European Policy Unit can be obtained from the Director, at the European University Institute in Florence.

I. Major problems in the functioning of the EC foreign relations.

The Treaty of Rome does not contain a separate chapter on external relations.[1] The complex of provisions relating to foreign relations can hardly be said to belong to the most successfully drafted parts of the Treaty.[2] Yet the external competence of the Community concerns the very life nerve of the Community's legal system.

The provisions are scattered all over the Treaty and can only be fitted into a coherent system with some intellectual efforts. Such efforts have been deployed first and foremost by the European Court of Justice which through the ERTA-case introduced some coherence and consistency into the field of foreign relations, in the first place with regard to the extent of Community competence. The ERTA-judgement is the basis for the doctrine of parallelism whereby treaty making power would be co-extensive with the excercise of internal competences in any given field even without an explicit treaty-making authority in the Treaties.

This case was considered controversial in many quarters, but the Court hardly had any choice. It could not have rendered a "non liquet". Subsequently, the Court continued to fill in the gaps left by the Treaty in cases like the Kramer-case (3,4 and 6/76) and opinion 1/76 concerning a draft agreement

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1) The ECSC and Euratom treaties do contain such chapters but the relevant provisions have had little significance and will not be dealt with further in this paper. For a more complete analysis of the EEC external relations see J. Megret "Le droit de la Communauté économique européenne, Vol 12 Relations Extérieures".

2) Art 228 states somewhat pompously that "where this Treaty provides for the conclusion of agreements between the Community and one or more States etc." - However, the Treaty provides for only two or three types of such agreements (art. 113, 229 and 231, and the afterthought in 238).

Introduction

In the context of the present paper entitled "The Foreign Relations Powers and Policy in the Draft Treaty establishing the European Union" the term "Policy" is to mean areas in which the Union possesses international relations powers. Indeed, the actual concrete policies to be pursued by the Union in the various fields of foreign relations are to be determined by the competent institutions of the Union at the relevant moment. Thus, I shall not dwell on the kind and contents of commercial policy, development aid policy etc. to be conducted by the Union.

This definition seems to be in harmony with the general approach reflected in the Draft Treaty, i.e. an institutional rather than a functional approach.

For similar reasons the present study will mainly focus on the foreign relations machinery in the broad sense of the term. Will the machinery set up by the Draft work according to the underlying intentions? This approach will perhaps facilitate the task to analyze and judge the relevant parts and provisions on their own merits, irrespective of the rather widespread doubt whether at all at this moment a new treaty is the best way to set about achieving greater European unity. It is not for us to answer this question as such in the present context. However, our critical remarks may in certain respects amount to questions as to whether a Draft Treaty following an institutional approach is adequate to solve the problems of the unsatisfactory functioning of the Community inter alia in the field of foreign relations.

At the same time it must be recognized that the present Draft Treaty offers an excellent basis for discussing a coherent foreign relations system of a European Union. May the following comments be perceived in the same constructive spirit in which the Draft has been elaborated.

establishing a European laying-up fund for inland waterway vessels.

The Court's own words in this Opinion are illustrative. After stating that "the power of the Community to conclude such an agreement is not expressly laid down in the Treaty" The Court continues by saying that "authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions".

The Court concluded that wherever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.

By this addition the Court went beyond the scope of the ERTA-doctrine opening new avenues for external Community competence but generating, simultaneously, further controversy.

The reference to "necessary etc." is surprisingly similar to the language of art 235 which in an obiter dicta in the ERTA-case was also recognized as a legal basis for concluding Community agreements - and used in practice, in particular in the field of environment protection. (It also evokes the language of the Copenhagen Report of 1973 para 11 which states that Governments will consult on all important foreign policy questions provided, inter alia, the subjects concern European interests where the adoption of a common position is necessary or desirable).

Both under the 1/76-doctrine and art 235 the problem arises whether "necessary" is a political concept leaving a nearly

unlimited discretion to the competent institutions, in particular the Council, or whether it is rather a legal principle leaving a right of censorship to the Court.

Even in the area where the Treaty provides expressly for Community competence, i.e. commercial policy under art 113, problems arose as to the interpretation of this concept, see Opinions 1/75 and 1/78.

These opinions constitute, together with the ERTA-judgement, the leading cases in regard to the exclusive character of Community competence. The severe peremptory approach in Opinion 1/75 was somewhat mitigated in Opinion 1/78 (The Rubber Agreement) demonstrating the conflict between legal orthodoxy and political reality.

The 1970ies were characterized by a dynamic development of establishing international relations and by a progressive assertion of Community power in respect of treaties. In practice the Community lawyers were often faced with the problem of determining whether the Community was competent to conclude agreements with third countries where the political need for such action was felt. Or rather, the Community had to respond to a series of external challenges in new fields such as environment protection, fisheries, development aid, transport and even in the classical area of commercial policy. The doctrines were refined; already then the notions of exclusive, concurrent and potential competence together with the concept of mixed agreements were emerging.

However, by the end of the 1970ies the problem was not so much the determination of the legal parameters of Community external competence but rather the reluctance by the Community to avail itself of the external powers recognized by the Court.

The conflict lies between on the one hand the Commission, having obtained the support of the Court for a wide interpretation of Community powers, and on the other hand the Council and/or individual Member States reluctant to surrender their powers in the field of external relations and accept Community competence. Experience has shown that even if they do accept Community action in a certain field they are sometimes very hesitant, in the event, to allow financing such action through the Community budget (Rubber Agreement Opinion 1/78).

The problem is not only of an internal nature. The attitude of third states has also been an important element in the process of mounting the Community as an actor on the international scene. Two trends seem to be noteworthy:

Certain third states have not been prepared to recognize the legal capacity of the Community under international law. In particular the USSR and Eastern European Countries have for a long time maintained such a negative attitude. This factor has contributed to the difficulties of conducting a common commercial policy. The Council decision of 22 July 1974 introducing a procedure of consultation relating to economic cooperation agreement still to be negotiated on a bilateral basis illustrates this difficulty.

In recent years the Eastern bloc altitude has softened in certain respects, in particular in certain multilateral fora. The United Nations Convention on the Law of the Sea, which allows for Community participation, provides a good example.

Conversely, in other situations practice has shown that third countries tend increasingly to regard the Member States and the Community as a unity, often more than the Member States do themselves, and expect the Ten/EC to act as an

entity on international issues. The difficulties to respond to such expectations have manifested themselves in two related respects:

Experience has shown that subjects for international negotiations, in particular in multilateral fora, rarely fit the structure of the EC-treaties. Even in economic fields the subject may often involve matters under Community competence as well as under Member States competence. In fact, there may be a sliding scale from exclusive Community competence, potential competence, art 116-matters and Member States Competence. In such cases resort has been made to "mixed agreements".

In other instances, deliberations among the Ten within European Political Cooperation (EPC) have lead to political decisions which required the intervention of the Community for their implementation.

EPC-discussions on political aspects of proposals concerning economic aid to third countries provide clear examples, f. inst. food aid to Poland and economic assistance to Central America. Other cases show that the present distinction between EPC and Community creates difficulties even if the political will to carry out international action is manifest. Thus the decisions on economic measures ("sanctions") against Iran, the USSR and Argentina were taken within EPC. The decisions were in certain cases implemented by Community measures (f.inst. first phases of USSR sanctions), in other instances by the Member States according to national legislation (Iran). [3)]

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3) The later phases of sanctions against USSR and the Argentina-case revealed fundamental difficulties due to a lack of agreement among Member States on the extent of Community powers.

Conversely, economic cooperation within a Community framework may open the door for political cooperation. Relations with the ASEAN-countries provide a good example.

The CSCE, the Euro-Arab dialogue and in particular the UN Law of the Sea Conference are examples where Community action and Political Cooperation go rather successfully hand in hand.

In fact, it has become increasingly difficult to distinguish between the Ten acting in Political Cooperation and the Community. The picture becomes even more blurred when account is taken of fields of cooperation among the Ten which progressively have moved away from EPC proper and established their own framework such as Trevi and "espace judiciaire". Both areas deal with relations among the Ten rather than with relations between the Ten and third countries.

It may be argued that the difficulties encountered when responding to one or the other kind of a "mixed" situation are due to the "old-fashioned" and "inadequate" structure of the Community and that a simple restructuration of the institutional framework would serve to overcome these difficulties. However, it is impossible to reconstruct history. It may, indeed, equally be argued that the increased engagement of the Community/the Ten would never have taken place without the present structure which has allowed for a gradual and flexible evolution of powers according to needs. In particular, this would not have happened in the absence of a distinction between Community and EPC. It is at least noteworthy that some Member States weighing the pro's of Community action against the con's of surrendering powers in the external field have been willing to give certain concessions along the road. Ministers have grown out of the absurdity to fly from one capital to another to underline

the legal distinction between Community and EPC-affairs. However, some of them at least seem very reluctant to give up the fundamental bastion i.e. that decisions within EPC as a matter of principle are taken by uanimity.

Even if the Council and the Member States have been prepared to accept the evolution of Community competences, also in new areas not foreseen by the fathers of the Treaty of Rome, they have not always been willing to draw all the consequences, in particular in matters of procedure of negotiation.

The present negotiation regime has evolved through practice, inspired largely by art. 113 procedures and by international state practice. The legal principles defended in particular by the Commission have been in constant clash with socalled political realities.

The difficulties reside mainly in the fact that the articles of the Treaty (other than article 113), which according to the Court provide a legal basis for external action as well have not been drafted for such application. The present picture is multi-faceted and sometimes confusing like a mirror-room. Among the main questions which still give rise to difficulties are the following.

In practice the Commission always asks the Council for prior "authorization" to negotiate agreements also in areas outside art. 113, which is the only provision stipulating this requirement. This practice is contested by some authors, but seems to meet with Commission acquiescence. Another open question is to what extent the Commission may entertain prior contacts with third countries.

The nature of the decision of the Council authorizing negotiations has also been questioned. The present doctrine regards it as an act sui generis, an internal preparatory

step in a long process which - as distinct from the process of internal law making - involves one or more third parties. Hence, it has been generally felt that a certain number of special factors should be taken into account when applying the system of the Treaty in practice to the process of international law-making.

Agreements on protection of the environment and fisheries agreements are concluded on the basis of art 235 and art 43 respectively. Both provisions require consultation of the European Parliament. At what stage of the process should consultations take place? In practice Parliament is consulted when the agreement has been signed. Certain informal procedures serve to ensure that Parliament is kept informed during the negotiation process. Recently, a parliamentary request has been made for information already from the stage where draft directives are being elaborated by the Commission. The question is how such requests can be reconciled with the vital need for confidentiality in international negotiations.

According to article 228 of the Treaty the Commission is the Community negotiator. Para 1 of this article provides a clear, general rule. However, it is among those which are most frequently violated in practice. Often the Commission has to share its negotiator task with the Council presidency, even in cases where a "mixed" solution is not necessarily called for.

The co-participation of the presidency is not always the result of wishes from the Council and Member States. It may be necessary in negotiations with third countries which still have reservations about the Community as an international actor. In other situations, it has been felt useful to have a Member State supporting the Community position.

However, in general the two-headed delegation formula serves to make Community negotiations very complicated. Further complications may arise when individual Member States insist to speak as well.

The Proba 20-formula is the expression of a practical solution to problems of an internal and external nature. In some respects it is not in conformity with the Treaty system (recognizing mixity where there is obviously no legal need). In other respects it has brought practice closer to the Treaty by recognizing an increased negotiator role for the Commission.

Negotiations are, as a rule, monitored directly or indirectly by a group or committee composed of Member States representatives. The system of article 113 has come off on negotiations under other articles.

This practice has been contested in certain quarters. The fact that the Council and Member States attach great importance to this system was highlighted recently with regard to negotiations and consultations with third countries in fishery matters.

The present negotiation system is not in conformity with the Treaty, nor is it functioning as effectively and smoothly as it could. Member States are reluctant to surrender their external powers into new fields not expressly covered by the Treaty ("l'effet de freinage"). This fear is largely responsible for Member States wishes to monitor closely the Commission as spokesman in external affairs. Procedures taking account of Member States (and the Parliament's) interests have contributed to making action at Community level a cumbersome affair. (The task is not made easier by the general lack of delegation of power within the systems of the various institutions).

Conversely, this has in certain cases affected Member States confidence in the ability of the Community to act appropriately on the international scene. Member States often fear that the Community is unable to react fast enough and that Community action, because of the transparency of preparations, cannot guarantee the required confidentiality in negotiations.

To some extent it is a vicious circle. The question is where to break it.

II. International Relations of the Union.

1. General observations.

Title III of the Draft Treaty is devoted to the international relations of the Union. Apart from the seven articles in this chapter (articles 63-69), the Draft contains certain other provisions dealing wholly or in part with external affairs.

Thus, the fourth preambular paragraph reaffirms "the desire to contribute to the construction of an international society based on cooperation between peoples and between states, the peaceful settlement of disputes, security and the strengthening of international organizations".

A similar but not quite identical provision is found in Article 9, section 3. Section 2 and 4 also deal with objections concerning the international relations of the Union.

Furthermore, the following provisions contain particular references to the Union's external relations:

- Article 4 para 3 concerning the Union's accession to human rights conventions;

- Article 6 on the legal personality of the Union;

- Article 7 on the Community patrimony, in particular para 4;

- Art 16 litra 1, Art 21 litra 2 and Article 28 litra 7 specifying the functions of the Parliament, the Council and the Commission respectively. The powers and functions of the European Council are specified in Title III.

The provisions of Title III, of course, have to be read in conjunction with the general rules of the Draft Treaty, in particular Part Two on the objectives, methods and competences of the Union, Part Three on the institutional Provisions and Part Four concerning Policies of the Union.

Compared with the present system the main feature of Title III, seen together with Article 7 para 4, is that EPC has been brought under the auspices of the Union. In principle, the distinction between Community and EPC-matters has been broken down. However, Title III is not limited to setting the objectives and competences in the external field; it also provides for methods among which some apparently are meant to take account of the sensitive and delicate character of EPC-issues. As a general rule, EPC-matters are subject only to the method of cooperation. They may be transferred to the area of common action. However, Article 68 para 2 and 3 contain special rules, derogating from the general system of the Draft Treaty and designed to introduce a special flexibility in the EPC-area. In general, the impresion is that the authors of the Draft Treaty have attempted to preserve the EPC system at its present stage of evolution when introducing it into the framework of the Treaty.

Finally, a word on the terminology used in this part of the Draft. The term "international relations" has been chosen as

the principal notion. "External relations" is the label for international relations conducted by "common action", typically actions covered by present Community powers. "Foreign policy" is the term frequently applied to international relations conducted by "cooperation", as a general rule relations dealt with under EPC.

2. Objectives and the Treaty system of international relations.

Art 63 sets out the principles and objectives of the Union's international relations. Para 1 takes up and expands the language of preambular para 4 and Article 9. Seen as a whole, Art. 63 may to some extent be repetitive.

The express reference to Art 9 in para 2 introduces some uncertainty regarding the relationship between the two paragraphs of Art 63. Para 1 states that the "Union shall direct its effort in international relations towards the achievement of..." whereas para 2 says that the Union "shall endeavour to attain the objectives set out in Art 9". At the same time, para 1 contains objectives mentioned as well in Art 9, such as peace, détente, and improvement of international monetary relations. Conversely, the term "cooperation" does not appear in para 1.

The methods (common action or cooperation) are only mentioned in para 2; it is not clear whether these methods also apply to attain the objectives of para 1. If so, it might help to introduce the last sentence of para 2 in a new separate para 3.

Apart from these more specific comments, it seems that the language of para 1 in certain respects is too specific and in other respects too much an expression of pious wishes.

Instead of "disarmament" (the term of Article 9) para 1 refers to "mutual balanced and verifiable reduction of military forces and armaments". This, of course, is one method of disarmament, in fact the one pursued presently by the Ten; but it need not be the only method and not necessarily the preferred method in the next decade.

The term "strengthening of international organization" does not strike the right note. All the Member States are presently devoted to very restrictive budget policies in nearly all international organizations. They are, as a general rule, committed to foreign policy guidelines aiming at avoiding the establishment of new international organizations unless they can be justified as absolutely necessary. A term like "strengthening of international cooperation" might be more appropriate.

External actions of the Union are either common action or cooperation. The fields of cooperation may be transferred to common action (Art 68.2) and the fields of cooperation may be extended (Art 68.1).

Art 10 para 2 defining common actions specifies that they may be addressed inter alia "to States", a term which seems to encompass "third States". Other subjects of international law, such as international organizations, are not specifically mentioned as addressees.

In resume, the system may be described as follows:

Within the framework of common action the Commission is the Union-negotiator; guidelines are issued by the Council; the Parliament is kept informed at every stage and approves -together with the Council - international agreements.

The European Council is responsible for cooperation.

The Commission is the institution exercising the right of (active) legation (or representation) abroad.

3. Analysis of the operative provisions on international relations.

Article 64 para 1 seems to confirm the principle of parallelism between internal and external Union powers. Thus, in its international relations, the Union shall act by common action in the fields referred to in this Treaty where it has exclusive or concurrent competence.

The question is how the concept of "common action" should be interpreted in the sense of Article 64 para 1. The provisions of Art 10 para 2 define "common action" as all normative, administrative, financial and judicial acts, internal or international, issued by the Union itself, originating in its institutions etc. Art 12 para 2 provides that where the Treaty confers concurrent competence on the Union the Member States shall continue to act so long as the Union has not legislated. In this situation, it may be asked whether Member States shall continue to act - also in the external field.[4)]

Assuming that the Draft Treaty were based on the same system as the Treaty of Rome the situation with regard to external relations would be as follows:

If the institutions of the Union cannot arrive at a decision to act at Union level in cases where it has exclusive competences the legal consequence is not that Member States may act.[5)] If the competent institutions cannot act in areas

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4) Para 4 of Article 64 concerns cases where the EC has exclusive competences which have not been fully exercised and does not address this situation where there are concurrent competences.

5) It should not be excluded that the institutions of the Union, under certain conditions, might delegate the power to act to the Member States.

where there are concurrent competences the legal consequence is that Member States may continue to act - of course, with respect of the provisions of Article 13.

This is one thesis which might well be advanced as an answer to our question. It is, at least, the result of a fair interpretation of Article 64 para 1 read in conjunction with Articles 10 and 12.

It is, however, not the result flowing from a reading of Article 65 which is built on the assumption that the Commission is the sole representative of the Union in the exercise of its competences, exclusive and concurrent.

The conflicting interpretations seem to stem from the fact that Article 64 para 1 - perhaps inadvertently - has married the issue of competences with the issue of the modalities for their exercise. If so, it may be advisable to review Article 64 para 1 in order to make the necessary choices and clarify the situation.[6)]

We see no objection to a legal construct whereby the Union acts at the external level through the competent institutions also in areas where no competence has been exercised at the internal level.[7)] It might be argued that Article 64 para 1 presupposes the adoption of an organic law concerning the operation of the Union's external actions - in the field of exclusive as well as concurrent competences.

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6) See similar criticism in the paper of V. Constantinesco "La répartition des compétences entre l'Union et les Etats Membres".

7) See Joseph Weiler in "The external legal relations of non-unitary actors: mixity and the federal principle" from "Mixed Agreements" edited by David O'Keefe and Henry G. Schermers (Kluwer/Deventer, The Netherlands 1983).

In the meantime, it might be wise to adopt a pragmatic approach which ensures total parallelism between internal and external powers: where the competence is exclusive internally the Union is exclusively competent in the external field; in areas of concurrent internal competence the Member States remain competent to act externally until the adoption of a law according to Article 12 para 2 in fine.

It follows from this scenario that mixed negotiations and mixed agreements cannot be avoided under the Draft Treaty. This is not necessarily to be regarded as an evil. Mixity, properly administered, offers flexible solutions in many situations.

The areas referred to in Article 64 para 1 are found mainly in Part Four of the Draft "The Policies of the Union". Since the provisions covering the various fields have been drafted essentially with a view to action within the Union they may give rise to some difficulties of interpretation when applied to international action. Indeed, it may create difficulties when a particular policy is applicable "within the Union", see Article 50 para 1.

One example may illustrate the problems which may be encountered. Environmental policy is dealt with in Article 59. This provision is very general in certain regards and surprisingly specific in other respects. It is not quite clear whether the list of special policies is exhaustive. Protection f.inst. of the marine environment is not mentioned in particular, and yet this is the field which has most often been the subject of negotiation of international agreements by the Community.

A solution may be sought through recourse to the general provision of para 4 of Article 64, which seems to encompass external policies under exclusive Community competence

established as well on the basis of article 235. This, however, would hardly be a legally secure solution.

Para 2 of Article 64 confirms in particular that commercial policy remains a field of exclusive competence. Whereas art 113 of the Treaty of Rome contains certain contributions to the interpretation of the notion of commercial policy, the similar provision of the Draft is very lapidary.

Mr. Derek Prag's working document (Doc. 1-575/83/C p. 113) gives certain indications as to the intentions of the authors, but otherwise the text of the Draft is not very helpful. The present formula may, after all, be preferable in order to allow for a dynamic interpretation of "commercial policy" based inter alia on the Community patrimony.

Development aid policy (DAP) referred to in para 3 of art. 64 is not defined f.inst. in relation to commercial policy.

The provision prescribes that during a transitional period of ten years DAP shall progressively become the subject of common action by the Union.

It is not entirely clear whether all aid, including aid granted by Member States, is to become the subject of the Union's DAP and thereby of common action. The last part of the paragraph seems to presuppose the continued co-existence of independent DAP programmes by Member States. This would be a flexible and wise solution. Recognizing the very important internal policy factors underlying DAP in every Member State as well as the special ties that certain Member States entertain with particular developing countries it would hardly be realistic to expect any Member State to surrender all policy powers in this field.

The provision transferring the Union's DAP progressively to common action leaves open the question whether the DAP is to

be subject to exclusive or concurrent competence of the Union. This may, of course, become the subject of a special organic law. In any event, the scenario which may result from para 3 of Article 64 seems to be DAP within areas under exclusive as well as concurrent competence. In the latter fields, Member States may continue to act so long as the Union has not legislated. Furthermore, Member States preserve the power to act under their independent programmes which shall be coordinated with the DAP of the Union. Finally, it cannot be excluded that certain political aspects of aid policy will be dealt with under cooperation.

Para 4 of Article 64 aims at situations where the exclusive competence of the European Communities has not yet been fully exercised. Indeed, it is true that in some cases under the common commercial policy the Community has not been able to act, f.inst. vis à vis certain Eastern European countries and the USSR. In other cases, f.inst. in relation to Japan, the inability to act seems due rather to opposition by Member States. While the exclusivity of Community competence in these cases is undisputed, at least in principle, there may be areas where the concept of "exclusive competence" is not subject to unanimous interpretation by the Commission and Member States. The dispute relates inter alia to the preemptive effects of agreements concluded on the basis of ERTA plus Opinion 1/76 and perhaps also of Article 235.

This leads to an intricate question relating to the continued co-existence of art 235 of the Treaty of Rome and the provisions of the present Union Treaty which does not contain a similar provision (and perhaps does not need it).[8] How would Article 235 operate in particular in relation to para 4 of article 64.?

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8) See Doc. 1-575/83/B p. 5 para 12 Explanatory Statement.

Article 65 contains the regime governing the conduct of common action. At first glance, it appears to reinforce the role of the Commission as the sole representative of the Union vis à vis the exterior. The new feature is the increased role of the EP. According to para 4 all international agreements shall be approved not only by the Council but also by the EP.

The approach seems to reflect a praiseworthy attempt to balance the need of an effective regime against the need of observing certain basic democratic principles. The question is whether a reasonably balanced result has been found.

When considering the co-decision power of the EP with regard to all international agreements to be concluded by the Union it should be recalled that no Member State Parliament has such extensive powers. This, of course, should in itself be no excuse for not making the procedures of the Union more democratic. However, the Union is not based on a parliamentary system; the Council is not politically responsible to EP. Consequently, it hardly seems justified, in principle, to grant such co-decision power to the EP.

In any event, it is difficult to understand why EP should have a co-approval power with regard to all international agreements without any discrimination. Many agreements do not deserve such treatment.

Moreover, the provisions of art 65 seem to exclude application of the so-called simplified procedure whereby an agreement may be concluded solely by signature of the Parties without subsequent ratification or approval.

Conversely, para 4 refers only to international agreements but not to other international acts (unilateral legal or political acts), see para 2, which seems to cover only acts

entailing legal obligations. It is not specified which institution approves such acts.

It might also be argued that some international actions do not even merit submission to the Council. There should be a subsidiary organ for handling current affairs, f.inst. COREPER which in spite of its very important role in actual practice is not even mentioned in the Draft.

Para 3 concerning information of EP does not define the term "every action". It may cover any action preparing for or being part of the negotiation phase. The term "every action" should, therefore, at least be made more specific in order to make sure that the confidentiality of negotiations is safeguarded.

Finally it is not made clear whether the Commission may take external initiatives without prior "authorization" by the Council.

In summary, the procedures laid down in Article 65 do not seem to offer an acceptable solution to the problems which face the Community as an international actor. On the contrary, Article 65 appears to have added further obstacles to the present cumbersome machinery. In particular, the co-decision power of the EP goes further than necessary to safeguard the relevant democratic guarantees.

The following suggestions might serve to make the regime more acceptable. Firstly, it might be useful to codify the present practice of setting up a committee composed of representatives of Member States to assist the Commission during negotiations. Experience has shown that such a monitoring system will eventually facilitate the task of the Commission.

Secondly it would probably be wise to couple the provisions of para 3 with a clause concerning the establishment of a permanent foreign relations committee of the EP authorized to receive information on actions in the field of international relations. The Draft Treaty might also prescribe that the rules of procedure of this committee should contain certain provisions on confidentiality etc. This would be consistent with present practice and might enhance the flow of information on international actions.

Thirdly, it might be appropriate - if the system of EP co-approval is maintained - to limit the categories of international agreements subject to co-approval by the EP in order not to overload EP with technical agreements of minor importance. Various criteria might be applied. International agreements having financial implications or containing provisions which would affect existing Union law or introducing new rules which - if made internally - would fall under the Articles concerning draft laws should always be subject to co-approval of the EP. Furthermore, the approval of the EP might be made subject to a silence procedure. In any case, there should be a special provision dealing with the situation where the EP - or the Council - fails to take a decision concerning the approval of an agreement.

Conversely, agreements dealing with subjects which otherwise would fall under the regulatory power of the Commission according to article 40 might be left for the Commission alone to negotiate and to conclude unless the Council decides against with a qualified majority.

Article 66 and the following articles represent one of the major new features of the Draft Treaty: the inclusion of EPC into the Union System.

The question is what the Draft has achieved by this inclusion, in particular whether the Draft has overcome the

obstacles which so far have made Member States keep EPC outside the Community framework. Apparently, the Draft has adopted a very careful approach which attempts to codify the present state of evolution of EPC.

Article 66 defines the scope of cooperation. Contrary to the basic documents of EPC (the declarations of Luxembourg, Copenhagen, London, and Stuttgart) this article seeks to define more precisely the areas of political cooperation. Where EPC so far has progressed step by step, whenever and whereever it has been possible to obtain unanimity, within parameters defined as "all major policy questions of interest the Member States as a whole" the Draft Treaty attempts to establish a catalogue of areas inspired by the subsidiarity-principle. Apparently, the Union is not to have a foreign policy; the Union is rather intended to constitute a framework or forum for mandatory cooperation. By establishing a catalogue and by using a terminology, which is so wide and rather vague that it may embrace any foreign policy issue of concern to more than one Member State the Draft has adopted a maximalistic approach. Seen in conjunction with Article 68 there seem to be no limits as to what matters might come under cooperation. Under the present system EPC is governed by declarations of a political nature. According to the Draft EPC will be made the subject of a legal text in introduced by the mandatory words: "The Union shall conduct etc".

This leads to another question of principle, namely whether matters covered by cooperation fall under the competence of the Union or of Member States. The answer to this question is relevant f.inst. in relation to the role of the Court in the area of cooperation.

It seems to result from the provisions of Article 12 eo contrario that such matters do not fall under Union compe-

tence. However, a simple reading of the provisions of Article 68 para 3 (i.e. "the European Council may decide to restore the fields transferred to common action either to cooperation or to the competence of the Member States") may lead to the conclusion that the areas covered by cooperation are neither under Member States competence.

According to the logic of the construct intended by the Draft it seems most reasonable to conceive matters of cooperation as falling under the competence of Member States. Otherwise, the provisions of Article 67 para 2-4 would not make sense. However, a problem arises if - as foreseen by para 1 of Article 67 - an action is to be implemented by the Commission. Is the Commission acting on behalf the Member States or on behalf of the Union by means of acts of the Union? In the latter case, the question is whether the matter is to be considered as transferred to Union competence at the stage of implementation.

If the Draft Treaty is to avoid the present problems relating to the complex interdependence of Community matters and EPC matters, f.inst. in the field of economic sanctions, it must be ensured that the management of political matters remain under cooperation, unless expressly transferred to the field of common action. The reason is that the voting rules will not be the same: Under cooperation they are likely to be unanimity whereas common action will be governed by majority rules.

An example may illustrate the problem. Modifications of the rules on liberalization of trade in goods may be one of the instruments by which economic sanctions are introduced vis à vis a third country. These rules fall, as such, under common action but should if modified for foreign policy reasons be governed by the rules under cooperation unless the European Council expressly authorizes the Council of the Union and/or

the Commission to implement these measures according to the rules on common action. If necessary, it should be possible to authorize one or more Member States to derogate from such measures. This would be in the spirit of the provision in Article 68 para 2 in fine.

Art 67 on the conduct of cooperation raises the question why cooperation as such is reserved for the European Council whereas the Council of the Union shall be responsible - only - for its conduct.

Experience from EPC has shown that cooperation is required as a day-to-day affair and that - for practical reasons - it must be delegated to a large extent to the level of officials.[9] Of course, the broad terms of Article 67 open the possibility for setting up a machinery similar to the present EPC-machinery in particular the Political Committee. Not that it should be imitated, but the right way of improving the present system would seem to be to build on the most successful features while keeping the basic EPC-patrimony intact.

Compared to the present EPC-system Art 67 contains a novelty by granting the Commission a right of initiative in the foreign policy field. This may be a controversial issue in many Member States. In any event, such a new task will inevitably affect the organizational structure of the Commission. (A new General Directorate of Foreign Affairs?)

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9) The Interim Report of the Ad Hoc Committee on Institutional Affairs submitted to the European Council at its meeting in Dublin December, 1984, foresees a reduction from three to two annual meetings of the European Council.

Paras 2 and 3 use the term "the Union" without specifying the competent institution. Otherwise, these provisions seem to contain a suficient degree of flexibility. The crux of the matter remains: What are the more precise parameters for cooperation and which is to be the decision-making rule of the European Council and of the Council of the Union when acting within the field of cooperation.[10)]

Para 4 preserves the valuable patrimony concerning the role of the Presidency.

Article 68 concerns extension of the field of cooperation and transfer from cooperation to common action. Para 1 mentions specifically as some of the new areas of cooperation, armaments, sales of arms to non-member states, defence policy and disarmament. Depending on the definition of "disarmament" it should be noted that disarmament-related issues are already subject to political cooperation among the Ten within the UN and CSCE. The objective "disarmament" is also mentioned in Article 9. Suffice it to say that the other matters, like defence policy, are highly controversial issues and that they will raise a host of questions as to the relationship be-tween the UNION and organizations like NATO and WEU of which most or some of the Member States are members. It will come to the surprise of nobody that men-

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10) Another question is whether a Council of the Union composed of ministers permanently and specifically responsible for Union affairs, see Article 20, will be acceptable as a forum for Cooperation matters, if these ministers are not foreign ministers as well, f.inst. like in France. The composition of the Council should be open to some flexibility.

tioning these subject matters is tantamount to waving the red rag in some capitals. At least, if there are no limits as to the matters which may become the subject of cooperation - and subsequently of common action - the parliaments of Member States would be justified if criticizing the Draft for giving too extensive powers to the European Council.

Para 2 provides, as an exception, that the "veto-power" in questions of transfer of a field from cooperation to common action is preserved without any time limit. One might question the need for this rule. Cooperation is the prerogative of the European Council; its decision-making procedures are not laid down in the Treaty but are to be determined by the institution itself, see Article 32 para 2. If unanimity is to be the "voting-rule", the practical need for a "veto-power" would be minimal, i.e. a constitutional guarantee in case the unanimity rule is amended.

The power to authorize one or more Member States to derogate from common action measures is a sound expression of pragmatism. The constraints of article 35 do not apply as such, but the principles thereof should be borne in mind. This authorization would serve to legalize situations like those the Community has experienced in the field of sanctions, see above under II.

Para 3 contains a revolutionary provision of a heretical nature in a Community context. It allows for a reversal by empowering the European Council to decide to restore fields transferred to common action either to cooperation or to the competence of the Member States. Taking account of the very delicate fields found in the foreign policy arena the rule as such seems very useful; it allows for flexibility and balances to some extent the daring perspectives of para 1. The sentence "and in accordance with paragraph 2" does not seem to make any sense as presently worded, in particular

because para 2 refers to the whole of Article 11. The use of the veto-power in this situation does not seem to make sense either, unless para 3 is based on the philosoply that is important to make sure that there is permanent unanimity to maintain a certain field within common action and that lack of unanimity at a later stage should lead to restoring the field to cooperation.

The novelty of art 69 is that the Commission may represent the Union - and not only the institution as such - in third countries and international organizations. Art 69 deals with the socalled "droit de légation active" as distinct from the right of representation in international negotiations. It seems that a provision on "droit de légation passive" is missing, and that a clause to this effect might be useful. In fact, this issue has been the subject of some controversy in the history of the Community.

The right of active representation is a prerogative of the Commission in matters subject to common action. In the fields of cooperation the task is shared with the Presidency's diplomatic agent.

4. Open issues

When looking at the present Community regime it should be noted that certain issues have not been taken up for express regulation in the Draft Treaty.

Since it cannot be ascertained by what kind of act international agreements are approved it is not possible to state whether the term "law" in Article 39 on publication could be interpreted to the effect that international agreements of the Union are to be published. Nor is there any provision concerning the registration of the Union's agreements with the United Nations Secretary General. This obligation may be

said to flow from international law. However, since a special system of registration has been established with regard to agreements concluded by entities like the European Community, it might be useful to insert a provision to this effect.

Considering the co-existence of art. 228 para 1(2) of the Treaty of Rome concerning the judicial review of the Court in the area of international agreements a special clause of a similar nature - which does not exist in the present Draft - may not be necessary. The question of introducing a better rule than Article 228 1(2) might, however, be considered.

The intricate legal question on the effects of international agreements in the Community/Union legal order has not been taken up and there may be several good reasons for leaving it to the jurisprudence of the Court. A rule like the provision of Article 228 para 2 might, in the event, be ajusted and inserted in the Draft.

Other problems which the Community has faced in practice relate to the right of representation of the Union in organs set up be mixed international agreement in particular if the agreement contains the traditional clause which does not allow two members of the same nationality. Furthermore, the voting right in international organizations has presented problems both in "mixed" and "pure" situations. The question is whether the general policy of the Union should be to strive for a number of votes cooresponding to the member of its Member States or only one vote. Legal and political arguments may be advanced for one or the other solution.

Finally, it should be mentioned that the Draft Treaty clearly states (art 70 par 2) that common actions are, in the event, to be financed by the revenue of the Union. The question concerning financing of measures taken within the field of cooperation is apparently left open.

III. Conclusion.

The international relations regime of the Draft Treaty grosso modo, forms a logical and coherent system.

The main novelty compared to the present situation is the formal inclusion of the EPC into the Union-system. Efforts have apparently been deployed in order to ensure continuity and the largest possible extent of flexibility. The "flexibility" regarding the definition of foreign policy areas under cooperation is, however, so great that it may prove counter-productive with a view to obtaining acceptance by Member States. Furthermore, the draft leaves open the crucial question of the decision-making rule in the area of cooperation.

In the classical area of common action the Draft Treaty has built rather faithfully on the Community patrimony. However, the rules concerning the conduct of common action should be reviewed. The negotiation system would probably create more problems than it solves. It will be so heavy that this factor alone may deter Member States from "surrendering" external powers to the Union. In particular, it would be difficult to justify the role of the EP to the extent foreseen by the Draft.

Finally, seen from the point of view of international relations it is hardly possible to conceive of a Union of less than all Member States. Indeed, the system of Art. 82 allowing for a progressive creation of the Union could not be reconciled with the regime on international relations of the Draft Treaty. In any event, it has been difficult to mount the Community as an actor on the international scene and to explain its legal personality; it would be virtually impossible to explain the co-existence of a Union with a different membership to third countries.

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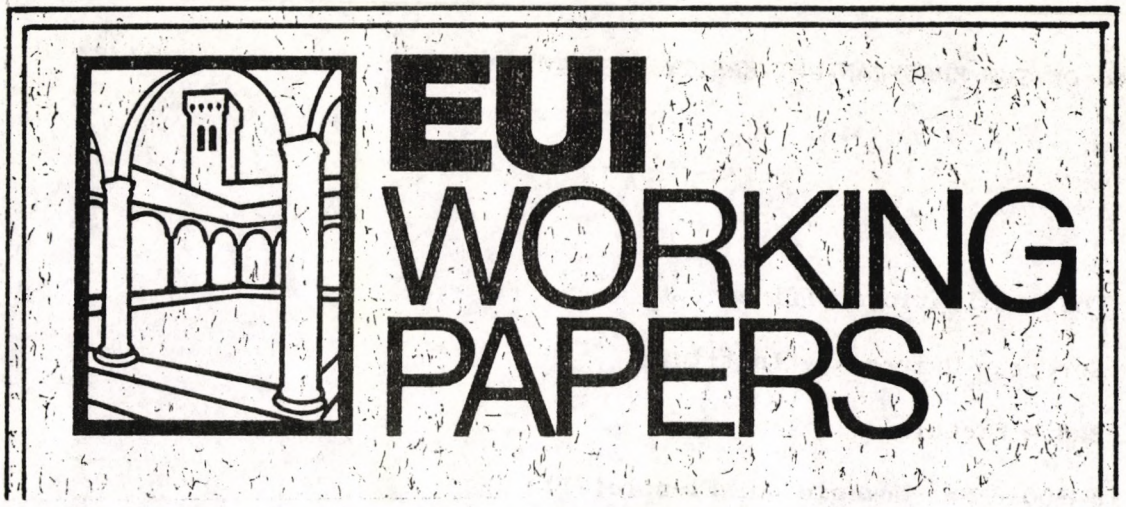

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